

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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)
JOHN MERKL, Administra)
tor, &c.,)
)
Plaintiff,)
Defendant in Error.)
)
vs.) On Error
)
JERSEY CITY, HOBOKEN &)
PATERSON STREET) Brief of De-
RAILWAY COMPANY,) fendant in
)
Defendant,) Error.
Plaintiff in Error.)
)
-----)

STATEMENT OF FACTS.

This case was tried before Mr. Justice Fort with a jury at the Hudson Circuit.

On the night of the Fourteenth day of April, Nineteen hundred and six, or early in the morning of the Fifteenth, the plaintiff's intestate, a young man, unmarried and about twenty-three years of age, was killed by being struck and run over by a car of the defendant Company, at or near the intersection of Thirty-first Street and Bergenline Avenue in Hudson County.

Bergenline Avenue is a street running generally north and south, and through the center of which the defendant Company operates its cars on two

tracks, one being north bound and the other the south bound track.

Plaintiff's intestate was hit by a north bound car.

No one saw the deceased struck by the car, except possibly the motorman, who was running the car.

The deceased was last seen alive when he left a ball, given by a German Singing Society, which was being held in the building at the corner of Bergenline and Hamilton Avenues, about a block north of Thirty-first Street.

Plaintiff's intestate left this ball about two o'clock in the morning, apparently to go to his home, as the place where he was struck and killed was in the way which he would be likely to take to go to his home.

Prior to attending the ball, the deceased had visited his brother's house to bring Easter rabbits to his brother's children (Page 35, L. 10, &c.) and when he left his brother's house it was about a quarter of ten in the evening, and from there he proceeded either to his home or to the ball. (Page 35).

At the time the deceased was struck by the car, the car was going at about twenty miles an hour, and no bell was being rung as it approached and crossed Thirty-first Street, where the plaintiff's intestate was struck. (Page 24, L. 1, &c.) After the car struck the deceased, it cut his body up and carried it along the track for a distance of one hundred and fifty or two hundred feet. (Page 20, L. 19, &c.)

The assignments of error set forth two grounds of alleged error, namely, that the Court should have non-suited the plaintiff, or at the close of the

whole case should have directed a verdict for the defendant.

ARGUMENT.

THE TRIAL COURT PROPERLY REFUSED EITHER TO NON-SUIT THE PLAINTIFF OR TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT.

The grounds upon which the motion to non-suit was based, were:

FIRST—That the plaintiff had failed to establish any negligence upon the part of the defendant.

SECOND—That the deceased was guilty of contributory negligence.

The grounds of negligence alleged by the plaintiff's declaration were, among others, that the defendant had failed to use reasonable care to have its motor car under the reasonable control of its motorman, and that it ran said motor car at an unusually high and dangerous rate of speed, and that it failed to use due care to keep a reasonably proper lookout. (Pages 3 & 4).

It was proved that at the time of striking the deceased, the car was running twenty miles an hour. (Page 24, L. 13 &c.; page 30, L. 29 &c.) and after striking the deceased it carried and scattered his body over a distance of one hundred and fifty feet. (Page 20, L. 22) the head being about twenty feet south of the feet. (Page 21, L. 9 &c.) and the heart and liver and other parts of the body about one hundred feet from the trunk. (Page 21, L. 35 &c.)

The motorman had not been sounding his gong. (Page 24, L. 1 &c.; page 45, l. 39; page 46, L. 1 &c.)

The place where the accident happened was very dark. (Page 43, L. 12 &c.)

From this evidence, as to these facts, a jury would be entitled to infer that this car was proceeding through this public thoroughfare at a dangerous rate of speed, and that the motorman had negligently failed to give any warning, by signal, of the approach of the car, and that he did not have his car under reasonable control to safeguard the public using the street.

If a fair inference from these facts would lead to the conclusion of negligence, then the case must be decided by the jury upon this question.

The rule is, "that when the evidence upon any given subject in this class of cases, is open to fair debate, and leaves the mind in a state of some doubt upon the question, the trial Judge is not justified in taking the question from the jury. Wherever two inferences can be drawn from the evidence upon questions of negligence a case is presented which calls for the opinion of a jury."

Comben vs. Belleville Stone Co., 59 N. J. L. 233.

Belleville Stone Co. vs. Mooney, 60 N. J. L. 323.

Bien vs. Unger, 64 N. J. L., 596.

It would seem to be difficult to argue that the above stated facts showed conclusively, as matter of law, that the defendant was free from negligence.

The other ground of motion for nonsuit and for direction of the verdict (Page 41 & 65) was that the deceased was guilty of contributory negligence which led to his death.

This contention of defendant was chiefly urged upon the strength of the testimony of the motorman, Barbour, who testified that just before the deceased was struck the car was running at about eight miles an hour. (Page 43 L. 25) and that he first saw the intestate when the car was three or four feet away from him (Page 42 L. 39 &c.) when the man was lying on the track (Page 42 L. 37) and that the car had a head light, (Page 43 L. 2 &c.) and that where the man was lying was not at a street crossing. (Page 45, L. 13 &c.)

This evidence of the motorman was directly contradicted in several particulars by testimony introduced by the plaintiff.

Blood stains and pieces of intestines were in or near Thirty-first Street. (Page 32, L. 35 &c.; page 23, L. 10, &c.) Some of the body was scattered along from one hundred and twenty-five to one hundred and fifty feet.

The evidence of this witness, Barbour, was also discredited on his cross-examination.

He testified that he first saw the man lying in the track when he was three or four feet away from him, and on cross-examination he testified as to the exact position in which he was lying, where his hands were and their position, (Page 54, L. 2 &c.) and that he had his head upon his hands.

All this he must have seen, if he saw it at all, during the time when the car was traversing that

three or four feet, and before he ran over the deceased.

He, nevertheless, admitted on cross-examination that after the accident, and when he brought his car to a stop, he went through the car and told the passengers that he had run over something, and he didn't know whether it was a dog or a man. (Page 52, L. 35 &c.; page 53, L. 1 &c.)

If he told this after the accident, as he admits that he did, it throws grave doubt upon the truth of his story, that he saw the deceased at all before he struck him, and makes it highly probable that the first intimation which he received was the jolt of the car, which also attracted the attention of other passengers.

But in order for the Court to have nonsuited on the ground of contributory negligence, it would be necessary to say that the mere fact that a person is lying in the street charges him with contributory negligence, as matter of law, if run over by a vehicle.

To establish such a proposition might make the person responsible for circumstances and conditions over which he could have no control.

A man, crossing the street, who was suddenly rendered unconscious by disease and falls, would be, under such rule, guilty of contributory negligence. A man who was assaulted while crossing the street, and rendered unconscious would be guilty of contributory negligence, if while lying in that position, he were run over by a vehicle.

And many other illustrations might be supposed.

But it is clear that over such conditions and emergencies the person could have no control whatever.

If the intestate were, in fact, lying on the roadway, non constat but that his presence there in that position was caused by some one of those circumstances.

