INDEX

TESTIMONY.

NOTICE OF APPEAL.

(Filed Nov. 1, 1916.)

NEW JERSEY SUPREME COURT.

JOSEPH COLLETTO, *Plaintiff-Appellee,* *vs.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant-Appellant.*	*Notice of Appeal.*

To Joseph Colletto or David F. Edwards, his Attorney:

SIRS:

Take notice, that the defendant-appellant, Hudson & Manhattan Railroad Company, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on October 25, 1916.

COLLINS & CORBIN,
Attys. of Defendant-Appellant.

Dated October 28, 1916.

Served on plaintiff's attorney Oct. 30, 1916.

GROUNDS OF APPEAL.

(Filed Nov. 17, 1916.)

The appellant states the following grounds of appeal:

1. The Supreme Court affirmed the judgment of the Hoboken District Circuit Court, brought up for review in this cause, whereas, for one or more of the following reasons filed in said Supreme Court the said Supreme Court should have reversed and set aside said judgment.

(a) The said Hoboken District Court erred in entering judgment in favor of the plaintiff.

(b) The said District Court erred in failing to enter judgment in favor of the defendant and against the plaintiff.

(c) Said District Court refused to non-suit plaintiff, whereas, said non-suit should have been granted for one or more of the following reasons:

(1) No negligence was shown on the part of the defendant or its employes.

(2) Plaintiff, as a matter of law, was guilty of contributory negligence.

(d) The said District Court refused to direct the verdict in favor of the defendant, whereas, such verdict should have been directed for one or more of the following reasons:

(1) No negligence was shown on the part of the defendant or its employes.

(2) Plaintiff, as a matter of law, was guilty of contributory negligence.

COLLINS & CORBIN,
Attys. for Defendant-Appellant.

Dated November 17, 1916.
Served on plaintiff's attorney Nov. 17, 1916.

NOTICE OF APPEAL.

Filed February 15, 1916.

Hoboken District Court.

JOSEPH COLLETTO, *Plaintiff*,	
vs.	*Notice of Appeal.*
HUDSON AND MANHATTAN RAILROAD COMPANY, A CORPORATION, *Defendant.*	

To Joseph Colletto or David F. Edwards his Attorney:

SIR:

Take notice, that the defendant, Hudson and Manhattan Railroad Company, hereby appeals to the New Jersey Supreme Court from the judgment of the Hoboken District rendered in the above stated action on the third day of February, 1916.

COLLINS & CORBIN,
Attorneys of Defendant.

Dated February 8, 1916.

Service acknowledged this ninth day of February 1916.

DAVID F. EDWARDS,
Plaintiff's Attorney.

CLERK'S TRANSCRIPT.

Filed February 17, 1916.

DISTRICT COURT OF THE CITY OF HOBOKEN.

Before J. W. Rufus Besson, Esq., Judge, Harry Bennett, Clerk.

No. 17419.

STATE OF NEW JERSEY, HUDSON COUNTY, } ss.

JOSEPH COLLETTO,
Plaintiff,

vs.

HUDSON AND MANHATTAN RAILROAD COMPANY,
Defendant.

In Tort $500

D. F. EDWARDS, Plaintiff's Attorney.

COLLINS & CORBIN, Defendant's Attorney.

A summons was issued, tested November 5, A. D. 1915. Returnable November 11, A. D. 1915, at ten o'clock in the forenoon at the Court Room of said Court in the city of Hoboken. The Sergeant-at-Arms returned the summons as follows, viz.: I served the within summons and demand on the within named defendant corporation by Judge Collins, agent, this 6th day of November, A. D. 1915, by reading the same to him and leaving him a true copy thereof. John Solferino, Sergeant-at Arm, November 5, 1915. Plaintiff filed state of demand.

November 11, 1915, by consent adjourned to November 18, 1915.

November 18, 1915, by consent adjourned to November 30, 1915.

November 30, 1915, by consent adjourned to December 9, 1915.

December 9, 1915, parties appeared and proceeded to trial.

On the part of the plaintiff the following witnesses were sworn and gave their evidence, Edward Sturicho, Joseph Colletto, and Rosa C. Romano.

On the part of the defendant, the following witnesses were sworn and gave their evidence: Anton Birckholtz, Fred Haase, Daniel V. Aaron, Everet V. Karey, John M. Simmons, John Varley, William J. Walsh, David Lawler, Pietro Romano and Robert B. Kay.

William B. Richardson was sworn as stenographer.

December 9, 1915, Court reserved decision.

February 15, 1916, defendant filed notice of appeal and bond on appeal.

Whereupon it is on this third day of February, A. D. 1916, by this Court considered and adjudged that said Joseph Colletto, plaintiff, recover against said Hudson and Manhattan Railroad Company, defendant, the sum of one hundred and eighty-five dollars damages and twelve dollars and eighty-five cents costs, cost of suit.

COSTS.

	City	*Al.*
Summons, copy	$1.50	
Service and Return		.60
Mileage		.20
Trial Fee	1.50	
Attorneys fees 5%		9.25

STATE OF DEMAND

I, HARRY BENNETT, Clerk of the District Court, of the city of Hoboken, J. W. Rufus Besson, Esq.. Judge, do hereby certify that the foregoing is a true copy of the record of a judgment of said Court,

IN WITNESS WHEREOF, I have hereto set my hand as Clerk of said Court and affixed [SEAL] the seal of said Court, this fifteenth day of February, one thousand nine hundred and sixteen.

HARRY BENNETT,
Clerk.

STATE OF DEMAND.

Filed Nov. 5, 1915.

The plaintiff demands of the defendant the sum five hundred dollars ($500) for that whereas, on the 8th day of August, 1915, the defendant was operating a railroad for the purpose of carrying passengers for hire to and through the city of Jersey City to the city of New York and on said day the plaintiff became a passenger of said defendant for hire from its station at Grove street, Jersey City, to the city of New York and boarded one of the trains of the defendant for the purpose of being so transported, and that owing to the failure of the defendant to provide the plaintiff with a seat the plaintiff was compelled to stand in one of the cars of said trains while the said train was in motion, and the plaintiff avers and says: That while said train was so in motion it was operated at a high rate of speed and that by reason of the violent and unusual motion of said train, caused by the negligent operation of the defendant, the plaintiff was thrown against the

forward part of the car in which he was standing, and the sliding door in the end of said car, because of the negligence of the defendant in failing to properly fasten said door, violently closed upon the right hand of the plaintiff, jamming the hand of the plaintiff between the door and the side of the car, and crushing the fingers of his right hand so that a portion of one of the fingers of his right hand was afterwards cut off, by means whereof plaintiff was greatly injured and was compelled to procure medical attendance and medicines for his said injuries and loss and was deprived of his earnings during his incapacity and will in the future, by reason of such injuries, sustain damage.

Wherefore, the plaintiff says that he is injured and has sustained damages in the sum of five hundred dollars ($500).

DAVID F. EDWARDS,
Attorney of Plaintiff.

TRANSCRIPT OF TESTIMONY.

Filed Feb. 10, 1916.

HOBOKEN DISTRICT COURT.

JOSEPH COLLETTO, *Plaintiff*, *vs.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant.*	*In Tort.*

HOBOKEN, N. J., December 9, 1915.

Before Hon. J. W. RUFUS BESSON, Judge.

APPEARANCES:

THEODORE RURODE, Esq., for the Plaintiff.

COLLINS & CORBIN, Esqs. (Mr. Markley, Esq.), for the Defendant.

EDWARD STURCHIO, sworn.

Direct examination by Mr. Rurode.

Q. You are a practicing physician in Jersey City?
A. Yes, sir.

Q. How long have you been practicing in Jersey City? A. Four of five years in Jersey City.

Q. Did you attend, in August last, this man Colletto? A. Yes, sir; I did.

Q. Will you tell the Court what time in August it was when he came to you? A. I don't remember that.

Q. Was his finger bandaged when he came to you?

Mr. MARKLEY—I object to that question.

THE COURT—I will admit it.

Q. What injuries did you find this man was suffering from? A. A wound, on the finger.

Q. What finger was it? A. The little finger.

Q. The small finger of the right hand? A. Yes, sir, the small finger of the right hand.

Q. What was the matter with it? A. It was a wound.

Q. Was it cut on the end? A. Yes, sir.

Q. Was it crushed?

Mr. MARKLEY—I object to that question as leading.

A. Yes, sir.

By leave of the Court Anthony P. LaPorta acted as interpreter.

Q. When Mr. Colletto came to you in August last to have his finger treated, which finger was it that was injured? A. The small finger.

Q. On which hand? A. On the right hand.

Q. What was the exact trouble that you found on him? A. It was a lacerated wound.

Q. On what part of the finger? A. The extreme end of the finger, the small finger on the right hand.

Q. Was the nail off or on? A. It was broken.

Q. Has he since grown a new nail? A. Yes, that is a new nail.

Q. What treatment did you give him? A. I bandaged it and gave him surgical treatment for it.

Q. How often did he come to you? A. About a couple of weeks.

Q. Did he come every day? A. Yes, every day.

Q. What treatment did you give him when he came? A. I gave him a bandage for it.

Q. Did it appear to be painful to him? A. Yes, sir.

Q. Is that finger completely cured now? A. Yes, it is completely cured, sure.

Q. Does it show any scars or anything of the wound? A. Yes, sir,

Q. It shows the scars? A. Yes.

Q. Has he made any complaint to you about the feeling in the finger since then? A. That is a question for himself to know, not me.

Q. Has he made any complaint to you as to whether he has any feeling in finger or not?

Mr. MARKLEY—I object to that as immaterial.

THE COURT—I don't think you need ask him whether he complained.

Q. Doctor, in your experience as a doctor, is it possible for an injury of that kind to result in the end of the finger become numbed or dead?

Mr. MARKLEY—I object to that on the following ground: first, the doctor has testified that he was entirely cured; second, the doctor has not been qualified to give his opinion, and he has already testified that the finger is entirely good and cured; and, third, that it has not been shown that the condition of the finger was caused by anything done by the defendant.

Q. When you said that the finger was entirely cured, what did you mean by that? A. It is entirely cured, it is entirely healed, but the wound, he complained about cold getting in there; in other

words, he might get a pain in there and the nerves of the finger might be affected by cold.

Q. Can you say now, Doctor, as a physician, whether from a wound of this kind that you have examined on this man, it is possible for him to have a numbness in the end of the finger?

Mr. MARKLEY—I object to that on the ground that it is incompetent.

Cross-examination by Mr. Markley.

Q. You say you have been a doctor for four years? A. Yes, sir, I should say five years in this country, three years in Jersey City.

Q. How long have you been in this country? A. Five years.

Q. Where did you study your profession? A. In Naples, Italy.

Q. And what courses of studies did you go through there? A. Medical and surgical.

Q. Did you ever go to any university? A. Yes, sir.

Q. Where? A. In Naples.

Q. What university did you go to? A. The University of Naples.

Q. How long did you go there? A. Six years.

Q. Did you go to any other university? A. No, sir.

Q. What did you study there? A. Medicine and surgery.

Q. Are you in other business now besides medical and surgical business? A. No, sir.

THE COURT—I will allow him to testify.

By Mr. Rurode.

Q. I have asked you, from your experience as a

doctor, having examined this man's finger for an injury, whether it was possible that there can be a numbness in the end of that finger from such a wound? A. Yes, sir; this can be.

Q. And that is the natural result of such a wound as you found in this finger? A. Yes, from the wound.

Cross-examination by Mr. Markley continued.

Q. How many kinds of these cases have you had? A. I don't remember that.

Q. Have you had two finger smashes? A. Sure.

Q. How many cases have you had where a man has had his finger smashed like Colletto has? A. I can't remember that.

Q. Have you had twenty cases? A. Oh, more.

Q. Have you had fifty cases? A. More.

Q. Where did you have them, in this country? A. Yes.

Q. Over fifty cases where a man has had his finger smashed? A. Yes, sir; with injuries on the finger.

Q. Would you say that you have had over a hundred cases? A. About a hundred cases.

Q. In this country? A. Yes, sir.

Q. And how many cases did you have in the old country, or Italy? A. A few.

Q. A few over there? A. Yes, sir.

Q. And where did you have all those cases in his country, in Jersey City? A. No, in Jersey City, in Newark, in Passaic, and everywhere.

Q. All within five years? A. Yes, sir.

Q. When did you first treat the plaintiff? A. I don't remember the date, two or three months ago.

Q. You don't know what month? A. I don't remember the month.

Q. When was the last time that you saw the man? A. I don't remember that.

Q. For how long a period of time did you treat him? A. About two weeks.

Q. About two weeks? A. Yes, sir.

Q. Did he come to your office or did you go to his home? A. He came to my office.

Q. How often during those two weeks did he come to your office? A. Every day.

Q. Including Sundays? A. Yes, sir; but I don't remember, some days it was not necessary for treating and so he would leave a day apart.

Q. Then he didn't come every day? A. Yes, at the beginning every day.

Q. Well, what was the beginning, the first week do you mean? A. Yes, the first week.

Q And the second week, every other day? A. Yes, sir.

Q. And then you told him he didn't have to come any more? A. And another time I think he was treated by another doctor, but I don't know who.

Q. During that time he was treated by another doctor? A. Yes, sir; but I don't know who.

Q. During the second week did he come every day? A. Not every day.

Q. And after the first two weeks you did not attend him any more? A. No.

Q. Why didn't you treat him any more? A. Well, when he was cured I didn't treat him any more.

Q. You didn't have to treat him because he was cured after the first two weeks? A. No, sir; because the wound was closed.

Q. There is nothing the matter with that finger now, is there; that finger, the little finger on the left hand is as the other little finger? A. Just the extreme end of that finger (indicating the little right

hand finger) is not as good as the other, the finger that was injured is smaller.

Q. He can use that finger as good as he can use this one, on the other hand? A. Yes.

Q. Have you rendered a bill, Doctor? A. No, sir; because he belongs to a society that I give free treatment to.

Q. That is all.

Recess until two o'clock.

AFTER RECESS.

JOSEPH COLLETTO, sworn.

MR. RURODE—I understand this young man cannot speak very good English.

THE WITNESS—I can say some things but some things I cannot explain.

MR. MARKLEY—How long have you been in this country?

THE WITNESS—Ten years.

MR. MARKLEY—And you had your finger hurt?

THE WITNESS—Yes, sir.

MR. MARKLEY—I think, your Honor, he can speak English.

THE COURT—Very good, try him.

Direct examination by Mr. Rurode.