The theory of suicide was suggested by the defendant at the trial, but no evidence was produced to substantiate such a theory, and the conduct of the intestate before the accident would seem to contradict such a theory.

The Court below, and this Court, would not be justified in drawing inferences of the negligence of the deceased under the evidence, for no contributory negligence can be presumed from the mere happening of the accident, and all of the evidence in this case permits of the inference that the intestate was not contributorily negligent.

Upon a motion to nonsuit on this ground, in order to withdraw the case from the jury, the contributory negligence must appear clearly, as a conclusion of fact or by necessary exclusive inference.

Palys vs. Erie Railway Co., 3 Stew. Eq. 604.

Penn. Railroad Co. vs. Righter, 13 Vr. 180.

Penn. Railroad Co. vs. Middleton, 28 Vr. 155.

Suburban Electric Co. vs. Nugent, 29 Vr. 658.

In this case the evidence does not permit of the inference that the deceased committed suicide, as a **necessary exclusive inference**, nor would it justify the Court in saying that the **necessary exclusive inference** to be drawn from the testimony is that the plaintiff's intestate was guilty of contributory negligence.

It is respectfully submitted that the case was one which called for the finding of, and was properly submitted to the jury, and that the judgment should be affirmed.

WARREN DIXON,
Attorney and of Counsel
With Defendant in Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

_____o)	
JOHN MERKL, admr., &c.,)	
Plaintiff,)	
Defendant in Error,)	10
vs.)	
JERSEY CITY, HOBOKEN)	In Tort.
& PATERSON STREET)	On Error.
RAILWAY COMPANY,)	
Defendant,)	20
Plaintiff in Error.)	
_____o)	

BRIEF FOR DEFENDANT, PLAINTIFF IN
ERROR.

The above action was tried before the Hon. J. Franlin Fort, Justice of the Supreme Court, holding the Hudson Circuit, and a jury. It resulted in a verdict for plaintiff of \$1000. The defendant took several exception, and assigns error thereon. **30**

The defendant operated a trolley railway and cars thereon along Bergenline Avenue in the Town of Guttenberg, in the County of Hudson. The Street or road runs north and south. At the point in question, the road lies practically in the country, the land is but sparsely built up. On the morning in question (about two o'clock A. M.) the plaintiff's **40**

deceased was run over and killed by a car of the defendant company. There were no eye witnesses to the accident produced by the plaintiff. The deceased was a single man and left him surviving a father, mother and a married brother.

The first assignment was as to the refusal of the Court to non suit.

10 The plaintiff produced several witnesses. The first was Andrew Gershon, who testifies (p.8 &c.) that he saw the plaintiff's decedent at a dance or ball in Marsh's Hall, Bergenline and Hamilton Avenues, Guttenberg. That about two o'clock A. M. he saw him leave the hall and shortly afterwards learned of the accident. That the road is a dirt road, and is straight up and down for a long distance. He did not see the accident. The lights inside the car were burning brightly, and the headlight was lighted.

20 The next witness was Albert Walker, a passenger, who testifies (p. 19 Etc.) that there were about six passengers on the car, and that as the car proceeded along he noticed a jolt, and then that the car stopped. That the car went about 150 feet after he felt the jolt; and that it was going in his judgment, about twenty miles an hour. He states that the street is straight for a long distance, at least for half a mile in either direction; that as soon as he
30 felt the jolt he looked around, but could see nothing. That the car was lighted inside and that the headlight was burning.

This is the only evidence produced by the plaintiff as to the accident.

From the above it will be seen that the only points from which negligence might in any possible manner be inferred, is the fact that the witness Walker testifies that the car was going about twenty
40 miles an hour, and that it went about 150 feet be-

fore it stopped after he felt the jolt. No proof is offered that the motorman did not have absolute control of his car, or that the car was defective in any manner, or that the roadbed was defective, or that the car was not lighted, or the headlight burning, nor is any eye witness to the accident produced. There is simply the mere statement of one witness (who admits that he was not paying much attention to the speed until after the accident) that the car was going twenty miles an hour. 10

It will be remembered that the accident happened on a Sunday morning about 2 A. M. in the Town of Guttenberg, at a place where the streets or roads are long distances apart, and the land not built up very thickly, and that the accident happened between streets, and not at a crossing; that there was no traffic on the road at the time.

A motorman is not held to the same rigorous rule while running a car through the country or outlying districts as he is through the thickly settled part of the City; there is not the same reason for apprehending that a person might be in the street or road, or that someone might suddenly run across the road. Just as a motorman is not bound to apprehend that a person will suddenly cross the street in the middle of the block, and is not therefore required to use the same degree of care as at a street crossing. 20

30

The duty of a driver of an electric car passing along a sparsely settled country road in the space between intersecting roads is not to be judged by the same rules in regard to speed which apply to the same car passing along a crowded street of a city. The care to be exercised is relative, and must be proportional to the danger reasonably to be apprehended at the time and place.

Stelk vs. McNulta, 99 Fed. Rep. 138. 40

Negligence is never presumed, and the mere fact that the car was running at a speed of twenty miles an hour, without other evidence indicating that such speed under the circumstances was excessive and maintained without regard to the safety of others using the street, is not proof of negligence. This has been held by the courts of many states.

10 "In order to justify a jury in finding a street railroad company, operated by electricity, guilty of negligence by reason of the running of a motor car at too high a rate of speed, there must be some evidence that the rate of speed is unusual, improper or dangerous, and the jury is not permitted to speculate as to the duty of the Railroad Company in regard to the rate of speed at which it may run its cars, nor to capriciously fix such rate without evidence."

20 Francisco vs. Troy & Lansingburgh R. Co. 78 Hun. (N. Y.) 13, 29 N. Y. Sup. 247.

"As to whether or not the rate of speed at which a car is operated is dangerous, is usually determined by the circumstances and the local conditions; as where it was shown that a driver of a street car drove the horse thereto on a trot in a place where excavations were being made, for the purpose of repaving tracks, and the defendant was held liable therefor."

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Daub vs. Yonkers R. Co., 69 Hun. (N. Y.) 138, 23 N. Y. Sup. 268.

"The greatest rate of speed consistent with the safety of other persons using the street or highway may be maintained, and the Court cannot say that any rate of speed that does not transcend these limits is negligent or should be submitted to the jury as sufficient to justify a verdict against a Railroad
40 Company."

Kline vs. Electric Traction Co. 181 Pa.
State 276, 37 At. Rep. 522.

The evidence of the plaintiff produced no proof of any negligent act upon the part of the defendant, or its servant. He produced no testimony as to the manner in which the accident happened. His whole case consisted of the fact that the man's body was found on the track after the car had passed, and the statement by one witness that the car had been going at about twenty miles an hour. There was no evidence by the plaintiff to the effect that this rate of speed was improper or dangerous under the circumstances; in proof that the place of the accident was a busy street or a crossing, or that the accident happened in the day time when there might be reasons to expect a person or vehicle on the road; in fact the evidence is all to the contrary. As above remarked, the mere fact of the speed being at such a rate cannot, standing alone, without other circumstances, is not sufficient to charge the defendant negligence. If we look at the surrounding circumstances as shown by the plaintiff's case, we see that they all show that the accident happened, not through any fault or negligence upon the part of the defendant, but through the negligence of the plaintiff's intestate.

The Street was straight, and one could see for upwards of half a mile in either direction (pages 14-28); the car was lighted inside and the head light was burning brightly (p. 14 and 30). The accident happened between streets in the outskirts of the Town of Guttenberg, where the streets are wild and mostly unoccupied (p. 27); the time was 2 A. M. Sunday morning; there was no traffic on the road.

It will thus be seen that had the plaintiff's intestate been paying the slightest attention to his surroundings, he would not have been injured.

The fact of his being struck evidences the fact that he was in the path of the moving car; the street was straight and unobstructed, and he had a view of one half a mile in either direction; the car was lighted, and the headlight was burning, and had he looked he must have seen the oncoming car. He was in the darkness and the motorman could not see him but he could see the brilliantly lighted car a long distance away. Under the law, this evidence
 10 establishes the fact that he could not have made the observation required of him, for if he had he would have seen the car and avoided the accident.

The doctrine of *Pennsylvania Railroad Co. vs. Righter* 13 Vr. 180 applies.

See also *Brown vs. R. R. Co.* 39 Vr. 618.
Van Riper vs. N. Y. S. & C. R. R. Co. 42 Vr. 345.

In the absence of any proof of negligence upon
 20 the part of the defendant, and with the testimony above mentioned so plainly evidencing contributory negligence on the part of the plaintiff's decedent, the Court should have granted a non suit.

II.

The Court should have directed a verdict for the defendant.

After the defendant had closed its case, a new aspect of the case was shown. The evidence of the
 30 motorman shows clearly that his car was under perfect control; that the lights in the car and the headlight thereof were burning; that the accident happened in about the middle of the block, that it is very dark at this place, and although he was looking ahead, and watching the track, he did not see the man until about three feet away from him, and that the man was then lying on the track; that the car was going about eight miles an hour, and that he stopped as quickly as he could. He testifies that
 40 his car could not go at the rate of twenty miles an

hour. That he did not think there was that much speed in the car. The conductor also testifies that the car was going about ten miles an hour and the lights burning.

It thus appears that not only did the plaintiff's evidence fail to show any negligence upon the part of the defendant, but the evidence of the motorman and conductor proves that they were exercising all the care required under the circumstances and establishes the fact that there was no negligence upon the part of the defendant. 10

A case, so similar to the case at hand, that the one might be substituted for the other is that of Vizacchero vs. Rhode Island R. R. Co., 26 R. I. 392, 59 Atl. Rep. 105. This was an action brought "to recover damages for the death of the plaintiff's intestate, who was struck and mortally wounded by one of the defendant's electric trolley cars, which was going toward the City in the Town of Johnston about 8 o'clock P. M. March 8, 1903. The place where the accident happened was on Atwood Avenue, a thinly settled country road fifty feet wide, having the car track located along one side next to the sidewalk, leaving about thirty feet of unoccupied highway. The evening was dark and stormy, and the headlight and other lights of the car were lighted, and a person on the track approaching the place of the accident, and facing toward the car, had an uninterrupted view for at least eight hundred feet. 20
The headlight enabled the motorman to distinguish objects upon the track within a distance of about twenty-five feet. A witness, who with his wife and child were the only passengers on the car, testifies that the car at the time of the accident was going as he thinks, at the rate of about twenty miles an hour. Under cross examination he admits that he could not see through the windows, which were obscured by the weather; that his attention was taken up by the child with whom he was playing, and that 30
40

his estimate of the speed of the car was merely a guess. The motorman and conductor testified that the car was going at the rate of from nine to twelve miles an hour, as was customary at that place. The motorman testifies that looking carefully ahead he first saw the intestate on his hands and knees upon the track, facing the car about twenty-five feet away; that he immediately applied his brake and reversed the power, but notwithstanding his efforts, which
 10 were all that he could make, the car struck the man, threw him to one side of the track and stopped about twenty feet further on.

The Court held thus:

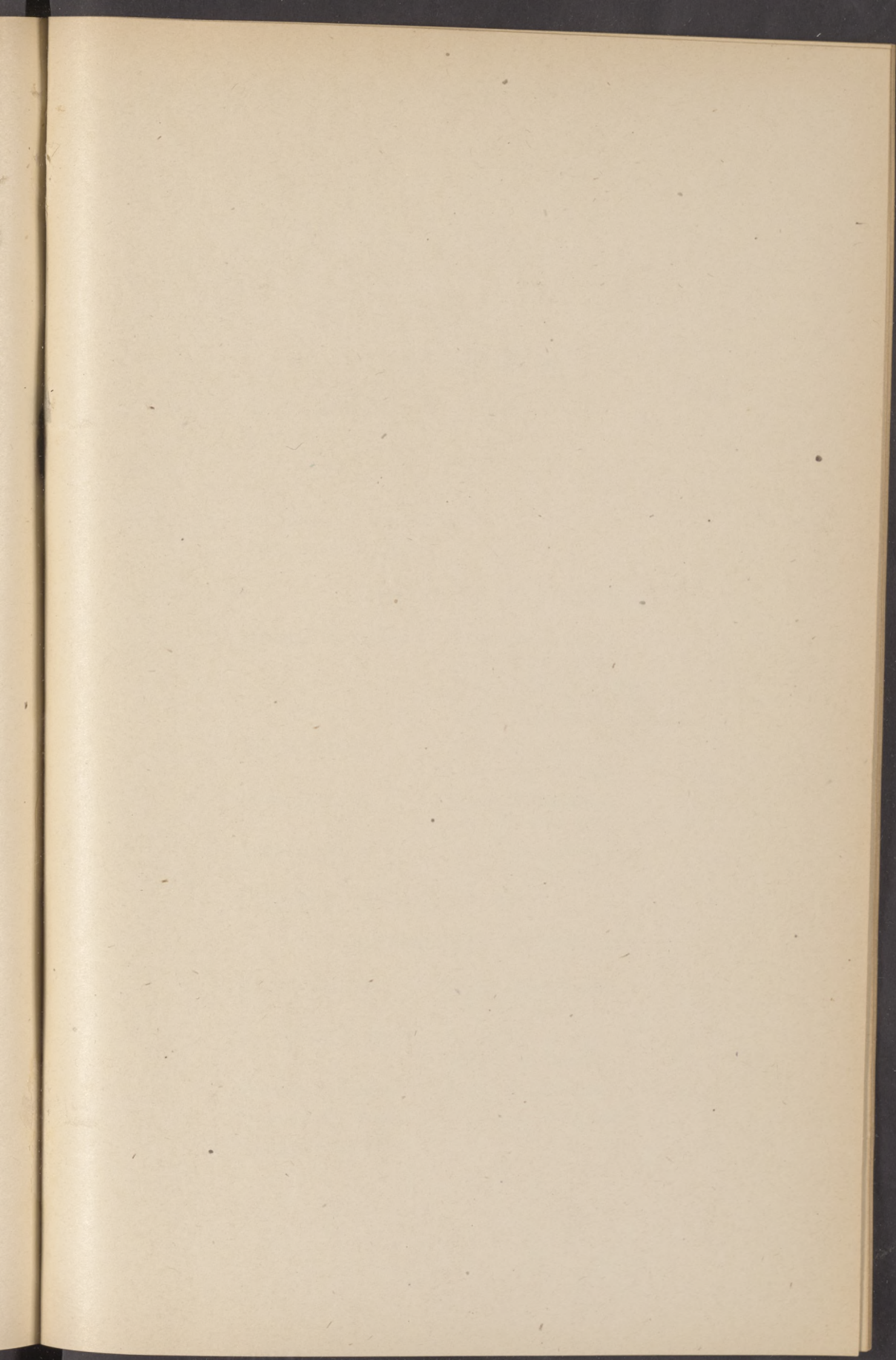
“Defendant’s car as proceeding along the road on a dark and stormy night. Its headlight could have been seen at a distance of eight hundred feet, but this motorman, with the aid of the headlight could only see about
 20 twenty-five feet. Plaintiff’s intestate was seen on his hands and knees on the track, and the motorman immediately tried to stop the car, but he struck the intestate and he was killed. The company was held to be under no duty to run its car at such a rate of speed that they could be stopped within the distance which the motorman could see ahead with the aid of the headlight. Where
 30 the intestate could have seen the approaching car at a distance of eight hundred feet, and yet was upon the track when the car was only twenty-five feet away, his own negligence was the proximate cause of the accident, even though the defendant was negligent.”