Q. Your name is Joseph Colletto? A. Yes, sir.

Q. Where do you live? A. 260 Newark avenue.

Q. Jersey City? A. Yes, sir.

Q. How old are you? A. Thirty-four.

Q. Are you married? A. I am married; I was married two weeks ago.

Q. Where are you employed, who do you work for? A. I work for Mr. Long.

Q. What do you do for him? A. I am a laborer.

Q. On August 8th last, which was a Sunday, were you a passenger on one of the trains in the subway, in the tube of the Hudson & Manhattan Railroad Company? A. Yes, sir.

Q. Where did you get on the train? A. At Grove street station in Jersey City.

Q. And which way were you going? A. To New York.

Q. Was there anyone with you? A. Yes, my sister.

Q. Is she in Court with you now? A. Yes, sir.

Q. Did you pay your fare, did you pay money when you got on the train? A. Yes, I paid ten cents.

Q. And you got on a train going to New York City? A. Yes.

Q. Did you sit down in a seat? A. No, sir; there were no seats.

Q. Were there any seats to sit in? A. No, sir.

Q. Were there many people standing in the train? A. The train was very full.

Q. Did you stand in the middle of the car or the end of the car? A. May be in the middle of the car.

Q. In which part of the car, the middle of the car or the front of the car; do you know what I mean? A. I was by the door of the train.

Q. Which door of the train? A. I was by the rear door.

Q. And was there anyone standing with you at the rear door? A. Sure.

Q. Who was standing with you? A. My sister, the two of us were there.

Q. Have you ever ridden on the trains in this tunnel before this day? A. Sometimes.

Q. You have been on these trains before? A. Yes, sometimes I was on them.

Q. Did you ever go from Grove street to New York City on these trains before your injury? A. Yes, sir.

Q. Now, what station did this train stop at in New York City? A. The Cortlandt street station.

Q. What time did you get on the train; what time of the day? A. It might be half-past nine o'clock.

Q. In the morning? A. Yes.

Q. Did anything happen to you on that trip? A. Yes, when the train arrived at Cortlandt street, the conductor went to another place and he opened the door and he left it open, and after the people were all on their feet, and in a moment, during the time that the door was open, when the train turned with my left hand I held my sister and with my right hand I was holding the door, where the motor is, and then the door closed suddenly, and after my finger was injured, the conductor came up.

Q. Never mind that. As the train approached Cortlandt street, where you expected to get out did the conductor call out anything? A. I didn't hear anything.

Q. As you approached Cortlandt street, and the conductor opened the door, was there any motion of the train at that time? A. Yes, sir; the train was in motion.

Q. Then what happened; did anything happen at that time beside the closing of the door? A. And then at that time my finger was injured.

Q. Was the train moving? A. The train was moving when I was injured.

Q. And what caused you to be injured? A. The

door was open and as the train moved around the curve the door closed and my finger was caught.

Q. Why did you put your hand on the door? A. To hold myself.

Q. Why did you have to hold yourself? A. Well, if I didn't try to hold on to something, I would have fallen down.

Q. Why? A. Because the train had reached this curve and was turning.

Q. Was it going around the curve? A. Yes.

Q. How fast was it going at the time it reached the curve? A. Well, it was running fairly, because it was at the curve.

Q. Was it going slow or fast? A. Well, just moderately, not fast or slow.

Q. If you hadn't put your hand on the door to steady yourself, what would have happened to you, do you think? A. I suppose I and my sister would have fallen down.

Q. What would have caused you to fall down? A. The train which was moving.

Q. The train which was moving would have caused you to fall down? A. Yes, sir.

Q. Was there any unusual speed of the train at the time you put your hand on the door and before the door closed on your hand?

Mr. MARKLEY—I object to that question as very leading.

Question withdrawn.

Q. Was there any unusual motion of the train just before you put your hand on the door?

Mr. MARKLEY—I objectto that question as leading and suggesting an answer from the witness.

THE COURT—I think the proper question is, What was the motion of the train at that time, not to characterize it as unusual.

Mr. RURODE—I think I have a right to ask the witness whether he can say that there was an unusual motion of the train.

THE COURT—I think you should ask him what the motion of the train was.

Q. What was the motion of the train which caused you to put your hand on the door before the door closed on your hand?

Mr. MARKLEY—I object to that question; the question is rather indefinite.

Question withdrawn.

Q. What made you put your hand on the door before it was closed on your hand; what did you do it for? A. To hold myself.

Q. Why did you want to hold yourself? A. Because the train was moving.

Q. Was it moving any different than it was all the way over? A. It was running quite fast.

Q. Why didn't you put your hand on the door as soon as you left Grove street? A. The door at Grove street was closed at the time.

Q. You know where Exchange Place is, don't you? A. I do not know.

Q. Why didn't you put your hand on the door when you were leaving Jersey City?

Mr. MARKLEY—I object to that question as immaterial.

Q. Why did you put your hand on the door jamb at the time you did? A. There were no straps to hold on; with my left hand I was holding onto my sister and with the other hand I put it on the door because that was nearest to me.

Q. Was there anything about the motion of the train at that time which was different to what it was before which made you put your hand on the door jamb? A. Yes; at this time it was running stronger, a little faster.

Q. Well, was there anything about the motion of the train, other than the speed of the train, that caused you to put your hand on the door jamb at that time? A. Well, as the condition was, if I hadn't put my hand there I would have surely fallen down.

Q. Why would you have fallen down? A. Because the train was running.

Q. Well, the train was running before this, wasn't it? A. Yes, but the people were all moving towards the door as we were reaching Cortlandt street there and I had to move, and that is how it happened that I went near the door.

Q. Was there any difference between the motion of that train at the time that you put your hand on the door and which caused you to put your hand on the door jamb than there was before you put your hand on the door jamb? A. This was at the curve, and as you know, the car turns at the curve and then we were reaching Cortlandt street station and all the people arose and I had to move, and then the conductor moved from one place to another and left the door open.

Q. Did the conductor fasten the door back when he opened it? A. No, the conductor left it open.

Q. He just punched it back, did he? A. No, sir, he left it open.

Q. And what made the door go shut again? A. All that I know is, my finger was minus, and that is all I know.

Q. Did you see the door go shut on your finger? A. No, sir; I did not, because that was momentarily; just as I turned.

Q. How long after you put your hand on the door jamb to hold yourself from falling, as you have stated, was it before the door came shut on your hand? A. It was just at the moment that the car turned, just at that moment.

Q. Just at that moment what did you do? A. I was with this hand (indicating the left hand) holding my sister, and with the other hand (indicating the right hand) I was holding myself.

Q. And how long after you put your hand on the door jamb to hold yourself, was it before the door came shut on your hand? A. Up to the time that I arrived at the Cortlandt Street station.

Q. How long had you had your hand on the door jamb before you were caught by the door? A. It was at the moment that the car was turning, and at the moment that the conductor left the door open, instantly this occurred.

Q. How long did you have your hand on the door jamb before it was caught by the door, did you have it there fifteen minutes or an hour? A. I have explained that this happened at the moment that the train was about to arrive at the Cortlandt Street station, and then I was injured.

Q. (Question repeated). A. It might have been six minutes and it might have been ten minutes.

Q. Did you have your hand on the door jamb ten minutes before it was hurt? A. Yes, sir.

Q. Well, how long does it take to go from Grove

street over to Cortlandt street on these trains? A. I do not know.

Q. It takes you about five minutes to go from Grove street over to Cortlandt street? A. I think it is about five or six minutes.

Q. If it takes you five or six minutes to go from Grove street over to Cortlandt street, how could you have your finger on the door for ten minutes? A. I say, here is what I mean, I mean just as the conductor opened the door, I put my hand there, and at that very moment I felt an injury on my finger.

Q. Now, Joseph, where did you work at this time, the time of the accident? A. For the gas company.

Q. And how much did you earn from the Gas Company, how much did they pay you? A. $1.75 a day.

Q. And did you work overtime sometimes with them? A. Sure; at that time they were very busy.

Q. What did you do? A. Caulking pipes.

Q. What did you average a week with the gas company, how much did you get a week, about? A. Well, at that time I was working overtime and on Sundays.

Q. How much did you get every week? A. Twelve or thirteen dollars, and overtime work, of course, would make it fourteen dollars a week; every two weeks I would get twenty-five or twenty-six or twenty-seven dollars.

Q. After your finger was injured were you able to go to work? A. How could I go to work with my finger injured?

Q. You had to work with your hands, had you? A. Yes, sir.

Q. And how long was it before your hand was

well enough so that you were able to go to work? A. It was about two months after that I went to work.

Q. Who did you go to work for? A. For Mr. Long.

Q. After the time that you were hurt at Cortlandt street, did the Company's doctor treat your hand? A. Yes, the Company's doctor was treating it.

Q. Did you go to any other doctor after that? A. Yes.

Q. What doctor? A. Doctor Sturchio.

Q. How often did you go to Doctor Sturchio? A. I went there two weeks.

Q. Did he dress the wound? A. Sure.

Q. Did you feel any pain there during that time? A. Sure.

Q. How much pain did you feel? A. Oh, it pains very much.

Q. Did it pain very much? A. Yes, sir.

Q. Do you have any feeling in the end of the finger now; tell us how the finger feels now, have you any feeling in it now? A. No, it is funny, I can't feel anything.

Q. How does the weather affect it? A. When it is cold it hurts me.

Q. Did you lose your nail? A. Yes, sir.

Cross-examination by Mr. Markley.

Q. When the weather is cold your finger is cold? A. Yes, sir.

Q. And when the weather is warm your finger is warm? A. The finger hurts me often; when it is warm I can't touch anything with it.

Q. When the weather is warm it is cold; is it cold all the time? A. Sure, this finger is dead; I can't use it.

Q. Would you feel a pain if you stuck a pin in it? A. I can't feel it because it is dead.

Q. Do you know what day this accident happened? A. Yes, the eighth day of August.

Q. What year? A. This year.

Q. 1915? A. Yes, sir.

Q. You got on the train at Grove street, didn't you? A. Yes, sir.

Q. Who was with you? A. My sister.

Q. Anybody else? A. No, sir.

Q. When you got on the train at Grove street what part of the train did you get on; did you get on the middle of the car or the end of the car? A. At the middle door of the car.

Q. Here are two cars on this piece of paper (illustrating) this represents a car and this represents the door; there is a door there at the end and one in the center, and door over there, and here is the center of the two cars (indicating); which door did you get on at; show us, this is the car? A. This one here (indicating the middle door).

Q. Where did you stand? A. I stand there in the back of the car.

Q. You walked from the middle of the car over to the end? A. Yes, because there were too many people here (indicating) so I went in the back.

Q. Were there any people at the back? A. Yes, sir.

Q. And then you stood there until you got to Cortlandt street? A. Yes, I stayed there in the back of the car until we got to Cortlandt street.

Q. Were there other cars on the train? A. I think there were other cars attached to it.

Q. There were several cars? A. I think so.

Q. There was a car up in front? A. Yes, sir.

Q. And a car in the back? A. Yes, sir.

Q. Did you go into these cars? A. No, the same car that I entered, the same car I remained in.

Q. You stayed there all the time? A. Yes, sir.

Q. You don't know whether there were any seats in the other cars? A. No, all the cars were full.

Q. You didn't look, anyway? A. Yes, wherever I could see, I could see.

Q. Did you go into the other cars to see? A. No, sir; because the cars were full.

Q. You don't know whether they were full?

Mr. RURODE—I object to that question as immaterial.

Question withdrawn.

Q. You have testified that you went in the middle door of one car and walked to the end of that car? A. Yes, sir.

Q. Did you go in any of the other cars?

Mr. RURODE—I object to that question on the ground that it is immaterial; a passenger is not bound to go into another car to look for a seat.

THE COURT—I will allow the question.

Q. (Question repeated). A. No, sir.

Q. Who was standing in the part of the car where you were standing at the end of the car? A. There were several people, I don't know who they were.

Q. Do you know how many? A. About five or six, I guess.

Q. About five or six? A. Yes, sir.

Q. Now, where was this door that closed upon your finger, was it the door leading to the platform

or was it the door leading to the other car? A. It was the door leading into another car.

Q. It was the end door of the car? A. Yes, it was the door next to the motor.

Q. Now, you said in your direct examination that you saw the motorman or the guard, the man on the train, open that door; did you see him open the door? A. Sure, he passed the place that I was in and then he opened the door and went into another car.

Q. The car in front? A. Yes, sir.

Q. In the direction in which you were going? A. Yes, sir.

Q. And then you put your hand up on the door jamb after he opened the door? A. I put my hand there to hold myself up.

Q. And after that the door shut on your hand? A. Yes, sir.

Q. Did you see it shut on your hand? A. I didn't see it; if I had seen it I would have taken my hand away.

Q. At that time you were working for the Public Service Gas Company and were earning $1.75 a day for ten hours work; yes or no? A. Yes, sir.

Q. How long were you incapacitated by reason of the accident? A. I stayed in the house about two months on account of the finger, and when I tried to get work back at the place that I was working I found my position occupied.

Q. Didn't you go back and work for the Public Service Gas Company twenty-two days after you were hurt? A. I went there but the foreman would not give me work.

Q. You went there twenty-two days after, did you? A. I went there to try if I could get work, but the foreman didn't give me any employment.

Q. Didn't you work the first day, three hours, yes or no? A. No, sir.

Q. Didn't you return to work on August 30th, yes or no. A. Yes, I went there on that day and the foreman gave me ten day's work and the foreman would not keep me there any more.

Q. Ten day's work? A. Yes, because I could not use my finger, and the foreman noticed that and he sent me away.

Q. Didn't you work there until September 13th? A. Yes, sir.

Q. And then you were laid off, were you not? A. Yes, sir.

Q. And a lot of other men were laid off? A. I don't know if a lot of men were laid off then.

Q. Don't you know that some other men were laid off? A. I know that he discontinued my services because he observed that I could not use my finger.

Q. Were not other men laid off at the same time that you were laid off, doing the same work? A. Yes, sir.

Q. You were a caulker, and that is summer work? A. Yes, I had been working there of late years, and I had worked winter and summer.

Q. You can't do caulking work in the winter? A. Well, we were working upon other things, fixing things up.

Q. The caulking work can only be done in the summer time? A. Oh, no, this work is also done in the winter time.

Q. What do you mean by telling this Court that you didn't work for two months after the accident? A. When I went there I did work ten days, but I could not use my finger and the foreman seen that, and he did not give me any further employment.

Q. But you did work within two months after

the accident, didn't you? A. Only the ten days which the foreman gave me.