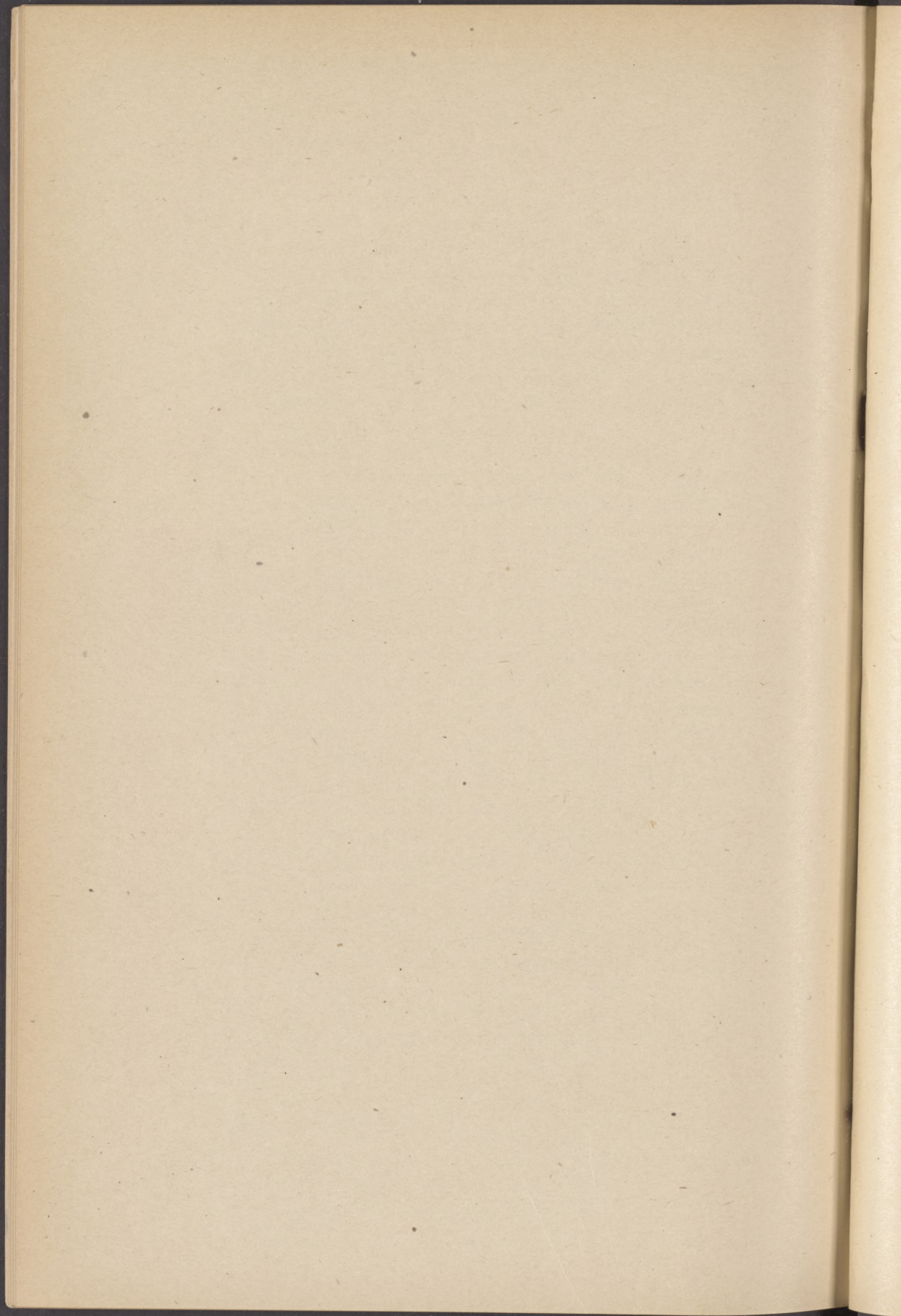
Particular attention is called to this case.

The Court should have directed a verdict for the defendant.

WM. D. EDWARDS,
 EDWIN F. SMITH,

Of Counsel.





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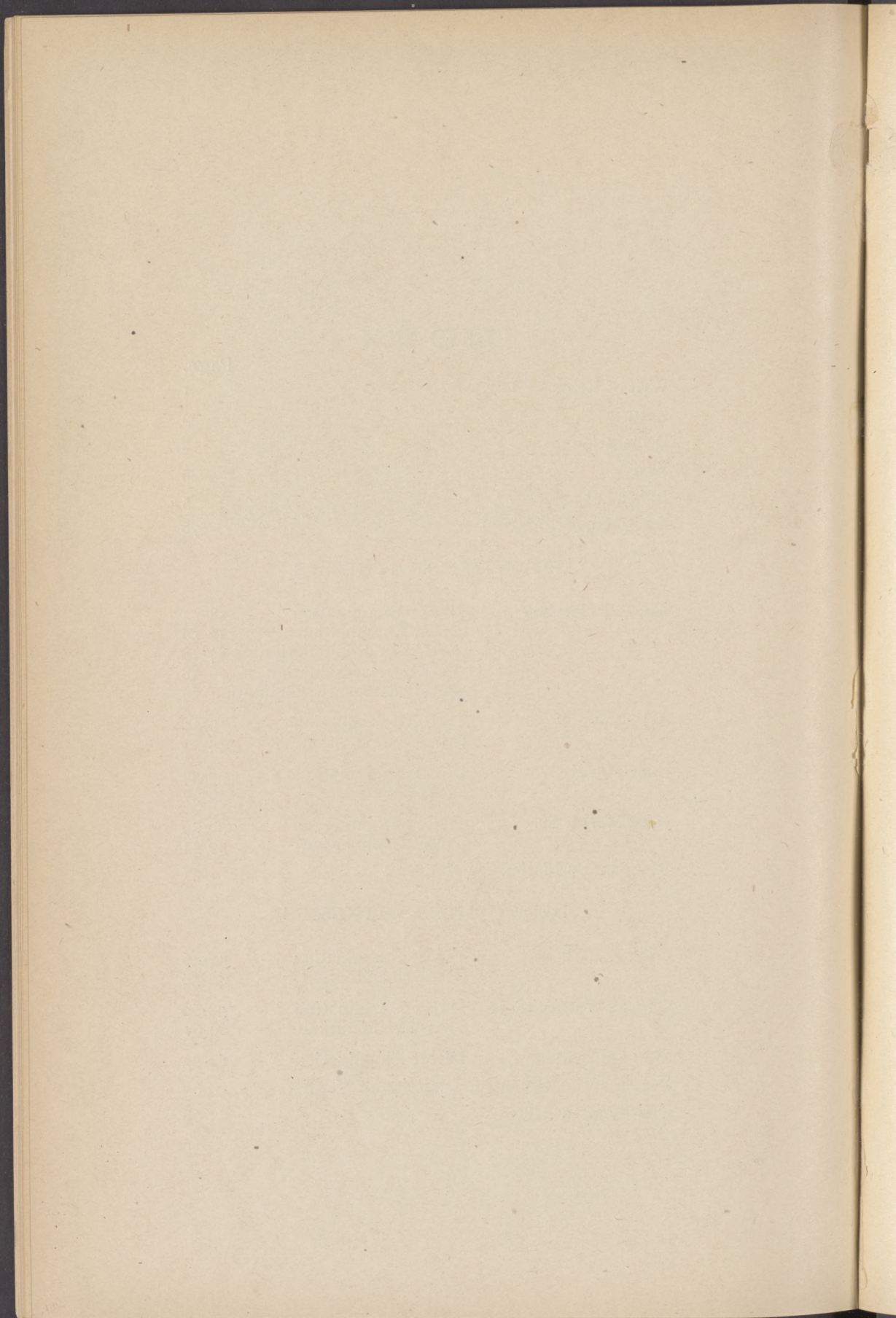
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NEW JERSEY, ss. :

The State of New Jersey to the Chief
Justice and other Justices of our
(L. S.) Supreme Court of Judicature,
Greeting:

For as much as in the record and proceedings, and ¹⁰
also in the giving of judgment in a certain plaint
which was in our Supreme Court of Judicature be-
fore you, between John Merkl, administrator, plain-
tiff, and the Jersey City, Hoboken and Paterson
Street Railway Company, defendant, in an action in
tort, manifest error hath intervened, to the great
damage of the said defendant, as it is said; we being
willing that the error, if any there be, should in due
form be corrected, and full and speedy justice done to ²⁰
the parties aforesaid, in this behalf, do command
you that if judgment be thereupon given and affirm-
ed, then you distinctly and openly send, under your
seal, the record and proceedings aforesaid with all
things touching and concerning the same, to our
Judges of our Court of Errors and Appeals, in the
last resort in all causes, at Trenton, on the fifth day
of December next, together with this writ; that the
record and proceedings aforesaid being inspected,
we may cause to be further done thereupon for cor- ³⁰
recting that error, what of right and according to
the law and custom of the State of New Jersey ought
to be done.

Witness, William J. Magie, Esquire, our Chancel-
lor and President Judge of our said Court of Errors
and Appeals at Trenton aforesaid on the sixteenth
day of November, 1906.

S. D. DICKINSON,
Clerk.

BEDLE, EDWARDS & HOLMES,

Attorneys.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule in this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J.

10

NEW JERSEY SUPREME COURT.

Of the third day of July, nineteen hundred and six.

HUDSON COUNTY, ss.:

Jersey City, Hoboken and Paterson Street Railway Company, a corporation, the defendant in this suit,
20 was summoned to answer unto John Merkl, administrator of the goods and chattels, rights and credits which were of George Merkl, deceased, the plaintiff herein, in an action of tort and thereupon the said plaintiff, by Warren Dixon, his attorney, complains:

For that whereas the said defendant, at all times hereinafter mentioned, was, and still is, a corporation doing business in the State of New Jersey and at said times was the proprietor, possessor and operator of a
30 certain electric street railway and railway cars running along and through divers streets and avenues in the County of Hudson aforesaid, including a certain public street or avenue commonly called Bergenline avenue, which was, at said times, a public street or avenue opened and dedicated according to law, for public use and travel.

And whereas, the said defendant, to wit, on the fifteenth day of April, nineteen hundred and six, in the early morning when it was yet dark, at Hudson County aforesaid, was the possessor, proprietor and
40 operator of a certain motor car which by a certain

motorman and conductor, its servants and agents, by means of electricity, it then and there operated, propelled and ran along the tracks of its said railway in, through and upon said Bergenline avenue in a northerly direction.

And whereas, the said George Merkl, in his lifetime, to wit, in the early morning when it was yet dark, on the fifteenth day of April, nineteen hundred and six, in Hudson County aforesaid, was lawfully in and upon said Bergenline avenue at or near its intersection with a certain other public street or avenue commonly called Thirty-third street, and was then and there crossing said Bergenline avenue at or near said Thirty-third street, in a careful and prudent manner, and was then and there crossing the tracks of said defendant Company upon which it was running said car in and through Bergenline avenue, and in front of said motor car.

Whereby it then and there became and was the duty of the said defendant toward the said plaintiff to use due and reasonable care in the operation, management and control of its said motor car, and to keep a reasonably careful lookout on said motor car for persons lawfully in and upon said street or avenue while crossing the same, and to use due and reasonable care to warn the said George Merkl while crossing said avenue, of the approach of said motor car by means of a gong which was its usual signal of approach, or by means of a light or lights upon said car which was its usual signal of approach, or by other reasonable means, and to use due and reasonable care to run said motor car at a reasonably safe rate of speed and to have the said motor car under the reasonable control of its said motorman, so as not to run the said motor car upon, against and over the said George Merkl, while he was crossing over said tracks, and was in the exercise of due and reasonable care on his part.