Q. After you were laid off did you go back there at any time to see the boss? A. No, sir.

Q. Did you see that man there (indicating a man in the Court room)? A. Yes, sir; he was in the office; at the time I hurt my finger I did go to the office and told him that I hurt it.

Q. Do you know him? A. Yes, sir.

Q. You went back and saw him after you were laid off, yes or no? A. Yes.

Q. What did you tell him? A. I didn't tell anything to this young man; what have I got to say to this young man?

Q. What did you go there for? A. I went to report that my finger was injured.

Q. Didn't you tell him that you would like to have them say that you were earning more than you were in fact earning? A. No, no, no.

Q. You have seen Mr. Kay? A. Yes, sir.

Q. You gave him a statement, did you not? A. Yes, sir.

Q. Who was present when you gave him that statement? A. I and my sister.

Q. And who else? A. And my brother-in-law.

Q. Your brother-in-law? A. Yes.

Q. Romano? A. Yes.

Q. He was there too? A. Yes, sir.

Q. Can you write English? A. No, sir.

Q. Can you write your name in English? A. No, sir.

Q. You did not write your name at that time? A. No, sir.

Q. Did you tell Mr. Kay at that time that you were making $2.25 a day?

Mr. RURODE—I object to that; the testimony

is now and the claim is that he was making $1.75 a day; it does not matter what he told Mr. Kay for contradicting or diminishing the damage, and it does not affect this case at all; we claim that he was only making $1.75, and it does not make any difference what he told Mr. Kay.

THE COURT—I do not think it is material.

Q. Didn't you say to Mr. Kay that the train was going just as it always went, yes or no? A. No.

Q. And didn't you say that "I didn't see anyone else lose balance?"

THE COURT—He has not denied that.

Mr. MARKLEY—He has testified that he cannot write English and I want to put those things in the record that he made this statement at this time.

Q. You were treated by Doctor Ryan, were you not? A. Yes, sir.

Q. And before Doctor Ryan treated you you had been treated by Dr. Sturchio? A. Yes, more than twice.

Q. Well, how often, then? A. I said I went there two weeks to be treated.

Q. Do you know Doctor Ryan? A. Yes, sir.

Q. Doctor Ryan treated you two days after the accident? A. Yes, sir.

Q. And he treated you four days after the accident; he treated you for a week or two? A. Yes, sir.

Q. Was Doctor Sturchio treating you at the same time or before? A. Yes.

Q. They were both treating you at the same time, is that right? A. Yes, sir.

Q. About how many people were standing in this car at this time? A. The cars were all filled.

Q. I am asking you about a particular car; can you give me any idea of how many people were standing in the car in which you were standing? A. All the seats were occupied and all the spaces in the car were occupied by people standing.

Q. There was lots of room; you could walk from one end of the car to the other without any trouble? A. No, there was not enough room, because the cars were all filled.

Q. How did you come to walk from one end, or the middle of the car to the other? A. Well, I had to force my way through, that is how that happened.

ROSIFICE COLLETTO ROMANO, sworn.

Direct examination by Mr. Rurode.

Q. You are a sister of Joe Colletto, who was just on the stand? A. Yes, sir.

Q. And where do you live? A. At 260 Newark avenue, Jersey City.

Q. On August 8th last, were you with Joe on a tunnel train going to New York? A. Yes, I was with him.

Q. Where did you get on the train? A. It was about half past nine. I didn't have a watch to look at.

Q. What was the name of the station you got on at? A. I don't know how he called the station, because my brother brought me there.

Q. Where were you going? A. I was going to my aunt's in New York.

Q. Did Joe have his hand hurt on the train that day? A. Yes, sir.

Q. And were you with him when his hand was hurt? A. Yes, sir.

Q. And you saw his hand hurt? A. As we entered the train the spaces were all occupied and it was difficult to pass and as we could not go any further into the train we stopped at the place where Joe and I were together, towards the front part of the car.

Q. And did you stand there all the way over to New York? A. We were; and my brother was holding me by the side.

Q. And were you standing up all the time? A. Yes, we were always on our feet standing up.

Q. Did you see Joe when he had his hand hurt? A. Yes, sir; I was right near him.

Q. What caused the injury? A. The door caused the injury.

Q. What did the door do? A. He was holding himself on the door and as the conductor opened the door he happened to have his hand on the door jamb and the door came suddenly against his hand.

Q. What made the door come against his hand? A. Why, the door closed; the door was left open, and when the door closed, it caught his finger.

Q. What made the door close? A. Why, it was no human being that did it; the door closed itself.

Q. The door came shut itself? A. Yes, sir.

Q. Did you see Joe put his hand on the side of the car before the door closed? A. Yes, sir.

Q. Why did he put his hand on the side of the car? A. He was holding his hand there because the train was going rapidly and if he didn't hold on to me I would have fallen down too.

Q. Did you see the conductor open the door of the car? A. Yes, I did.

Q. Did Joe have his hand on the side of the car by the door before the conductor opened the door? A. Yes, he had his hand there.

Q. Before the conductor opened the door? A. Yes, before he opened the door, because he had no other place to hold on.

Q. Then, when the conductor opened the door, did Joe take his hand away? A. No, he didn't take his hand away, because if he had taken his hand away he would have fallen down, because the train was going rapidly.

Q. At the time the door closed on his hand was there about the motion of the car that was different than it had been before the door closed on his hand? A. No, sir, it was too rapid, it was too strong.

Q. When did it become too rapid? A. It was at the time he was hurt, because if he didn't hold himself there he would have fallen down.

Q. Was it at that very time that the door came shut on his hand? A. Yes, it was at that moment that the conductor opened the door and it happened just at that moment when the conductor opened the door, it happened that way.

Q. What happened that way, the violent motion of the train? A. That the train was going very rapidly.

Q. Was there anything different about the motion at the time the door closed on his hand than there was before the door closed on his hand? A. The train was going fast and it was shaking this way (illustrating) and if he didn't hold himself he would have fallen down.

Cross-examination by Mr. Markley.

Q. How long have you been in this country? A. Two years.

Q. Are you married to Mr. Romano? A. Yes, sir.

Q. How long have you been married to him? A. The 27th of August it was six months.

Q. You live with your husband? A. Yes, sir.

Q. And you were present when your brother made a statement to Mr. Kay, that gentleman sitting here with the mustache? A. Yes, sir.

Q. And your husband was present? A. No, not at the beginning.

Q. Was your husband there at any time while your brother was making the statement to Mr. Kay? A. He came after a few minutes.

Q. Did you hear your brother say that your train was moving the same at the time of the accident as it always does, yes, or no? A. I was not always present.

Q. Did you hear your brother say that the train was moving the same at the time of the accident as it always does? A. My brother asserted that the train at the time he was injured was running strong or fast or rapid.

Q. Well, it was running fast and rapid before the accident? A. At the time of the accident the train was going fast.

Q. Didn't the train go fast at any time before that? A. No, before the accident the train was running evenly or moderately.

Q. Have you ever ridden on these trains in the tunnel before? A. Yes, sir; I have been on them myself alone, and never had anything happen to me.

Q. And they ran at those times as they did on this day? A. No, sir.

ROSIFICE COLLETTO ROMANO—Cross

Q. Did you go in any other car besides the one in which you were riding? A. No, sir; just as we entered we stopped in there and we didn't move any further.

Q. Did you go in the middle door or the end door of the car? A. We came through the middle entrance.

Q. And did you walk to the front of the car? A. No, just as we entered we didn't go very far.

Q. That is all.

Mr. RURODE—Your Honor, that is the plaintiff's case.

Mr. MARKLEY—I move for a non-suit on the following grounds: first, no negligence is shown on the part of the defendant; there is no evidence of any negligence; the second, the plaintiff, as a matter of law, is guilty of contributory negligence; the evidence shows that the plaintiff put his hand on the door jamb and that when he did so the door was open and he saw that it was open and that it might close on his fingers, and therefore he is guilty of contributory negligence as a matter of law and cannot recover in this action.

THE COURT—I am in doubt, and I will call for the defence and I will deny your motion for a non-suit.

Mr. MARKLEY—I ask an exception to your Honor's ruling.

THE COURT—I will grant you an exception.

Mr. MARKLEY—I would like to ask your Honor whether you consider the extraordinary jerk out of the case?

THE COURT—I do not consider there was any extraordinary jerk in the case at all; I consider the car went in there at the same rate of speed, and when it reached the curve it began to wobble. I do not suppose I ought to determine anything just now.

Mr. MARKLEY—Then I will call the gentleman from the Public Service Company.

THE CASE OF THE DEFENDANT.

ANTON BIRCKHOLTZ, sworn.

Direct examination by Mr. Markley.

Q. Mr. Birckholtz, where are you employed? A. By the Hudson & Manhattan Railroad Company.

Q. In what capacity? A. In the inspection department.

Q. Did you inspect car 718? A. Yes, sir.

Q. When did you inspect it? A. On the 17th of July last, and then I got it back on the 9th of August.

Q. Did you inspect all the doors on that car? A. All the doors.

Q. The two end doors also? A. Yes, sir.

Q. Did you examine the doors leading from one car to another? A. Yes, sir.

Q. Did you examine the doors at each end of the car? A. Yes, sir.

Q. And how did you find them? A. I found them in good condition.

Q. You examined them and found that they worked all right? A. Yes, sir.

Q. That is a portion of your duties to examine these doors? A. Yes, sir.

Cross-examination by Mr. Rurode.

Q. Mr. Birckholtz, you say that you are an inspector and you say that you inspected this car? A. Yes, sir.

Q. You particularly looked at the end doors? A. Yes, sir.

Q. Is there a fastening on these doors to hold them back? A. They are sliding doors.

Q. And when they are slid back they are held by a lock? A. Yes, sir.

Q. Tell us how that lock is? A. It is square piece like a "T" and right in the center there is a spring in the lock, and if you turn it to the front, it opens it up, and if you turn it back it shuts it.

Q. After the door is open and put back in the slide in which it works, the lock is supposed to catch and hold it in place? A. Yes, sir.

Q. How can that door be opened; how do you open the door? A. You have got to take hold of the handle and turn it in order to open the door.

Q. And if the lock is in working order that door will hold back without sliding back, with any extraordinary motion of the train? A. Yes, sir.

Q. And with the extraordinary motion of the train it won't even slide? A. No, sir.

Q. You say you inspected this car the next day and found that the fastenings on each end were O. K.? A. Yes, sir.

Q. And that that door with these fastenings, being in good order as you found them, should not have closed again with any motion of the train? A. No, because if it always the back it is locked.

Q. And no matter whether the motion of the train were ordinary or extraordinary that door

would remain where you see it? A. Yes, sir.

Q. And if you don't put it back all the way, if you only shove it part of the way back and don't make the lock catch, then, of course, the door will slide with any motion of the train? A. When I inspected it—

Q. You are an inspector and inspect those locks to see if the door is properly fastened back in the lock, and if it is it will not slide back or close with any extraordinary motion of the train; it will remain stationary? A. Yes, sir.

Q. They slide pretty easily? A. Yes, sir.

Q. And if that door is not fastened all the way in the lock, then, I suppose, it will close with any ordinary motion of the train, is that right? A. That is right.

FREDERICK HAASE, sworn.

Direct examination by Mr. Markley.

Q. Mr. Haase, you are employed by the Public Service Gas Company? A. Yes, sir.

Q. In what capacity? A. I am a clerk in the gas department.

Q. Do you remember when Mr. Colletto was laid off by the Public Service Gas Company? A. I have the date here.

Q. Do you remember thetime when he was laid off? I do.

Q. Was he the only man laid off at that time; I don't know that anybody else was laid off at that particular time, but on all through the latter part of the summer season we had been laying them off one after the other, and so far as his being laid off is concerned, I do not know that there is any other cases, then our work is done for the summer.

Q. After he was laid off did he come back to see the people in the shop? A. Not that I remember.

Q. Did he go back there at any time and ask you to make, or ask the people in the shop and you to make a misrepresentation of his salary? A. Yes, that was before he was laid off; it was either a day or two after that, and he came in with his arm bandaged or in a sling.

Q. And what did he say? A. I don't remember the exact words, but he said he wanted us either to make a statement or an acknowledgment of some sort, that he was earning more money and he named an amount which I do not remember, but it was more than what he was getting.

No Cross-examination.

Daniel V. Arants, sworn.

Direct examination by Mr. Markley.

Q. Mr. Arants, you are employed by the Hudson & Manhattan Railroad. A. Yes, sir.

Q. In what capacity? A. Switchman.

Q. Were you riding on this train on which the plaintiff was on August 8th, 1915. A. Yes, sir.

Q. How near were you to him? A. I was standing at the end door.

Q. Were you traveling to New York to your work at that time? A. I was travelling from Henderson street to New York.

Q. You had no duty to perform on the train? A. No, sir; I was just riding as a passenger.

Q. Was he standing with anybody else? A. Yes, there was a lady standing by him and another lady at the other side of the vestibule.

Q. How many people were there in that car? A. There were seven or eight people standing in the center of the car.

Q. Is that all? A. Yes, that is all.

Q. As you went into New York, how about the motion of the train, how was it? A. Nothing unusual.

Q. Nothing unusual? A. Nothing unusual at all.

Q. Tell us what you saw with reference to the catching of this man's finger on the door jamb? A. When the conductor opened the door he announced the station "Cortlandt street;" he pushed the door back and then he went to open the other door and then the door came back and caught his finger and I pulled the door off of his finger.

Q. What happened after that, did you assist him in any way? A. No, I just looked at his finger and he commenced to squeeze his finger like that (illustrating) to squeeze the blood out of it.

Q. How near were you to the station platform at that time? A. We were pretty near in there; it happened right at the end of the platform.

Q. Right at the end of the platform? A. Yes, right at the end of the platform.

Q. Did you know the conductor at that door? A. No, sir.

Q. Have you seen him in Court here? A. Yes, sir.

Q. (Mr. Kay, stand up please.) Is that the gentleman? A. Yes, sir; that is the gentleman.

Cross-examination by Mr. Rurode.

Q. You say there was no unusual motion of the train at all? A. No, sir; there was not.

Q. And the conductor had opened the door and called out the name of the station? A. Yes, sir, "Cortlandt street."

Q. And the door immediately came shut? A.

After he opened it and turned his back the door came shut.

Q. And caught Mr. Colletto's finger, that is all you know about it? A. Yes, sir; that is all I know about it.

EVERETT B. KARY, sworn.

Direct examination by Mr. Markley.

Q. Mr. Kary, you are employed by the Hudson & Manhattan Railroad? A. Yes, sir.

Q. In what capacity? A. As a guard on the tunnel trains.

Q. Were you a guard on a train on August 8th? A. Yes.

Q. And were you a guard at one end of the car on which Colletto was riding? A. Yes, sir.

Q. What was the number of that car? A. It was number 718.

Q. You found out afterwards that he was injured at your end of the car? A. Yes, sir.

Q. And this was on Sunday? A. Yes, sir; Sunday morning.

Q. About what time? A. About ten o'clock.

Q. In the car number 718 were there any people standing? A. Yes, sir; a few.

Q. About how many? A. You might say about eight or ten.

Q. And in rush hours how many people can stand in those cars? A. In the morning and evenings?

Q. In rush hours. A. Well, about thirty or forty people can stand.

Q. Now, tell us what you know about the accident? A. Why, it was at Cortlandt Street when the train was pulling into the station I called out Cortlandt Street and I opened my door and I stepped to my next door and I did the same thing, and

at the same time I reached for the next car and I pulled the guard back and I stepped in the car and I saw the man pressing his finger; while the finger was bleeding I asked him what was the matter with it and he said he caught his finger in the door and it was only a few minutes that the train stopped and I had to open the door and he made an attempt as if he was going to get off the train and I asked him his name and address; the people were getting off at the same time and I tried to get some witnesses, but the people went up the stairway and I kept him down there, and after I got his name and address, I tried to get the drug-store open up at the terminal, but being Sunday everything was closed.

Q. Did you see his finger on the door? A. No, I didn't even take notice of it.

Q. Was there any unusual motion of the train? A. No, sir.

Q. Do you have to go around a curve as you go into the station; is there a curve there? A. Yes, sir; and I opened the door and I stepped in the next car and I commenced doing the same thing; it was just a few moments when we stopped at the station; it was right at the station.

Q. Did you see him there at the time you opened the door? A. No. I didn't take notic of anybody just the passengers, that is all.

Q. How did you push the door when you opened it? A. All the way back, otherwise I could not step into the next car.

Q. And you say it was all the ways back when you left it? A. Certainly, yes.

Q. There were passengers near that door? A. Which door?

Q. The door that you opened? A. Not at that time.

Q. Not at that time? A. No, not as far as I can remember now.

Q. Well, those people in the vestibule were near the door? A. Yes.

Q. There was this man Mr. Arants? A. We were talking together before I opened the door.

Q. And Mr. Colletto and this lady that was with him and there was another lady? A. There might be, but I can't remember.

Q. They were right near the door? A. Yes, sir.

Q. And that door can be opened from the vestibule? A. Yes, sir.

Cross-examination by Mr. Rurode.

Q. Did that door have any fasteners on it? A. Fasteners?

Q. Catches or locks? A. It has got a lock and a catch.

Q. And that lock is supposed to catch the door when it is pushed back? A. Yes, sir.

Q. And it has got to be pushed up all the way in order to catch it? A. Yes, sir.

Q. And you saw Mr. Arantz there? A. Yes, sir.

Q. And he was standing right near the door and you were speaking to him? A. Yes, sir.

Q. And Mr. Colletto was there? A. I didn't take any notice of him; I noticed the passengers there.

Q. As you opened the door was Mr. Arantz anywhere near the door? A. I cannot say whether Mr. Arantz was right near the handle.

Q. And you say there was no extraordinary motion of the train? A. No, sir; there was not.

Q. But just as soon as you opened the door, you opened one door and pushed it back, and then you stepped to the other door to make an announcement and the door came shut? A. It was in a second; I

opened the door and made an announcement in the next door and then I heard the door close.

Q. You were in the car that Mr. Colletto was in first? A. Yes, sir.

Q. And you opened that door? A. Yes, sir.

Q. Had you made your announcement in that car before you opened the door? A. Yes, sir.

Q. And then you stepped in the other car? A. Yes, and I opened the other door.

Q. You opened both doors; they were both closed, and just as soon as you did that you heard the door behind you close suddenly? A. Yes, sir.

Q. And you turned around and saw his hand? A. No, I didn't see his hand, I saw Mr. Arantz pulling back the door.

Q. And that is all you know about it? A. That is all.

JOHN H. SIMMONS, sworn.

Direct examination by Mr. Markley.

Q. Mr. Simmons, you are an employee of the Hudson & Manhattan Railroad? A. Yes, sir.

Q. In what capacity? A. As a guard.

Q. And you were on this train on which Mr. Colletto was riding, a part of the car with Mr. Kary? A. Yes, sir.

Q. Between what two cars were you, starting from the front of the train backwards? A. The second and third car.

Q. So you had the adjoining car to his? A. Yes.

Q. Did you notice whether those two cars, that you had the one next to him and the one above were filled? A. There was no excess load in the two cars that I was in.

Q. Do you know whether there was any seating room or not? A. No, I don't recollect that.

Q. Was anybody standing? A. I guess there were a few standing.

Q. How many people in a rush hour can one of those cars hold standing? A. I should judge about thirty-five or forty.

Q. And people besides that can be sitting down? A. Yes, sir.

Q. And how many people does that car hold? A. Its seating load is forty-four.

Q. And the rest besides can be standing? A. Yes. sir.

Q. How about the motion on that car when you went into New York? A. Nothing unusual that I noticed.

Q. Do you take a number of curves going into New York? A. Only the one going to the station.

Cross-examination by Mr. Rurode.

Q. Is that a very sharp curve at the station? A. Well, I just can't say how sharp it is.

Q. You ride on it every day; it is a long sweeping curve, is it not? A. No, sir.

Q. You didn't see this accident? A. No, sir.

Q. Or know nothing of it? A. No, sir.

Q. When did you first hear about it? A. I heard them talking about it a short time afterward.

Q That is all you know about it? A. Yes, sir.

Re-direct examination by Mr. Markley.

Q. Nobody told you that the car had an unusual motion? A. No, sir.

Q. And so far as the number of passengers that were in the car were concerned, nobody told you about that? A. No, sir.

Re-cross examination by Mr. Rurode.

Q. Those cars never have an unusual motion, so far as you know of? A. Not that I know of.

JOHN VARLEY, sworn.

Direct examination by Mr. Markley.

Q. Mr. Varley, you were on that train on that morning, as a conductor? A. Yes, sir.

Q. And the other men were the guards? A. Yes, sir.

Q. Between what two cars were you? A. Between the first and second car.

Q. Was there anybody standing in these cars? A. No, sir.

Q. Do you know whether or not there were any seats vacant? A. There probably were a few seats vacant.

Q. You don't recollect? A. There might be seats vacant up in front of the car.

Q. How many cars were there on that train? A. Seven cars.

Q. And you were on the first and second car? A. Yes, sir.

Q. How about the motion of the train as the train went into New York on that trip? A. Nothing unusual on that trip.

Q. Were you informed that somebody was injured on that trip? A. Yes, sir.

Q. How soon after? A. After we got into Jersey City.

Q. And you say there was no unusual motion of the train? A. No, sir; there was not.

Q. Is there a curve as you go into New York? A. Yes, sir.

Cross examination by Mr. Rurode.

Q. If the motorman takes that curve very easily, why there is no extraordinary motion of the car? A. What?

Q. But if he takes it fast there is an extraordinary motion of the car? A. He never takes it fast.

Q. On any train on which you were riding did you ever notice the motorman take the curve fast enough to throw somebody down? A. No, sir.

Q. Never on any train on which you were riding? A. No, sir.

WILLIAM JOSEPH WALSH, sworn.

Direct examination by Mr. Markley.

Q. Mr. Walsh, were you one of the guards on that train on which this accident happened. A. Yes, sir.

Q. On which Mr. Varley is conductor? A. Yes, sir.

Q. When was this accident first called to your attention that a man had had his finger cut? A. I heard them talking about it two or three hours after.

Q. What cars were you between? A. The guard of the last car.

Q. Were those two cars crowded? A. I have no distinct recollection of the load that we were carrying at the time.

Q. Do you know whether anybody was standing? A. No, sir.

Q. Do you remember as to the motion of the train? A. Yes, sir.

Q. How about the motion of the train? A. The usual motion of a train coming around a curve.

Q. Do you know how fast a train runs coming into New York? A. About six miles an hour coming around curve.

Q. There is curve there? A. Yes, sir.

ross-examination by Mr. Rurode.

Q. You said that you recollect about the motion of the train, but you do not recollect to the passen-

gers, is it because somebody called your particular attention to this phase of the case? A. No, sir.

Q. It just happened? A. Well, all the motormen take the same rate of speed, and if there was anything unusual I would know it.

Q. Of course, you are not supposed to testify to anything unusual?

Mr. MARKLEY—I object to that question.

Re-direct examination by Mr. Markley.

Q. Have you ever been on a train going to New York on which they took the curve fast? A. No, sir.

Q. And if a train should take it fast do you think you would remember it? A. Yes, sir.

Re-cross examination by Mr. Rurode.

Q. They never take a curve fast? A. Not as far as I remember.

Q. You only remember the ordinary things that they do? A. No, sir.

DAVID J. LAWLER, sworn.

Direct examination by Mr. Markley.

Q. Were you the motorman on this train on which Conductor Varley was the conductor? A. I was the motorman on the train that day.

Q. Going into New York at ten o'clock? A. Yes, sir.

Q. Is there a curve as you are about to go into the station? A. Yes, sir.

Q. And how fast were you going? A. About six to eight miles an hour.

Q. What is the usual limit of speed at which you

go through there? A. About eight miles an hour.

Q. About eight miles an hour? A. Yes.

Q. And you were going somewhere between six and eight miles an hour? A. Yes, sir.

Q. Did you notice anything unusual in the motion of the train as you went into New York? A. No, sir.

Cross-examination by Mr. Rurode.

Q. You were sitting down, I suppose? A. Certainly, I was sitting down.

Q. And you could not tell, sitting down, whether anybody could stand on their feet? A. I could tell by the speed; there was nothing unusual to throw anybody off their balance.

Q. Do you know that you were the motorman on the train on which Mr. Colletto was injured? A. I was working with Mr. Varley on that day.

Q. Were you with him on that trip? A. Yes, I was with him on that trip; I was with him all day.

Q. Nothing extraordinary happened at all? A. No, sir.

Q. You just went along smoothly; that is a very sharp curve? A. Well, no, they call it a medium curve; it is not very sharp.

Q. Well, if you take that curve just a little bit faster than ordinary it makes some difference in the cars behind you? A. Well, you would have to take it at a very high rate of speed to cause any swaying of the cars; it would have to be twenty-five or thirty miles an hour.

Q. If you have got a speed of from sixteen to twenty five miles an hour would it; you have got to take it up from sixteen to twenty-five miles an hour? A. Yes, sir.

Q. And if you took it at twelve miles an hour it would not make any unusual motion in the cars;

you can stand in the cars when the train is going twelve miles an hour? A. Yes, sir.

Q. It would take sixteen to twenty-five miles an hour to throw you off your balance? A. It would depend upon the way you stood.

Q. If you were standing not holding on anything? A. That would depend upon the way you were standing, too.

Q. If you didn't suspect any motion of the car and did not expect it, you would be thrown very much more easily than if you did know it? A. Yes, sir.

Q. That is your experience? A. Yes, sir.

PIETRO ROMANO, sworn.

Direct examination by Mr. Markley.

Q. Mr. Romano, is that your brother-in-law that is bringing this suit? A. Yes, sir.

Q. And your wife, she testified? A. Yes, sir.

Q. I mean the woman that testified here is your wife? A. Yes, sir.

Q. You saw her testifying? A. Yes, sir.

Q. You work for the Hudson & Manhattan Railroad Company? A. Yes, sir.

Q. In what capacity? A. A seat repairer.

Q. Were you present at Mr. Colletto's when Mr. Kay was there? A. Yes, sir.

Q. And did you hear him say that there was no unusual motion to the train; did you hear your brother-in-law say to Mr. Kay that the train went along as usual? A. Mr. Kay wrote down everything he said.

Q. Did Mr. Colletto say that the train went along the same as always? A. Yes, Mr. Kay wrote it down.

Q. Did you hear him say that? A. I don't re-

member that; Mr. Kay wrote everything down that Mr. Colletto said.

Q. Did you hear Mr. Colletto say that there was no unusual motion to the train? A. No.

Q. You don't remember what he said? A. I don't remember what he said.

Q. After Mr. Kay wrote it down, did Mr. Kay read the paper over to Mr. Colletto? A. Yes, sir.

Q. And did Mr. Colletto say that was right? A. Yes, sir.

Q. You heard him say that? A. Yes.

No Cross-Examination.

Robert B. Kay, sworn.

Direct examination by Mr. Markley.

Q. Mr. Kay, did you take a statement from the complainant in this case? A. Yes, sir.

Q. And did you write it down? A. Yes, sir.

Q. And after you wrote it down did you read it to the plaintiff? A. Yes, sir.

Q. And who was present when you took that statement? A. Why, Romano, and Romano's wife, I think; it was a young girl; the woman that testified here in court.

Q. What did he say to you with reference to the speed of the train? A. He said the speed of the train was the same as always; I wrote the statement out in more or less pig Italian, if you want to use that expression.

Q. Is that the statement that you took (showing witness paper)? A. Yes.

Q. He told you that there was no unusual motion of the train? A. Yes, sir.

Cross-examination by Mr. Rurode.

Q. Mr. Kay, of course, this witness, this Italian plaintiff, is a very intelligent man? A. No.

Q. He is not? A. No.

Q. He understands English very beautiful and speaks English beautifully? A. No, sir.

Q. And the statement was not taken in beautiful English; in other words it was so bad that you took it in pig Italian? A. Yes, sir.

Q. You went there with the idea that you wanted this witness to say that there was no unusual motion of the train? A. No, I appreciate that I know something of the law and I wanted to bring out the question.

Q. You know what the law was; you based your examination on the law so as to be within the law? A. Yes.

Q. And you didn't base your examination on the facts so as to get the facts from an ignorant witness? A. Yes, I based it on the facts, and I based it on my understanding of the law.

Q. In other words you based it on the facts that you wanted to show that there was no extraordinary motion of the train? A. No, I got the fact that would be pertinent in the action?

Q. Pertinent to the action? A. Pertinent in an action.

Q. And you limited your action to that only? A. Only to the pertinent facts.

Q. You asked the witness a question and then he assented and then you put down what you thought he said? A. No, sir.

Q. Did you put down question and answer? A. No, sir.

Q. Could you understand everything he said? A. Yes, sir; I could.

Q. And you could make him understand every thing you said. A. Yes, I could in speaking very plain English, as I understand he has lived here for thirteen years.