Yet the said defendant disregarding its said several duties in this behalf and wrongfully and unjustly intending to injure, prejudice and aggrieve the said George Merkl and the said plaintiff, on the day and date last aforesaid, in the County of Hudson aforesaid, by means of electricity, so unskillfully, negligently and unlawfully managed, operated, propelled and ran the said motor car along
10 the said tracks in and upon the said Bergenline Avenue, at or near where the same intersects with said Thirty-third Street, and at or near the said place where said George Merkl was crossing said street or avenue, and then and there unlawfully and negligently failed and neglected to keep a proper and reasonable lookout, or to exercise due care to keep said lookout for said George Merkl while he was crossing the tracks of said defendant in a careful and prudent manner, and then and there unlawfully and negli-
20 gently failed and neglected to warn the said George Merkl, while crossing and about to cross said Bergenline Avenue, of the approach of said car by bell or gong or by lights or by any other reasonable warning, and then and there unlawfully and negligently propelled said car at an unusually high and dangerous rate of speed and negligently and unlawfully failed and neglected to keep the said car under the reasonable control of its said motorman, so that the said motorman was then and there, through the
30 negligence of the said defendant and its servants and agents as aforesaid, run into, upon and over the said George Merkl and him, the said George Merkl, then and there greatly injured, so that he then and there died, and this without any fault or negligence on the part of the said George Merkl, or upon the part of the said plaintiff.

And the plaintiff avers that thereafter, to wit, on the fourth day of May, nineteen hundred and six, letters of administration upon the estate of said
40 George Merkl were duly issued to the said plaintiff

by the Surrogate of the County of Hudson, and that the said plaintiff thereupon entered upon the due execution of his said duties as administrator, which said letters of administration the plaintiff here brings into Court.

And the plaintiff further avers that the said George Merkl left a father, the said plaintiff, his next of kin.

Wherefore said plaintiff as next of kin of said ¹⁰ George Merkl, has been injured and suffered damage by reason of the negligence of the defendant as aforesaid, in the sum of Ten Thousand Dollars, and therefore he, as administrator of said George Merkl, brings his suit, &c.

Filed July 11, 1906.

And the said defendant, by Bedle, Edwards & ²⁰ Holmes, its attorneys, comes and defends the force and injury, when, &c., and says that it is not guilty of the torts above laid to its charge, or of any or either of them, or of any part thereof, as the said plaintiff hath above thereof complained against it; and of this it puts itself upon the country, &c.

Filed July 25, 1906.

And now at this day, to wit, the ninth day of No- ³⁰ vember, nineteen hundred and six, before our said Supreme Court, comes the said plaintiff by his attorney aforesaid, and the Justice before whom, &c., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, at a Circuit Court holden at Jersey City, in and for the County of Hudson, before J. Franklin Fort, Esquire, one of the Justices of the Supreme Court, on the twentieth day of September, ⁴⁰

nineteen hundred and six, according to the form of the statute in such cases made and provided comes as well the said plaintiff John Merkl and administrators, &c., as the said defendant the Jersey City, Hoboken & Paterson Street Railway Company by their respective attorneys within mentioned, and the jurors of the jury, between the parties aforesaid, in the plea aforesaid being also summoned, come who
 10 to speak the truth of the matters and things within contained, being chosen, tried and sworn say upon their oath that the said defendant Jersey City, Hoboken & Paterson Street Railway Company is guilty in manner and form as said plaintiff in his said declaration alleged; and they assess the damages of the said plaintiff, John Merkle, by reason of the guilt of the said defendant over and above the costs and charges by him about his suit expended in the sum of One Thousand Dollars and for those costs and
 20 charges the sum of six cents.

Therefore it is considered that the said plaintiff, John Merkl, do recover against the said defendant the Jersey City, Hoboken & Paterson Street Railway Company his said damages by the jury in the form aforesaid found to the sum of One Thousand Dollars, and it is further considered that the plaintiff do recover against the said defendant the sum of Forty-
 30 one dollars and forty-one cents for costs and charges by the Court now here adjudged to the said plaintiff and with his consent which said damages costs and charges in the whole amount to One Thousand forty-one dollars and forty-one cents.

Judgment signed this _____ day of November, nineteen hundred and six.

WILLIAM S. GUMMERE,

Chief Justice.

NEW JERSEY SUPREME COURT.

Hudson County.

_____o)	
JOHN MERKL, Admr.,)	
)	
Plaintiff,)	
)	10
vs.)	
JERSEY CITY, HOBOKEN)	
& PATERSON STREET)	
RAILWAY COMPANY,)	
Defendant.)	
_____o)	

20

Before Hon. J. Franklin Fort, Justice, and
a jury.

Appearances:

Warren Dixon, Esq., for the Plaintiff.

Messrs. Bedle, Edwards and Holmes, by
Mr. Holmes, for the Defendant.

Be it remembered, that on the twentieth day of³⁰
September, nineteen hundred and six, at a Circuit
Court holden at Jersey City, in the County of Hud-
son, before his Hon. J. Franklin Fort, Justice of the
Supreme Court, the issue joined in the above cause
between the parties (pro ut the pleading), came on
to be tried by a jury for that purpose duly empanel-
led and sworn, and thereupon the plaintiff and de-
fendant offered evidence (as hereinafter set out), to
maintain the issue on their respective parts, as fol-
lows:

40

ANDREW GERSHON.

Mr. DIXON opens for Plaintiff.

ANDREW GERSHON, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Dixon:

- 10 Q. Where do you live? A. At Guttenberg.
 Q. What is your business? A. Plasterer.
 Q. Are you connected with the court in any way?
 A. I was; I am a Constable.
 Q. You are a Constable? A. Yes, sir.
 Q. Did you know George Merkel in his lifetime?
 A. I did.
 Q. How long had you known him? A. I had known him about six years; six or seven years.
- 20 Q. Do you know where he lived? A. Yes, sir.
 Q. Where did he live? A. On Bull's Ferry Road, between Hudson and Franklin Avenue.
 Q. Do you know Bergenline Avenue in Hudson County? A. Yes, sir.
 Q. On which side of Bergenline Avenue did he live? A. He lived on Bull's Ferry Road, he did not live on Bergenline Avenue.
 Q. Which side of Bergenline Avenue would that be, east or west of Bergenline Avenue? A. He did not live on Bergenline Avenue.
- 30 Q. Where he did live, was it east or west of Bergenline Avenue? A. Oh, east of Bergenline Avenue.
 Q. Bergenline Avenue runs north and south? A. Yes, sir.
 Q. And he lived on the east of Bergenline Avenue?
 A. Yes, sir.
 Q. That is towards the Hudson River? A. Yes, sir.
 Q. And on the fourteenth day of April, 1906, did
 40 you see Mr. Merkel? A. I did.

ANDREW GERSHON.

Q. Where did you see him? A. Up at the ball at Marsh's hall.

Q. Where is that? A. On the corner of Bergenline and Hamilton Avenues, North Bergen.

Q. What was that ball? A. It was a German singing society, I believe they call it the Vorschrift Singing Society.

Q. Were you there all that evening? A. Yes, sir; from about nine o'clock. 10

Q. Until when? A. Till it was over, about half-past two, quarter past two.

Q. Did you see Merkel most of that time there? A. No sir, I did not; I did not see him until late in the evening.

Q. About what time did you see him first? A. Somewheres in the neighborhood of twelve o'clock, I should say. 20

Q. Did you see him leave the ball? A. Yes, sir, I saw him go out.

Q. About what time did he leave the ball? A. Well, he must have left the ball about, somewhere around two o'clock.

Q. How shortly before he left the ball, did you last see him? A. About twenty minutes or a half an hour.

Q. What was he doing when you last saw him? A. Well, he was talking to me in the saloon. 30

Q. When did you next see him, if at all? A. When he was going out of the door.

Q. Did you see which way he walked? A. No, I did not notice; he went right out the front door.

Q. When did you next see him? A. When he was lying on the track.

Q. How long after he went out was that, about? A. It might have been ten or fifteen minutes.

Q. What called your attention to him after he left the hall? A. The motorman came in and he asked 40

ANDREW GERSHON.

if we had a telephone, and I asked him what was the matter, he said, "I just hit a fellow"

Q. Then you went out? A. Yes sir.

Mr. HOLMES: I object to the statement of the motorman in that answer as not being a part of the res gestae.

10

The COURT: It was not responsive to the question and I will strike it out.

The motorman called your attention to the fact that something had happened outside. A. Yes sir.

Q. By reason of that what did you do? A. I went down to where he was.

Q. What did you do? Where did you go? A. I went right down the track.

Q. You went down the track how far? A. I went
20 down about seventy-five yards.

Q. How many blocks, if any blocks? A. Well, that block there is a big long block, it is about, I should say, half way, not quite half way.

Q. You went half way down that block? A. Yes, sir.

Q. Do you know how long that block is? A. No, sir, I could not say.

Q. Near what street was that? Near what cross street? A. Well, Thirty-first street, between that
30 and Hamilton avenue.

Q. Did you go as far as Thirty-first street? A. No, sir.

Q. Which is north, Hamilton avenue or Thirty-first street? A. Hamilton avenue.

Q. Did you go down beyond Hamilton avenue? A. I went down as far as where the body was lying.

Q. You went south then, to where the body was, did you? A. Yes sir.

Q. And you passed Hamilton avenue? A. Yes sir.

40 Q. You passed that street? A. Yes sir.

ANDREW GERSHON.

Q. And then, where did you find the body, or any part of it? A. About seventy-five yards south of Hamilton avenue.

Q. What part of the body did you see, what did you see there? A. I saw both parts.

Q. Describe what you saw? A. Well, he was lying there on the track; from here down, was on the north bound tract, and this part was midway. 10

Q. The upper part? A. The upper part was between the two tracks, the northbound and the southbound track; and the lower part of the body was on the northbound track.

Q. In the northbound track? A. Yes, sir.

Q. Between the rails? A. Yes sir.

Q. Was that all of the body which you saw there; did you see any other portions of it around? A. No, sir; I did not. 20

Q. Did you, in that time, observe any trolley car, within that vicinity? A. Did I what?

Q. Did you see any trolley car in that neighborhood? A. Yes, sir; there was a trolley car there.

Q. Where did you see any trolley car? A. Well, the trolley car was a little ways north of the body, I don't know how far.

Q. About how far? A. Well, it might have been twenty-five or fifty feet, something like that. 30

Q. What kind of a car was it? A. It was an ordinary trolley car.

Q. They have several kinds of ordinary trolley cars up there, haven't they; was it a new car or an old car? A. I did not notice that much, it looked like a good car though.

Q. Do you know; they have different kinds of cars there, don't they? A. The same as the cars any place.

Q. Was it an open car? A. No, sir; it was not an open car. 40

ANDREW GERSHON.

Q. Was it one of the large cars, or one of the smaller sized cars? A. Well, it was a large car.

Q. What did you then do, after you saw the body?

A. Well, I arrested the motorman and the conductor.

Q. Do you know who the motorman was? A. I did not at that time.

10 Q. Did you learn afterwards? A. Yes, sir.

Q. What was his name? A. His name, I believe, was Barbour.

Q. What became of the body? A. It was taken away in Neckar's ambulance, I believe.

Q. How was the atmosphere that night, what kind of a night was it? A. Well, it started to rain that morning.

Q. How was it at that time when you went out?

20 A. It looked like rain, but it was not then.

Q. It was not raining at that time when you went out? A. No, sir.

Q. Had it been raining at that time? A. No, sir.

Q. It had not been raining before that? A. No, sir.

Q. Are you sure? A. (No answer.)

CROSS-EXAMINATION by Mr. Holmes:

30 Q. You lived in this neighborhood? A. Yes, sir; I lived in that neighborhood.

Q. This dance hall, where this man had been, that was to the north of the place where he was killed?

A. Yes, sir.

Q. That was on the west side, wasn't it, of Bergeline Avenue? A. It was on the west side; yes, sir.

Q. What is the next street below that, the cross street, south? A. I believe they call it Wetherbee Place.

40 Q. Then you come to a long block? A. South again?

ANDREW GERSHON.

Q. Yes? A. Yes, sir.

Q. Still going south? A. Yes, sir.

Q. The next street south of Wetherbee Place is what? A. That is Herman Avenue.

Q. And then going on from Herman Avenue, what do you come to? A. South again?

Q. Yes. A. On the west side of the street, it is 10 Hudson Avenue, Franklin Avenue comes after Herman.

Q. Hudson Avenue on one side and Franklin Avenue on the other? A. Yes, sir.

Q. Then south of that again? A. Twenty-third Street.

Q. Where is this Hamilton Avenue that you were talking about? A. That is up in North Bergen.

Q. Is that North Bergen? A. Yes, sir.

Q. And is that north of Marsh's place? 20
A. Marsh's place is right on the corner of Hamilton Avenue.

Q. I thought you said the first street there was Wetherbee Place? A. South of Hamilton Avenue.

Q. Coming back to this dance hall, that was near Hamilton Avenue, was it? A. What was, the dance hall?

Q. Yes. A. It is right on the corner of it.

Q. And Hamilton would be south of that? A. 30
Yes, sir.

Q. And then there is this block which you have spoken about? A. Yes, sir.

Q. How long is that entire block from Hamilton Avenue down, what is your best judgment about it?

A. I don't know.

Q. Is it twice seventy-five yards, or one hundred and fifty yards long? A. I think it is, easy.

Q. Easy that? A. I think so.

Q. It might be a little longer? A. I don't know.

Q. Then the place where this man's body laid was 40

ANDREW GERSHON.

about in the middle of that block if it was seventy-five yards away? You said it was about seventy-five yards away? A. I don't think it was in the middle, no; I think it was a little further north than the centre.

Q. But it was not anywhere near the cross street?

A. Well, it was nearer to Thirty-first street.

10 Q. It was not at the corner of any street? A. No, sir.

Q. It was in between the streets? A. Yes, sir.

Q. And that is a long block? A. Yes, sir.

Q. There are two car tracks in that street? A. Yes, sir.

Q. And the north bound car would be running on the track which was farthest on the east? A. Yes, sir.

20 Q. Now, from the place where this man's body was found, looking south, the street runs pretty straight for quite a long distance, doesn't it? A. Bergenline Avenue?