Q. And you understood everything he said and he understood everything you said in connection with the facts? A. Yes.

Q. How long did this examination take, Mr. Kay? A. I don't think any more than fifteen or twenty minutes.

Q. How many pages does this examination, which you have reduced to writing, occupy? A. Less than one page.

Q. And you were examining him for how long, for twenty minutes or half an hour? A. I don't know; I wrote it out and had his brother-in-law read it over to him.

Q. At that time he thought that you had an idea of settling with him?

Mr. MARKLEY—I object to the question as incompetent.

A. I don't know about that.

Mr. MARKLEY—That is our case. I move for a direction of a verdict on the same grounds urged by me in my motion for a non-suit.

CERTIFICATES OF STENOGRAPHER AND JUDGE

I do certify that the foregoing is a true and accurate transcript of the testimony and proceedings in the case of Joseph Colletto, plaintiff, against Hudson & Manhattan Railroad Company, defendant, taken by me at the Hoboken District Court on December 9th, 1915.

W. B. RICHARDSON,
Stenographer.

To the Chief Justice of the Supreme Court of New Jersey:

I do certify the foregoing transcript of the testimony and proceedings in the above entitled cause, made by the stenographer designated by me and sworn, to be used on the hearing of the appeal herein.

J. W. RUFUS BESSON,
Judge of Hoboken District Court.

SPECIFICATION OF POINTS.

Filed March 2, 1916.

Hudson and Manhattan Railroad Company, defendant below and appellant herein, herewith files its specification of the determinations and directions of the Hoboken District Court, with respect to which it is dissatisfied in point of law.

1. Said Court erred in entering judgment in favor of the plaintiff.

2. Said Court erred in failing to enter judgment in favor of the defendant and against the plaintiff.

3. Said Court refused to non-suit plaintiff whereas said non-suit should have been granted for one or more of the following reasons:

(a). No negligence was shown on the part of the defendant or its employes.

(b). Plaintiff as a matter of law was guilty of contributory negligence.

4. The Court refused to direct a verdict in favor of the defendant whereas such verdict should have been directed for one or more of the following reasons:

(a). No negligence was shown on the part of the defendant or its employes.

(b). Plaintiff as a matter of law was guilty of contributory negligence.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Dated March 2, 1916.

OPINION.

(Filed October 13, 1916.)

NEW JERSEY SUPREME COURT.

JOSEPH COLLETTO,
Plaintiff-Respondent,
v.
HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

Argued June Term, 1916, before Justices Garrison, Parker and Bergen.

COLLINS & CORBIN, for Appellant.

DAVID F. EDWARDS and THEODORE F. RURODE, for Respondent.

Per Curiam:

The plaintiff's case shows that he was a passenger on the defendant's car; that the car was so crowded that there were no seats to be had, and he was standing near the door.

As the car approached a station the guard opened the door and as the car was passing around a curve in the track the plaintiff was thrown off his balance and in order to save himself from falling, put his hand against the jamb of the door, and that closing because of the swing of the train, his hand was caught and the injuries produced for which this suit was brought. The testimony shows that these doors slide in a groove in the sides of the car, and that when in place there is a catch which will hold the door so that it will not move because of any

ordinary motion of the train. It further appeared that this car was examined the next day and the lock or catch was found to be in good order and the uncontradicted testimony is that if the door had been pushed far enough open, it would have been locked in that position. The plaintiff has a judgment, from which the defendant has appealed because the Trial Court refused to non-suit, or to direct a verdict for it.

The first point argued, is that the non-suit should have been granted for want of proof of negligence on the part of the defendant because, as it is argued there is no proof of any extraordinary jerk or lurch of the car, and that the door closed because such a thing was likely to happen if the door was not properly locked. We think it may be properly inferred from the testimony that unless fastened, the door was liable to close when the car was running around a curve even if there was no unusual lurch, and that to prevent this the defendant company had provided the car with a lock or catch to hold the door in place, and that this accident occured because the guard neglected to properly fasten the door.

We think the case was open to a finding that the negligence of the defendant was in failing to throw the door far enough open so that the lock would hold it in place, and that with knowledge to be imputed to it that the door would not stay in place during ordinary operation unless it was properly held by the latch; the duty arose to so fasten the door as to prevent its movement during ordinary operation of the car.

The appellant cited two cases which we think not applicable, viz., Hannon v. Boston R.R. Co., 65 N. E. 809, where the passenger was inside of the car as it drew up to the platform and put his hand on

the glass of the door so that when it was opened by the guard standing on the station platform, the plaintiff's hand was caught, and in Cashman v. N. Y. & N. H. & H. R. R. Co., 87 N. E., 570, where the plaintiff's hand was pushed between the door and the jamb of an elevator as the guard was closing. In both of these cases the act of the plaintiff in putting his hand in a dangerous place was the proximate cause of the accident, while in the present case the negligence of the defendant was in not properly fastening the door which he knew was required to be held in place when the train was moving around a curve. We think the Trial Judge properly refused both motions.

The second point is that the plaintiff was guilty of contributory negligence as a matter of law. To this we cannot accede, for according to the plaintiff's case, the car was crowded with passengers and he was required to stand near the door, and because he was in such a position it became necessary, on account of the sudden motion of the car, to steady himself, and he had a right to assume that the door was properly fastened, and if it was, what he did was perfectly safe.

The judgment should be affirmed.

RULE AFFIRMING JUDGMENT.

(Filed Oct. 25, 1916).

NEW JERSEY SUPREME COURT.

JOSEPH COLLETTO,
Appellee,

vs.

HUDSON AND MANHATTAN RAILROAD COMPANY,
Appellant.

On Appeal.
Affirmance.

This cause having been argued at the last June term of this Court on the specifications filed, and the Court having duly considered the same, and being of opinion that there is no error in the judgment and proceedings of the Court below,

It is ordered, that said judgment be in all things affirmed, with costs to the appellee to be taxed; and it is further ordered that execution issue out of this Court therefor.

Entered October 25, 1916.

On motion of
DAVID F. EDWARDS,
Attorney.

NEW JERSEY COURT OF ERRORS AND APPEALS

JOSEPH COLLETTO,
Plaintiff—Appellee,
vs.
HUDSON & MANHATTAN RAILROAD COMPANY
Defendant-Appellant.

Plaintiff-Appellee's Brief.

This is an appeal from the Supreme Court whose opinion is found on page 52 of the printed book.

FACTS.

Colletto, the plaintiff, was a passenger of defendant (p. 13). He entered one of its cars at Grove Street, Jersey City, and, there being no seats, he was compelled to stand near the rear door (p. 13). As the train approached Cortlandt Street, New York, the conductor opened the end door leading from one car to another (p. 14, 36, 38). The door was one that when opened slid back in a groove, and was caught by a lock or catch which held it fast, so that it would not close with the motion of the train (p. 33). The fastenings which were designed to hold this door in place, when pushed back in the groove, were inspected by the defendant and found to be in order (see testimony of defendant's car inspector p. 32, 33, 34). As soon as the conductor opened the door, the plaintiff, because of the motion of the train, to save himself from falling, placed his hand on the door jamb, and at the same instant the

door "closed suddenly" injuring his hand (p. 14–28).

The relationship of plaintiff and defendant, at the time of the injury complained of, was that of passenger and common carrier.

A carrier is bound to a high degree of care as to a passenger.

> Brackney vs. Public Service, 77 New Jersey Law, 1.

And this is so upon whatever part of the car the passenger may be.

> Trussel vs. Morris County Traction Co., 79 New Jersey Law, 533.

The door which mashed the finger of the plaintiff, a sliding door, was opened by a servant of defendant, who saw plaintiff standing alongside the door (p. 39). The train was in motion. The car was provided with fasteners which held the door in place, and would prevent it from closing with any motion of the car, no matter how violent, and defendant's inspector said that the fastener was in order both before and immediately after the accident. It therefore follows that the defendant, having assumed the duty of opening this door and fastening it so that it could not slide shut with the motion of the train, is guilty of negligence in failing to properly perform that duty. The defendant, in the exercise of that high degree of care required of it, should have foreseen that it was likely that a passenger, standing as the plaintiff was might, because of the motion

of the train, place his hand suddenly on the nearest part of the car (in this case the jamb of the door) to prevent a fall, and that its failure having assumed the duty of opening the door and fastening it, to properly perform that duty, might result just in such an accident.

"A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate."

Rivers vs. Penna. R. R. Co., 83 New Jersey Law, 515.

"By foresight is meant not foreknowledge absolute * * * but rather 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 would prevent" (*Ibid*).

A reasonable inference of negligence of defendant in failing to secure the door properly, is deducible from the fact that it did slide shut, notwithstanding the fact that there were fasteners to hold it in place, which fasteners were in good order.

Machlin vs. Penna. R. R. Co., 83 New Jersey Law, 362.

The case of

Graf vs. West Jersey, 62 At. Rep., 333.

is a Supreme Court decision and, so far as it conflicts in principle with the Rivers case, is

is overruled. But the Graf case presents a different case, the only similarity being in the fact that it was a door in each case which caused the injury. For in the Graf case the door was a swinging door, there was nothing to show who had opened the door, or that there was a fastener provided, and negligence of defendant was predicated solely on the motion of the train and in this respect plaintiff had failed to show anything unusual.

Those cases, in other States, which held that it is not negligent for a guard to close a door on a passenger's hand, where he did not see the hand, and those cases in which it is held that the railroad company is not bound to keep the door from closing at a time when it was not called upon to anticipate that passengers would be standing upon the threshold or platform, do not involve the same application of the rule as to foresight applicable to this case, as laid down in the Rivers case *supra*.

CONTRIBUTORY NEGLIGENCE.

Upon what theory it can be said that a passenger is guilty of negligence in standing in one part of a car provided for transportation rather than in some other part, we are at a loss to comprehend, and no authority is quoted to sustain such a theory.

It must be conceded, and we need no citation of authorities to support the statement that a passenger who sees a guard about to *close* a door and who nevertheless places his hand in such a position that *inevitably* the door

will crush it, is guilty of negligence on his part; and the distinction between those cases and the one at the bar, where the act of the plaintiff was, we might say, involuntary, and the act of the defendant such as to give him *reasonable assurance*, is so apparent, that it needs but a statement of the facts to show the inapplicability of the rule in one to that of the other.

The appeal should be dismissed.

DAVID F. EDWARDS,

THEO. RURODE,

Attorneys for and of Counsel with Plaintiff-Appellee.

New Jersey Court of Errors and Appeals.

JOSEPH COLLETTO, *Plaintiff-Respondent,* *vs.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant-Appellant.*	On Appeal from Supreme Court.

BRIEF OF COLLINS & CORBIN IN FAVOR OF THE DEFENDANT-APPELLANT.

(1)

Statement of the Case.

The appeal in this case brings before this Court for review a judgment entered in the Supreme Court affirming a judgment of the Hoboken District Court in favor of the plaintiff and against the defendant in an action wherein Joseph Colletto brought suit against the Hudson & Manhattan Railroad Company to recover damages for alleged negligence of the latter in permitting a door on one of its passenger coaches to close on one of the former's fingers while he was a passenger on said coach (State of Case, p. 4).

The case was tried before the trial judge without a jury on December 9, 1915, and decision was reserved until February 3, 1916, when judgment was entered in favor of the plaintiff for $185 (p. 3, ll. 10-30).

The defendant appealed to the Supreme Court, where the judgment was affirmed (p. 52 et seq.). It is from this judgment of affirmance that the present appeal is taken (p. I.). The grounds of appeal in this Court are the same as those urged in the Supreme Court (p. II.).

(2)

Grounds of Appeal.

The grounds of appeal are as follows (p. II.):

1. The Hoboken District Court erred in entering judgment in favor of the plaintiff and against the defendant.

2. The Hoboken District Court erred in failing to enter judgment in favor of the defendant and against the plaintiff.

3. The Hoboken District Court erred in refusing to non-suit plaintiff, whereas, said non-suit should have been granted for one or more of the following reasons:

(a) No negligence was shown on the part of the defendant;

(b) Plaintiff, as a matter of law, was guilty of contributory negligence.

4. The Hoboken District Court erred in refusing to direct a verdict in favor of the defendant, whereas, said verdict should have been directed for one or more of the following reasons:

(a) No negligence was shown on the part of the defendant;

(b) Plaintiff, as a matter of law, was guilty of contributory negligence.

(3)

Statement of the Facts.

The facts are undisputed. The plaintiff and his sister testified as to the accident in behalf of the plaintiff and the witness Arants was an eye witness for the defendant. The plaintiff, accompanied by his sister on Sunday, August 8, 1915, at about 10 o'clock in the forenoon boarded a train of the defendant company at its Grove Street Sta-

tion in the City of Jersey City, destined for Cortlandt street, New York City (pp. 13-14; p. 37, ll. 20-30). Previous to August 8, 1915, plaintiff had often ridden on these trains (p. 14, ll. 1-10). The cars in the train that plaintiff boarded were so constructed that passengers might enter at either end or at the center. Plaintiff boarded one of the cars at the center and not finding a seat walked to the front end of the car and stood there until he was injured (p. 13, ll. 25-40; p. 21, ll. 10-30). There were cars ahead of and in the rear of the car that plaintiff boarded (p. 21, ll. 30-40); he admits that he did not go into any of the other cars to try to find a seat but that he remained in the one car all the time (p. 22, ll. 1-30). There were seven cars in the train *and a seat could have been secured in some of the other cars* (p. 42, ll. 10-20; p. 40, ll. 30-40). There were five other people standing in the car plaintiff boarded (p. 22, ll. 30-40). The accident can best be described by giving the plaintiff's testimony on direct examination verbatim. It should be noted that the plaintiff's finger was not caught by the door jamb of one of the entrance doors but by the door jamb of the intercommunicating door leading from the car in which plaintiff was riding to the car ahead of it (p. 22, l. 40; p. 23, l. 5). The plaintiff's testimony was as follows (pp. 14-15):

"Q. Did anything happen to you on that trip? A. Yes, when the train arrived at Cortlandt street, the conductor went to another place and he opened the door and he left it open, and after the people were all on their feet, and in a moment, during the time that the door was open, when the train turned with my left hand I held my sister and with my right hand I was holding the door, where the motor is, and then the door closed suddenly, and after my finger was injured, the conductor came up.

"Q. Never mind that. As the train approached Cortlandt street, where you expected

to get out, did the conductor call out anything? A. I didn't hear anything.

"Q. As you approached Cortlandt street, and the conductor opened the door, was there any motion of the train at that time? A. Yes, sir; the train was in motion.

"Q. Then what happened; did anything happen at that time beside the closing of the door? A. And then at that time my finger was injured.

"Q. Was the train moving? A. The train was moving when I was injured.

"Q. And what caused you to be injured? A. The door was open *and as the train moved around the curve* the door closed and my finger was caught.

"Q. Why did you put your hand on the door? A. To hold myself.

"Q. Why did you have to hold yourself? A. Well, if I didn't try to hold onto something I would have fallen down.

"Q. Why? A. Because the train had reached this curve and was turning.

"Q. Was it going around the curve? A. Yes.

"Q. How fast was it going at the time it reached the curve? A. Well, it was running fairly, because it was at the curve.

"Q. *Was it going slow or fast?* A. *Well, just moderately, not fast or slow.*"

According to the plaintiff's testimony, as the train was approaching the Cortlandt Street Terminal the conductor or guard opened the intercommunicating door between the two cars and left it open and the people all arose and then the door closed and plaintiff found his finger was injured. The plaintiff *saw the door opened* and at that time the train was in motion. The plaintiff says that he put his hand on the door to hold himself. He further said that the train was going around a curve and that therefore he had to hold himself; that the train was going "moderately, not fast or slow." There was an attempt on the part of counsel for the plaintiff to prove an extra-

ordinary jerk or jolt, or some unusual motion of the train at the time of the accident. But the testimony shows that there was no such jerk or jolt or motion (see particularly p. 15, l. 20, to p. 17, l. 40). The following is an example of such examination and answers thereto (p. 16, l. 25, to p. 17, l. 20):

"Q. What made you put your hand on the door before it was closed on your hand; what did you do it for? A. To hold myself.

"Q. Why did you want to hold yourself? A. Because the train was moving.

"Q. Was it moving any different than it was all the way over? A. It was running quite fast.

"Q. Why didn't you put your hand on the door as soon as you left Grove street? A. The door at Grove street was closed at the time.

"Q. You know where Exchange Place is, don't you? A. I do not know.

"Q. Why didn't you put your hand on the door when you were leaving Jersey City?

"MR. MARKLEY: I object to that question as immaterial.

"Q. Why did you put your hand on the door jamb at the time you did? A. There were no straps to hold on; with my left hand I was holding onto my sister and with the other hand I put it on the door because that was nearest to me.

"Q. Was there anything about the motion of the train at that time which was different to what it was before which made you put your hand on the jamb door? A. Yes; at this time it was running stronger, a little faster.

"Q. Well, was there anything about the motion of the train, other than the speed of the train, that caused you to put your hand on the door jamb at that time? A. Well, as the condition was, if I hadn't put my hand there I would have surely fallen down.

"Q. *Why should you have fallen down?* A. *Because the train was running.*"

On cross examination of the plaintiff, answering

the specific question whether he actually saw the conductor or guard open the intercommunicating door that shut on his finger, he said, *"Sure, he* (the guard) *passed the place that I was in and then he opened the door and went into another car."* He was then asked whether the guard went into the car in front of the car in which he was standing and he answered "Yes, sir." And then the following questions were asked and the following answers made thereto by the plaintiff (p. 23, ll. 25-35):

"Q. And then you put your hand up on the door jamb after he opened the door? A. I put my hand there to hold myself up.

"Q. And after that the door shut on your hand? A. Yes, sir.

"Q. Did you see it shut on your hand? A. I didn't see it; if I had seen it I would have taken my hand away."

The only other witness for the plaintiff as to the accident was his sister. Her testimony conflicts with itself. If we believed her testimony her brother had his hand on the door jamb before the door was opened, which, of course, would be an impossibility. She testified as follows (p. 28, l. 20, to p. 29, l. 15):

"Q. What did the door do? A. He was holding himself on the door and as the conductor opened the door he happened to have his hand on the door jamb and the door came suddenly against his hand.

"Q. What made the door come against his hand? A. Why, the door closed; the door was left open, and when the door closed, it caught his finger.

"Q. What made the door close? A. *Why, it was no human being that did it; the door closed itself.*

"Q. *The door came shut itself?* A. *Yes, sir.*

"Q. Did you see Joe put his hand on the side of the car before the door closed? A.

Yes, sir.

"Q. Why did he put his hand on the side of the car? A. He was holding his hand there because the train was going rapidly and if he didn't hold onto me I would have fallen down too.

"Q. Did you see the conductor open the door of the car? A. Yes, I did.

"Q. *Did Joe have his hand on the side of the car by the door before the conductor opened the door?* A. Yes, he had his hand there.

"Q. *Before the conductor opened the door?* A. *Yes, before he opened the door, because he had no other place to hold on.*

"Q. *Then, when the conductor opened the door, did Joe take his hand away?* A. *No, he didn't take his hand away, because if he had taken his hand away he would have fallen down because the train was going rapidly.*"

This testimony shows that no human being closed the door, but that it closed itself. The witness Arants, who was riding in the same car near the plaintiff testified that when the conductor opened the intercommunicating door as the train approached the Cortlandt Street Terminal he announced the station by saying "Cortlandt street", and then pushed the door back and went into the car in front, opening the intercommunicating door leading into that car and that while he was in the other car the door in question closed. He further testified that they were almost up to, and opposite the station platform at the time the door closed (p. 36, ll. 10-30).

The guard who opened the door testified that as the train was about to enter the Cortlandt Street Terminal he announced the station by saying "Cortlandt street", and then opened the door in question and stepped to the car ahead and opened the intercommunicating door of that car and announced the station in that car. That after he had announced the station in that car and came

back to the car in which plaintiff was riding the door in that car had already been opened and the plaintiff was pressing his finger. *He did not see the plaintiff's finger on the door at any time.* He testified that when he opened the door in question *he pushed it all the way back,* for otherwise he could not have stepped into the next car, and further said *that when he left the car in which plaintiff was riding the door was all the way back and that although there were passengers in the vestibule near the door there was nobody leaning against the door* (p. 37, l. 35, to p. 39, l. 10).

All of the witnesses for the defendant testified that there was no unusual motion or extraordinary jerk of the train at any time as it approached or entered the Cortlandt Street Terminal (p. 36, ll. 1-10 and 35-40; p. 38, ll. 20-25; p. 41, ll. 15-20; p. 43, ll. 30-35). The motorman of the train testified that they were going about six or eight miles an hour and that there was no unusual motion of the train (p. 44, l. 30, to p. 45, l. 10).

The defendant also adduced testimony, which was undisputed, that the car in question was inspected on July 17, 1915, and on August 9, 1915. The accident happened on August 8, 1915. The inspector examined the entrance doors and the intercommunicating doors and he found them all in good condition. They all worked perfectly. He testified that the intercommunicating doors were sliding doors and either when open or shut they were held by a lock. In order to open the door it is necessary to turn the handle on the door; ordinarily even with an extraordinary motion of the train the door will not even slide. He testified that the fastenings all were in good order. *In other words, on the day after the accident the door in question was examined and found to be in perfect condition* (p. 32, l. 20, to p. 34, l. 20).

(4)

Brief of the Argument.

The defendant's motions for a non-suit and for direction of verdict were erroneously denied.

At the close of the plaintiff's case defendant moved for a non-suit on the following grounds (p. 31, ll. 15-40):

(a) There was no evidence that the defendant was negligent.

(b) Plaintiff, as a matter of law, was guilty of contributory negligence.

The trial judge denied the motion and granted the defendant an exception (p. 31, l. 35). At the close of the defendant's case defendant moved for a direction of verdict on the same grounds and the motion was again denied.

We shall discuss the grounds for these motions in the order stated.

(a)

There was no evidence that the defendant was negligent.

The negligence charged against the defendant in the State of Demand is as follows, (p. 4, l. 35 to p. 5, l. 10):

> "That while said train was so in motion it was operated at high rate of speed and that by reason of the violent and unusual motion of said train, caused by the negligent operation of the defendant, the plaintiff was thrown against the forward part of the car in which he was standing, and the sliding door in the end of said car, because of the negligence of the defendant in failing to properly fasten said door, violently closed upon the right hand of the plaintiff * * * *."

We shall discuss the foregoing allegation of

negligence and show that there is no evidence supporting it.

There is no evidence that the train was operated at a high rate of speed. As shown in the statement of facts *supra,* the plaintiff himself testified that the train was moving "just moderately; not fact or slow." The motorman of the train testified that the train was moving at from 6 to 8 miles an hour.

Assuming that the train was going very fast, such fact would not be sufficient from which to infer negligence for it will be remembered that defendant's railroad is an underground railroad and the question of speed does not in any way enter into the question of negligence.

After alleging that the train was operated at a high rate of speed the plaintiff further alleges that by reason of the violent and unusual motion of said train, caused by the negligent operation, meaning by negligent operation the excessive speed, the plaintiff was thrown against the forward part of the car. This allegation was wholly unsupported by the evidence, and at the close of the plaintiff's case the trial judge conceded on the motion for non-suit that there was no unusual motion or extraordinary jerk. The trial judge said (p. 32, ll. 1-10):

> "THE COURT: *I do not consider there was any extraordinary jerk in the case at all;* I consider the car went in there at the same rate of speed, and when it reached the curve it began to wobble. I do not suppose I ought to determine anything just now.'

If there was no evidence of extraordinary jerk at the close of the plaintiff's case such evidence was not supplied by the defendant's witnesses. As shown in the statement of the facts, all of the defendant's witnesses testified that there was no unusual motion of any kind of the train. This allegation of the state demand must be regarded

as unsupported by the evidence. Assuming for the moment that there was an *ordinary* jerk or jolt of the train although no jerk or jolt of any kind was pleaded, the law is settled that negligence cannot be predicated on such a happening which is incident to the reasonably safe operation of the train.

Graf v. West Jersey & S. R. Co., 62 Atl. (N. J. Sup.) 333;
Rochat v. North Hudson Co. R. Co., 49 N. J. L. 445;
Chester v. Public Service R. Co., 94 Atl. N. J. Sup. 953.

The question that now presents itself is whether the door having closed because of an ordinary jerk of the train, or no jerk at all the defendant can be chargeable with negligence. The only reported case in this State directly in point is that of *Graf v. West Jersey & S. R. Co.*, 62 Atl. 333, decided by the Supreme Court. Justice Swayze speaking for that court held (italics ours):

> "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 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."

The case is direct authority and controlling. In the case at bar, the motion of the car which caused the door to close was no more than the usual motion incident to the operation of the train and therefore defendant cannot be held chargeable with negligence. Also in the case at bar the plaintiff himself anticipated the motion of the train for he testified that the car was just about to go around the curve which he knew, and as the car turned the curve he put his hand up to steady himself (p. 17, ll. 25-35). Surely the mere fact that the train was going around the curve of which fact plaintiff was aware does not warrant an inference of negligence. Although there is only one case in this State directly in point, there is abundant authority elsewhere for the proposition, that where a train gives an ordinary jerk to one side which causes a door of a car to shut upon the fingers of a passenger, the facts do not warrant an inference of negligence.

Hannon v. Boston Elevated R. Co., 182 Mass. 425;

Cashman v. N. Y. N. H. & H. R. R. Co., 201 Mass. 355;

Weinschenck v. N. Y., N. H. & H. R. R. Co., 190 Mass. 250;

Muller v. Manhattan R. R. Co., 96 N. Y. S. 270;

Maillefert v. Interborough Rapid Transit Co., 92 N. Y. S. 207;

Graeff v. Philadelphia R. R. Co., 161 Pa. 230, 28 At. 1107;

Dawson v. Maryland Electric Ry. Co., 86 At. (Md.) 1041;

Metropolitan R. Co. v. Jackson L. R., (Eng.) 3 App. Cas. 193;

Benson v. Furness R. Co., 88 L. T. N. S. 268 (Eng.);

Drury v. North Eastern R. Co., 2 Kp. (Eng.) 322;

Texas & P. R. Co. v. Overall, 82 Tex. 247; 18 S. W. 142;
Ham v. Georgia R. & B. Co., 97 Ga. 411; 24 S. E. 152;
Cormier v. Dominion A. R. Co., 36 N. B. 10;
Skinner v. Wilmington & M. R. Co., 39 S. E. 65; 128 N. C. 435.

In all of these jurisdictions the rule is the same as in New Jersey as to the degree of care to be exercised by a carrier to its passengers. 6 Cyc. 591. We shall not attempt to give quotations from each of the cases cited supra, but shall refer the Court to pertinent extracts from a few of the cases for the purpose of showing how well settled the rule is. Before doing this, however, we should like to complete our analysis of the plaintiff's allegation of negligence.

There is a twofold charge first that the train was operated at a high rate of speed which caused a violent motion throwing the plaintiff against the door in question, and, second, that when he was thrown against the door it closed because of the failure of the defendant to properly fasten it. *The second allegation of negligence is dependent on the sustaining of the first charge of negligence.* If there was no unusual motion causing the plaintiff to be thrown against the door the second allegation must necessarily fall because the mere fact of the door closing does not amount to negligence unless it be shown that it closed because of an extraordinary jerk or unusual motion of the train. Counsel for the plaintiff may attempt to argue that even though there was no extraordinary jerk, nevertheless the defendant is liable for the closing of the door because it was not properly fastened. Even assuming that such a proposition is sound *there is no evidence that the door was not properly fastened.* The guard testified that the door *was*

opened all the way by him for otherwise he could not have walked through to the other car in front. *The plaintiff testified that he with his own eyes saw the guard open the door, but he did not testify that the door was not opened all the way.* Counsel for the plaintiff may further argue that because the inspector who examined the door in question one day after the accident testified that on examination he found *that the door and its mechanism was in perfect condition* and that the door would not open or close when in such condition if latched, *it must be assumed that the guard did not properly open the door,* but such an unwarrantable assumption is mere conjecture and such conjecture cannot be entered into when there is no evidence to support it. The undisputed evidence is that there was only the usual motion of the train; that the door was in perfect condition and that it was properly opened by the guard. From these facts the conclusion cannot be drawn that the defendant was negligent merely by showing that the door did in fact close on this particular occasion. The inspector did not testify that the door *under any circumstances and in any event would not close; his testimony must be regarded as covering the ordinary case.* Any one of numerous causes might have caused the door to close on this particular occasion, none of which would have been sufficient to charge the defendant with negligence. For instance, there were five passengers who were in close proximity to the door; *any one of these passengers by touching the door knob could have released the catch; also on this particular occasion the mechanism of the catch may not have worked perfectly and this fact could not be detected in the ordinary operation of the train.* Where the result is likely to have been caused by something other than the negligence of the carrier, the Court *cannot assume, in the absence of evidence,* that the injury was due to the

latter cause. (*Lewis v. Penn. R. R. Co.*, 70 N. J. L., 130; affirmed 71 N. J. L., 339.) It is a well known fact that mechanical devices on different occasions work differently; such devices are affected by the heat and cold and if tilted a little more one way than the other they will not work properly. If any of these causes or similar causes prevented the latch from catching it is clear that the defendant could not be held chargeable with negligence. *A railroad is not an insurer of the different devices and appliances used by it, nor can the acts of third persons be charged against it, and if the door closed in spite of every effort to properly open it, and because of an ordinary jerk or jolt of the train negligence cannot be predicated on such a happening.* However, this discussion only becomes material if the court should come to the conclusion that the two allegations of negligence in the State of Demand are interdependent. We do not see how such a conclusion can be reached, for the allegation is that the violent motion of the train threw the plaintiff against the door which closed upon his finger. If there was no violent motion of the train to throw him against the door then he was in a position in which he had no right to be and his own act therefore must be regarded as the proximate cause of the accident. In other words, in order for the plaintiff to recover he must sustain both allegations of negligence for they are inseparable. Counsel for the plaintiff realized this fact, for he tried to show, in his examination of the plaintiff, that there was an unusual motion or extraordinary jerk of the train.

We shall now return to a discussion of some of the cases cited from other jurisdictions dealing with the question of negligence on the part of a carrier because of the closing of a door of a train. A very well considered case directly in point is *Dawson v. Maryland Elec. Ry. Co.*, 86 Atl. (Md.), 1041.

In that case the plaintiff entered the defendant's car at the rear end. The car contained a passenger compartment and a baggage compartment, and appellant, after entering the car, walked through the passenger compartment, and not finding a vacant seat he returned to the baggage compartment. There were no seats and no provision made for the accommodation of passengers in the baggage compartment, and the appellant took a position in the middle of the car, near and immediately in front of the door leading into the passenger compartment. He testified that he was not holding onto anything, but was standing in front of the door and looking into the passenger compartment; that passengers were getting off and on the car at the stations, but that he did not see any vacant seat; that he remained in that position for about half an hour and that while he was so standing the car gave a sudden jerk, he threw up his hand and grabbed the door jamb to stop from falling, and the door, which had been opened, closed on his hand and smashed his fingers. He further testified that he saw a man try to fasten the door back and that he had to push it several times before it would catch. The Court of Appeals of Maryland after stating the foregoing facts has the following to say in regard to the position taken by the plaintiff:

> "It is apparent from this brief statement of facts, which are all of the facts in the case having any bearing upon the question of the appellee's liability for the injury sustained, that the accident was directly due to the fact that the appellant voluntarily took the position stated in the baggage compartment of the car instead of remaining in the passenger compartment. The fact that he was permitted to do so would not render the appellee liable, where other provision was made for his safety and comfort. There is no evidence to show that there was not room for him to stand in

> the passenger compartment of the car, and, if he elected to take the position he did in the baggage compartment, he did so at his own risk."

This reasoning should be applied to the position taken by the plaintiff in the case at bar. There was no reason why plaintiff should stand alongside of the intercommunicating door from the car in which he was standing to the car ahead. The fact that he stood in that position would not render defendant liable where other provision was made for his safety and comfort. *There was plenty of room inside of the car and seats in the other cars* where the plaintiff could have secured proper accommodation. If he had stood inside the car, he would have been able to support himself by holding onto numerous handholds therein provided, or if he went into one of the other cars he could have secured a seat. Having elected to take the position near the intercommunicating door, which was not supposed to be used for passengers except to pass from one car to another, he did so at his own risk. According to his own testimony, he walked from the center of the car out to this position on the platform near the intercommunicating door. No reason appears why he did so.

The Court of Appeals of Maryland in the Dawson case also deals with the question of sudden jerk in a very clear and concise way as follows:

> "The fact that the car gave a sudden jerk is no evidence of negligence on the part of the appellee. It does not appear that the sudden movement of the car was due to any defect in the car or to any carelessness or negligence of those in charge of it. It is well known that electric cars do not run perfectly smoothly, and that there are certain irregular movements to which they are subject and which do not justify the inference of negligence or carelessness on the part of those in charge."

The Court having disposed of the question of sudden jerk then deals with the question of the closing of the door and holds as follows:

> "Nor is there any ground for imputing negligence to the appellee because the door in the car closed and mashed the appellant's fingers. It does not appear who opened the door, or that there was any defect in its construction, and the mere fact that the appellant saw a man push it back twice in order to fasten it does not justify an inference that the door was not properly constructed, or that there was a defective fastening. In the case of *Weinschenck v. N. Y., N. H. & H. R. R.*, 190 Mass. 250, 76 N. E. 662, the court said: '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. * * * Nor could it be inferred from the mere closing of the door either that there was a defective fastening or that there had been negligence in putting the door on the catch, for the reasons stated in speaking of the plaintiff's own care. It is not a case to which the doctrine of *res ipsa loquitur* can be applied.' See, also, *Graf v. West Jersey & S. R. Co.* (N. J. Sup.) 62 Atl. 333".

It will be noticed that the Court cites the case of *Graf v. West Jersey & S. R. Co.*, 62 Atl. 333, decided by this Court and holds in accordance with the doctrine therein laid down. The Court in the Dawson case concluded as follows:

> "In the case at bar the appellant was not compelled to ride in the baggage compartment of the car in question, but he elected to do so in preference to remaining in the passenger compartment, which was provided by the appellee for the safety and comfort of passengers. Under such circumstances and in the absence of some evidence to show negligence on the part of the appellee or its employes, there was no error in the ruling of the court below withdrawing the case from the jury."

We submit that the Dawson case is direct authority for this case and that it is sound on principle. It is even stronger than the case at bar for there was evidence in that case that the plaintiff saw a man try to fasten the door back and that it had to be pushed several times before it would catch. There is no such evidence in the case at bar but on the contrary there is the evidence of the inspector who says that the latch was in perfect condition.

Another case directly in point is that of *Weinschenck v. N. Y., N. H. & H. R. R. Co.,* 190 Mass. 250, 76 N. E. 662. In that case the plaintiffs entered the second car of a train and took seats at the front end of the car. The train stopped at a certain station and a man in uniform, either a conductor or a brakeman, opened the car door, and it remained open with swinging until the plaintiffs left the train. As the train was approaching the last station, just before it stopped and before the brakeman had called the station, the husband arose from his seat, and went out upon the platform to alight and his wife followed behind him. Just as she stepped upon the threshold, there was an unusual jolt of the car. She felt as if she were swaying forward and going to fall, and she testified that she grabbed the first thing to protect herself, which was the jamb of the door. She stepped on the platform, and then the door closed on her fingers, causing the injuries complained of. The Supreme Judicial Court of Massachusetts speaking through Sheldon, J., held:

> "On this testimony, it is at least difficult to say that the female plaintiff was in the exercise of due care. 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 the door was open. There was no evi-

dence that it was fastened back, or that she believed it to be fastened back; and it is generally known that the catches of car doors are not intended to hold them securely against being shut, but only to guard against their 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 a catch."

It will be noted that the Court said that the plaintiff knew the door was open *and that it is generally known that the catches of car doors are not intended to hold them securely against being shut, but only to guard against their being lightly or easily moved.* The Court further said that this is all that the plaintiff would have had a right to infer even if she had believed or known that the door was held by a catch.

The Court further said:

"Nor could it be found that the defendant was careless in the management of the door. Apparently it had been left open by reason of the closeness of the air in the car, and the defendant was not bound to keep it from closing at a time when it was not called upon to anticipate that passengers would be standing upon the threshold or the platform. Nor could it be inferred, from the mere closing of the door, either that there was a defective fastening or that there had been negligence in putting the door on the catch, for the reasons stated in speaking of the plaintiff's own care."

In the case at bar the door was opened because the train was approaching a station and it was necessary for the guard to announce the station and it cannot be inferred from the mere closing of the door that there was a defective fastening or that there had been negligence in putting the door on the catch. In *Maillefert v. Interborough Rapid Transit Co.,* 98 N. Y. Sup. 207, the Supreme Court of New York held:

"For the guard of a subway car, into which

> passengers were coming through a door opened only two-thirds of its width, to open in its full width, whereby a passenger, who, being crowded, had just put his hand on the casing of the door, had his finger crushed was not negligence; it not appearing that the guard knew or could have seen where the passenger's hand was, and there being nothing to show that it was common for passengers to place their hands on the door for support."

In the case at bar there is no evidence that the conductor or guard knew that the plaintiff would put his hand on the door jamb or that the guard did not properly open the door. There is no evidence that the guard saw the plaintiff's hand on the door jamb so that he could warn him to take it away, and in these respects the case might be regarded within the rule laid down in the Maillefert case. In *Christensen v. Oregon Short Line R. Co.*, (Utah) 99 Pac. 676; 20 L. R. A. (N. S.) 255, the Utah Supreme Court speaking through Frick, J., held:

> "Negligence on the part of a railroad company will not be inferred from the mere fact that a door slammed shut, catching and crushing the hand of a passenger, who, while attempting to pass through it, left his hand on the door jamb."

This case is stronger than the case at bar, because in that case the passenger was attempting to pass through while in the case at bar the plaintiff had no right to be leaning against the door in question which could not be used either for an entrance or exit. In *Hannon v. Boston Elevated Ry. Co.*, 182 Mass. 425; 65 N. E. 809, the Supreme Judicial Court of Massachusetts speaking through Knowlton, C. J., held:

> "We need not consider the question whether there was any evidence of due care on the part of the plaintiff in allowing his fingers to rest against the glass of the door at a time when

> he knew it was about to be opened, for we are of opinion that there was no evidence of negligence on the part of the defendant. To save time for the multitudes of traveling people, to whom time is valuable, it is necessary to have the doors ready to permit exit as soon as the passengers safely can begin to pass out. A little time must be consumed in unfastening and opening the doors. To hold that the guard outside shall not be permitted to begin the process until the cars come to a complete stand-still would impose an unnecessary and unreasonable restriction, whose effect would delay passengers and prolong the running time of the trains. Ordinarily there is no reason to anticipate danger from beginning to get ready the places of exit while the train is in the last part of its movement before coming to a full stop. Passengers are not expected to have their fingers in such a position as to be endangered by the opening of the doors at such times. Of course, the guard must be careful not to open the car when, from the speed of the train or from any other cause, he has reason to anticipate danger to passengers. In the present case there is nothing to show that he knew that the plaintiff's fingers were on the glass."

This case is in point in that the accident happened under somewhat similar circumstances for in the Hannon case the car was about to come to a stop and the Court said that the defendant company had the right to open the doors before the train had come to a complete stop. It was necessary in the case at bar to open the intercommunicating door before the train come to a stop in order to announce the Cortlandt Street Terminal.

In *Cashman v. N. Y., N. H. & H. R. Co.,* 201 Mass. 355, 87 N. E. 570, the Court held:

> "It is at least very doubtful whether there was any evidence to warrant a finding that the plaintiff was in the exercise of due care. There was certainly no evidence to show that the

operator of the elevator was negligent. By the plaintiff's direction, and to enable her to reach her train, he was trying to move the elevator quickly, and he had no reason to expect that, while he was in the act of closing the door, she would be pushed and would put her hand where the door would close against it."

The foregoing cases show conclusively that in the case at bar no negligence can be imputed to the defendant merely because the door closed. There is no evidence that the guard saw the plaintiff's finger on the door jamb so as to prevent the accident. There is no evidence that the door was not in proper condition and there is no evidence that the door was not properly fastened. On the other hand, there is evidence that the door was in perfect condition the day after the accident and that it was properly fastened by the guard. Furthermore, the fundamental fact upon which all such cases turn, namely, the unusual motion or extraordinary jerk of the train is absolutely lacking. We are unable to perceive on what principle in reason or logic the defendant can be held under such circumstances without also holding in effect that a common carrier is an insurer of the safety of its passengers in any event. We respectfully submit that no evidence of negligence was shown on the part of the defendant.

(b)

Plaintiff, as a matter of law, was guilty of contributory negligence.

The statement of the facts suffice here. The question is whether plaintiff as a matter of law was guilty of contributory negligence. This must necessarily depend on the facts in each case. The facts in the case at bar are undisputed. The rule is well settled that if it appears by the plaintiff's

evidence when he rests his case that his own negligence contributed to the injury for which he sues, it is the duty of the Court to non-suit him.

N. J. Exp. Co. v. Nichols, 33 N. J. L. 434;
Del., etc., R. Co. v. Toffey, 38 N. J. L. 525;
Del., etc., R. Co. v. Heffern, 57 N. J. L. 149, 154;
Mahnken v. Board of Freeholders, 62 N. J. L. 404;
Turner v. Hall, 74 N. J. L. 214;
Hodler v. Public Service Co., 85 N. J. L. 346.

The undisputed facts are that plaintiff entered the center door of the car and walked to the head end of the car and stood there throughout the entire trip. He did not make an effort to find a seat in any of the other cars of the train. Testimony shows that there were seats in the other cars. When the plaintiff took the position near the intercommunicating door it was closed and as the train approached the Cortlandt Street Terminal the guard announced the station and opened the door all the way so that he might pass through into the car ahead and announce the station in that car. The plaintiff and his sister both testified that they saw the guard open the door and saw how it was opened. The plaintiff also testified that at the time the train was going "just moderately; not fast or slow." Notwithstanding the fact that the train was going moderately and that the plaintiff saw the door opened and how it was opened he voluntarily and deliberately put his hand on the door jamb and then he carelessly and negligently (for it cannot be regarded as otherwise) looked in another direction and then the door closed on his finger. The plaintiff was unquestionably guilty of contributory negligence. *No negligence on*

the part of the defendant caused the plaintiff to put his hand on the door. He could have just as well put his hand on any other part of the car, or he could have gone into the car itself and taken hold of one of the handholds provided in the car for standing passengers. The car was by no means crowded for the standing capacity of the car was forty persons and there were only four or five persons standing at the time. If he did not want to stand in the car he could have gone into the other cars and undoubtedly found a seat. He voluntarily placed himself in a position near, not the entrance or exit doors, but contiguous to the intercommunicating door. There is no case in point in New Jersey on this question. We have already cited the case of *Graf v. West Jersey & S. R. Co.*, 62 Atl. 333, cited by this Court, but that case only deals with the question of negligence or no negligence on the part of the defendant carrier. There are many cases like the Graf case where the Court first considers the question of the negligence of the defendant, and concluding that the defendant is not negligent under the circumstances such as exist in the case at bar, find it necessary to decide whether the plaintiff is guilty of contributory negligence. Such cases are *Cashman v. N. Y., N. H. & H. R. Co.*, 201 Mass. 355; 87 N. E. 570, and *Hannon v. Boston Elevated Ry. Co.*, 182 Mass., 425; 65 N. E. 809. In the first case the Court said "It is at least very doubtful whether there was any evidence to warrant the finding that the plaintiff was in the exercise of due care. There was certainly no evidence to show that the operator of the elevator was negligent." In the second case cited the Court said, "We need not consider the question whether there was any evidence of due care on the part of the plaintiff in allowing his fingers to rest against the glass of the door at a time when he knew it was about to be opened, for we are of opinion that there was no evidence of negligence on the part of the defendant.

However, Thompson in his Commentaries on the Law of Negligence, Vol. 3, Sec. 2978, cites several cases for "the proposition that a passenger who voluntarily places his hand in the jamb of the door of a railway carriage, is guilty of contributory negligence, which will prevent a recovery of damages, in case his hand is crushed by the closing of the door." The foregoing quotation is Thompson's summary of the cases which he cites, which cases are as follows:

Richardson v. Metropolitan R. Co., 37 L. J. (C. P.) 300;
Murphy v. Atlanta, etc., R. Co., 89 Ga., 832; 15 S. E. 774;
Texas, etc., R. Co. v. Overall, 82 Tex. 247; 18 S. W. 142.
Guthman v. Manhattan R. Co., 53 N. Y. S., 139;
Brineger v. Louisville & N. R. Co. (Ky.), 72 S. W., 783.

In *Richardson v. Metropolitan Ry. Co.,* 37 L. J. (C. P.), 300, *supra,* an English case, the Court held:

> "The plaintiff, a passenger, after getting into a carriage of a train on the defendants' railway, left his hand for about half a minute on the door jamb; the defendants' guard, after crying out to the passengers to take their places, shut the doors of the carriages of the train, and not seeing the plaintiff's hand, injured his thumb in shutting the door—Held, distinguishing the case from *Fordham v. The London, Brighton and South Coast Railway Company* (1), that there was no evidence of negligence by the defendants, and that there was evidence of negligence by the plaintiff."

In *Guthman v. Manhattan Ry. Co.,* 53 N. Y. S., 139, *supra,* the Supreme Court of New York, speaking through McAdam, J., held:

"The plaintiff, a young woman of 24, a music teacher, was a passenger on one of the defendant's downtown trains on February 9, 1894. She boarded the train at 125th Street, and her destination was 53rd Street. On entering, she took a seat in the center of the car. When near 53rd Street, she changed her seat for one next to the front door of the car. As the train was approaching the station, the guard opened the door, called out the station, and closed the door again. Before the train stopped, plaintiff got up, opened the door, and stepped on the front platform. The car then came to a full stop with a jerk; and, to steady herself, the plaintiff placed her hand on the door jamb, and at the same instant the door flew back, and slammed the plaintiff's wrist, doing the damage complained of. There was no evidence that the manner of stopping the train was unusual, or that it could have been done with greater safety to passengers. The complaint charges that the condition of the door was imperfect, and that the guard was guilty of negligence. There was no proof of defective construction, and none of negligence other than might be inferred from the facts. Upon the conclusion of the case, plaintiff was nonsuited on the ground that no cause of action had been established, and she now moves for a new trial. It would be difficult to sustain a finding that the plaintiff was free from fault. She was seated near the front of the car, and she might have retained her seat until the train came to a complete standstill. Instead of doing this, she voluntarily opened the door, got upon the platform, and exposed herself to the danger she encountered. The plaintiff knew when she opened the door and took her position upon the platform, that the car would stop at the 53d Street station. It stopped there, as cars usually stop. The slamming of the door which the plaintiff had left unfastened, was an incident of the stoppage of the car, which might reasonably have been anticipated by the plaintiff, and should have been guarded against by her."

In *Brineger v. Louisville & N. R. Co.* (Ky.), 72 S. W., 783, *supra,* where plaintiff, while on a train approaching a station, stood in the open door with his hand on the casing, where it was injured as a passenger pushed the door shut, when the brakeman, who did not see plaintiff's position, called out to shut the door, it was held that the plaintiff was guilty of contributory negligence, barring recovery.

In *Texas & Pacific Ry. Co. v. Overall,* 82 Tex., 247; 18 S. W., 142, *supra,* the Supreme Court of Texas, speaking through Gaines, A. J., held:

> "The appellee was a passenger on the train of the appellant railway company. The train having stopped at a station, and the door of the car in which he had been riding being opened and fastened, he took position on the platform with his hand resting upon the jamb upon which the door was swung and with his little finger inside the cleat against which the door fitted when closed. As he testified, while standing in that position a brakeman entered the car and suddenly closed the door. The end of his finger was caught between the door and cleat and was injured. The brakeman denied that he shut the door, and testified that it was closed by a woman, who did it in order to enter the water closet. The appellee also testified, 'The man who shut the door could see me and see where my hand was when he shut the door.'
>
> "The appellee having obtained a verdict and judgment upon the facts as stated, the appellant made a motion for a new trial, which was overruled.
>
> "One ground of the motion was that the plaintiff was negligent and that his negligence contributed to the injury. Another was, that the evidence did not show negligence on part of the company. These questions are now presented to us by proper assignments.
>
> "It seems to us that the act of the defendant in placing his hand in such a position upon the jamb of the door that it would cer-

tainly be injured by any one closing the door was an act of negligence. The door, though 'securely fastened,' was capable of being suddenly closed, and was likely to be closed by either passengers or employes of the company, and especially by persons who desired to enter the water closet of the car."

In *Murphy v. The Atlanta & West Point R. Co.*, 89 Ga., 832, *supra,* the facts as stated by the Court were as follows:

"The plaintiff sued for damages, and was nonsuited. His testimony makes the following case: He bought a first-class ticket for the usual fare, and boarded the defendant's passenger train. He went into the first-class car and looked through it for a seat, and asked several if he could take a seat by them. Each one replied the seats were taken. Several seats were occupied by drummers and others by their luggage. He took a stand in the aisle near the water closet, braced his left hand on the door of the closet, and caught hold of the arm of the seat on the opposite side with his right hand, to steady himself and prevent the motion of the cars from throwing him down. He gave the conductor the ticket. He did not ask the conductor for a seat, but Baker, who boarded the train at the same station with him, asked the conductor for seats for both of them (they were standing together); and the conductor said he would try to get them seats. The plaintiff saw nothing more of him. After traveling about seven miles to the next station the train stopped, and plaintiff went into the next coach to get a seat, and finding none vacant; at once returned into the first-class coach and resumed his stand as before. The train again moved, and after going about half a mile, the defendant's flagman came through the car, approaching the plaintiff from behind, and suddenly opened the door of the closet and looked in. The plaintiff was standing talking

to Baker. As the door opened his fingers immediately slipped into the crevice next to the hinges, and the flagman suddenly closed the door before plaintiff had time to remove his hand, catching his middle and third fingers between the shutter and facing and crushing them. He did not know the fingers were in till they were crushed, it was so sudden."

The Supreme Court of Georgia held:

"Under the facts disclosed by the evidence in this case, it appears to the satisfaction of a majority of this court that the injury received by the plaintiff resulted from a mere accident, and was not due to any negligence on the part of the railroad company or its servants. The presumption of negligence which the law raises against the company was rebutted by the evidence introduced by the plaintiff himself, and the Court therefore did not err in granting a nonsuit.

"Judgment affirmed."

There are several cases in which the courts have held that such a happening is a pure accident. A case of this character came before the House of Lords, the facts of which were these:

The plaintiff was a passenger on the defendants' railway, the carriage in which he rode being overloaded. When the train arrived at a certain station, the door was opened by people from the outside, who endeavored to crowd their way in. The plaintiff voluntary arose, or partly arose from his seat to push these persons back. The train happened to move on. The plaintiff was jerked forward, and put his hand on the hinge of the carriage door at the very moment the door was in course of being shut by the porter, in consequence of which the plaintiff's thumb was injured. It was not proved that the porter saw the plaintiff fall forward or could have prevented the accident. It was therefore held that what

happened was a pure accident and that the defendants were not responsible. *Metropolitan R. Co. v. Jackson L. R.,* 3 App. Cas., 193; *s. c.* L. R. 10 C. P., 49. Also in the case of *Hardwick v. Georgia, etc., Co.* (Ga.), 11 S. E., 832, where a plaintiff went to the car door which had been left open by the conductor and placed his hand against the frame to steady himself as the door was swung shut by a sudden stopping of the train, it was held that the injury was a purely accidental one for which the company was not liable.

In *Maddox v. London C. & D. R. Co.,* 38 L. T. N. S., 458, where the plaintiff was completely inside the door when a servant of the company closed it, catching his thumb in the hinge, it was held that there was no evidence of negligence. See also *Benson v. Furness R. Co.,* 88 L. T. N. S., 268, and *Drury v. North Eastern R. Co.,* 2 K. B., 322; 84 L. T. N. S., 658, to the same effect.

It is clear from these cases that the plaintiff in the case at bar was guilty of contributory negligence as a matter of law. The plaintiff testified that the train was going moderately and that he saw the door opened by the guard, and that after it was opened he voluntarily and deliberately put his hand on the door jamb which he knew to be the door jamb, and then without any further regard for his safety, looked in another direction. As testified to by the plaintiff's sister, "no human being closed the door"—it closed itself. *The plaintiff was in a position where he had no right to be and he had no right to have his hand on the door jamb. The door in question was not an entrance or exit door, but an intercommunicating door leading from one car of the train to another. He did not intend to use it for such purpose for he himself testified that he made no effort, and intended to make no effort to find a seat in any*

of the other cars. The lack of authority in New Jersey on this point is due no doubt to the fact that Jerseymen are not in the habit of negligently and carelessly putting their hands on the door jamb of a car when they know it is a door jamb and see the door opened and then afterward bring suit for damages for the injury so sustained. We submit that plaintiff was clearly guilty of contributory negligence, as a matter of law, in placing his hand on the door jamb under the circumstances testified to by him. The Trial Court should have nonsuited the plaintiff or at the close of the defendant's case should have directed a verdict in favor of the defendant. There was no need of the plaintiff using the door jamb as a handhold for the defendant's cars are so constructed that the plaintiff could have supported himself by grasping the horizontal bars placed on each side of the intercommunicating door and thus protected himself or he could have stood in the car proper and secured a hold on the perpendicular handholds which are there provided. Also there were other means of support within reaching distance and there was no occasion for the plaintiff to select the door jamb as the place to support himself. Furthermore, no extraordinary jerk of the train compelled him to hold on to something for he testified that as soon as the door was opened, while the train was moving at a moderate rate of speed, he put his hand on the door jamb for support. There being no jerk or unusual motion, he could have just as well put his hand on the horizontal bars provided for that purpose, or he could have walked into the car without any difficulty and secured a hold on the perpendicular bars.

(5)

Comments on Supreme Court Opinion.

The Supreme Court in its opinion said "the plaintiff's case shows that he was a passenger on the defendant's car; that the car was so crowded that there were no seats to be had and he was standing near the door."

This is all that that Court said about the plaintiff's position at the time of the accident. This recital of the evidence loses sight of the fact that there were only five people standing in a car in which forty people could stand, and that if plaintiff had gone into the car he could have taken hold of one of the handholds therein provided for standing passengers; also if he did not want to stand he could have gone into the other cars and secured a seat. *Plaintiff himself testified that he entered by the center door, and walked all the way through the car to the end and deliberately stood near the intercommunicating door.*

The Supreme Court further said:

> "We think it may be properly inferred from the testimony that unless fastened, the door was liable to close when the car was running around the curve even if there was no unusual lurch, and that to prevent this the defendant company had provided the car with a lock or catch to hold the door in place; and that this accident occurred because the guard neglected to properly fasten the door."

There is no evidence that "the guard neglected to properly fasten the door." The guard said he opened it all the way, and if it was opened all the way the lock or catch will work automatically and hold the door. The plaintiff who saw the guard open the door did not testify that it was not opened all the way. The plaintiff's sister also saw the guard open the door, but did not testify that it was not opened all the way. It follows, therefore, that in the absence of evidence

that the door was not opened all the way the conclusion cannot be drawn from the mere closing of the door from an ordinary jerk that it was not properly opened.

The Supreme Court further said:

> "We think the case was opened to a finding that the negligence of the defendant was in failing to throw the door far enough open so that the lock would hold it in place. * * *"

This conclusion likewise is open to the same criticism as the previous quotation. Such a finding cannot be predicated on the mere closing of the door when any one of several causes might result in the closing of the door. There must be something more than the mere closing of the door to charge the defendant with negligence. There is no evidence that the door was not opened all the way, and in the absence of such evidence such fact cannot be assumed.

On the question of contributory negligence of the plaintiff, the Supreme Court said:

> "To this (the charge of contributory negligence) we cannot accede, for according to the plaintiff's case the car was crowded with passengers and he was required to stand near the door, and because he was in such a position it became necessary on account of the sudden motion of the car to steady himself, and he had a right to assume that the door was properly fastened, and if it was, what he did was perfectly safe."

The undisputed evidence is that the car was by no means crowded, for there were only five or six persons at the most standing while there is standing room for forty persons. He was not required to stand near the door but deliberately took that position after walking from the center of the car to the vestibule near the intercommunicating door. The very fact that he walked through the car shows that it was not crowded.

Also, he was not required to stand near the door because there were seats in the other cars, one of which he could have secured by merely going into one of the other cars. If he did not want to take the trouble to go into one of the other cars he was not required to take the position that he *did,* holding on to the door jamb, but on the contrary the defendant provided numerous handholds *inside* the car in which he was standing, for the very purpose of supporting passengers who might have to stand. It will be remembered that the plaintiff made no attempt to secure a seat in any of the other cars. The intercommunicating door, the door jamb of which plaintiff held on to, is not supposed to be used by passengers for any purpose except to pass from one car to another.

The trial court found that there was no jerk or unusual motion of the train. We therefore have the ordinary case of a passenger supporting himself while standing as the train goes along at its usual rate of speed. He voluntarily places his hand on the door jamb, and for some unknown reason the door closes. If the plaintiff had not put his hand on the door jamb but had, on the contrary, taken hold of the horizontal bars in the vestibule, or had remained in the car through which he walked and there supported himself by using the proper means, the handholds, or if he had gone into one of the other cars and secured a seat, the accident would not have happened.

Conclusion.

We respectfully submit that the judgment of the trial court should be reversed and a *venire de novo* ordered.

November Term, 1916.

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