Q. Bergenline Avenue, yes. A. Yes, sir.

Q. So that a person who would look down the street could see a good ways off? A. That is right.

Q. When you saw this car was it lighted? A. Yes, sir; it was lit.

Q. Did you notice whether the headlight was burning? A. It was burning.

30 Q. And the lights inside were burning? A. Yes, sir.

Q. Did it have any colored lights on it, were there any colored lights in the ends of the car? A. I did not notice that; I don't know.

Q. You say that this man left the dance hall about twenty minutes before the motorman came in? A. It was not twenty minutes; I was talking to him about twenty minutes or a half an hour before that.

Q. You testified before the Coroner in this matter, didn't you? A. I did.

40

ANDREW GERSHON.

Q. And you told the Coroner it was about a half an hour? A. What?

Q. That he left there about a half an hour previous? A. I don't think so. I don't think it was that long.

Q. Had you been there all evening? A. From about nine o'clock; yes, sir.

Q. What was this, a ball? A. Yes, sir. 10

Q. A dance? A. Yes, sir.

Q. Were there liquors on sale? Was there drinking going on? A. There were drinks there; yes, sir.

Q. And this young man had been there the whole evening? A. No, sir.

Q. How long had he been there? A. I noticed him there in the neighborhood of twelve o'clock.

Q. You had not seen him there before? A. No, sir.

Q. That is, you had not noticed him? He might have been there before. A. He might have been. 20
The first I noticed of him, he was dancing.

Q. When he went out from there, so far as you know, he walked down the street? A. After he went out of the door I did not see any more of him until I saw his body.

Q. You say that he lived on Bulls Ferry Road? A. Yes, sir.

Q. Was the place of his residence still further south than where his body was found? A. Yes, sir. 30

Q. And how far? A. Well, I don't know how far. It is south, and then it is way over towards the east in Bulls Ferry Road.

Q. How far south? A. A quarter of a mile.

Q. Is it not more than that; isn't it nearer a mile? A. It might be; I did not measure it; I don't know.

Q. It lies over on the east side of the road? A. Yes, sir.

Q. Thirty-first Street, that does not cross Bergenline Avenue, does it? A. No, sir. 40

ANDREW GERSHON.

Q. Going south from Hamilton Avenue, I understand it, the next street is Thirty-first street? A. That is on the east side.

Q. That is on the east side? A. Yes, sir.

Q. And it does not cross to the west.

Q. Going still further down, what is the next cross street that leads over to the east side? A. Ferry
10 road.

Q. How far is that away? A. Oh, it is two good blocks.

Q. Do you know Thirty-first Street? What condition is that in up there? Is it a used street? A. Yes, sir.

Q. Is it a thoroughfare? A. Yes, sir.

Q. Is there a sidewalk to it? A. No, sir.

Q. There is no sidewalk? A. There is no side-
20 walk, no; not up on the hill; it is down further; down across the railroad.

Q. It is a sort of a dirt road across there; not lighted? A. It is a dirt road; yes, sir.

Q. A very lonesome street? A. There is an electric light right down a little ways from Bergenline Avenue.

Q. Counsel in his opening said here that the heart of this man was in one place and his liver in another—

30 The COURT: Is it necessary to go into that?

Mr. HOLMES: I just want to ask one question on it.

Q. I understand you to say there was nothing of that sort there? A. I did not see it.

40 Mr. DIXON: We are going to prove that to show just where he was struck and where he was carried to before the car stopped.

ANDREW GERSHON.

RE-DIRECT EXAMINATION by Mr. Dixon:

Q. You were asked whether there was any light near Thirty-first Street; is there any light there? A. East of Bergenline Avenue?

Q. On the east side of Bergenline Avenue? A. Yes, sir.

Q. How near to Thirty-first Street? A. Well, it is down about two or three hundred feet, I should think. ¹⁰

Q. How big a light is that? A. It is one of those big arc lights, the same as on Bergenline Avenue.

Q. Did you look particularly at the light at the front of the car? A. I did; yes.

Q. Was it an electric light or an oil lamp? A. I think it was an electric light.

Q. Are you sure about that? A. I think so. I am not sure; I am not positive, no; the motorman drew my attention to it. ²⁰

Q. Do you know the number of the car? A. No, sir; I don't remember.

Q. Did you know the number? A. No, sir.

Q. Didn't you take the number of the car? A. No, sir.

Q. The motorman drew your attention to the fact that the light was lit, did he? A. Yes, sir; he found fault with the light.

Q. What is that? A. He found fault with the light. ³⁰

Mr. HOLMES: I move to strike that out.

Motion granted.

Mr. DIXON: I only want to find out how his attention was drawn to it.

The COURT: He says the motorman drew his attention to it. ⁴⁰

ANDREW GERSHON.

Q. I don't know whether I asked you which track that car was on? A. It was on the northbound track.

Q. Going north? A. Going north; yes, sir.

RE-CROSS EXAMINATION by Mr. Holmes:

Q. In regard to the weather, you say it had rained
10 in the morning, I understood you to say, it rained in the morning of that day? A. It started to rain that morning.

Q. At the time that you went out to see this body and the car, was it raining then? A. No, sir.

Q. How long had it stopped raining? A. I don't know how long it stopped raining. The first I noticed it rain was after I went down to Union Hill, down to the undertakers.

Q. What time of the year was this? A. It was
20 Easter Sunday morning.

Q. When you came out of the dance hall, could you see the car, did you notice the car standing down there? A. The first I noticed of the car, I saw it backing up.

Q. When you came out of this dance hall, you did see the car? A. Yes, sir.

Q. Whether it was backing up or standing still?
A. Yes, sir.

Q. How far away from you was it? A. How far
30 from me?

Q. Yes, when you first saw the car? A. Well, it was very near up to where the body was.

Q. And you were then up at this dance hall? A. I was standing in front of the stoop.

Q. So it was at least fifty yards away from you when you saw it? A. Oh, yes.

ALBERT WALKER.

ALBERT WALKER, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Dixon:

Q. Where do you live? A. At Fairview.

Q. What is your business? A. Superintendent, 10
watchman and officer of the cemetery.

Q. In the morning of the fifteenth day of April, 1906, were you riding on one of the cars of the Jersey City, Hoboken and Paterson Railway Company, going north on Bergenline Avenue? A. I was.

Q. You were a passenger on that car? A. Yes, sir.

Q. The car that ran over a man that morning?
A. Yes, sir.

Q. How many passengers were on that car? A. 20
There were about six.

Q. Was it a closed car? A. Yes, sir.

Q. Where were you sitting in the car? A. I was not sitting at all; I was standing on the back platform.

Q. Was there anybody with you? A. Myself and the conductor.

Q. You and the conductor were on the back platform? A. Yes, sir.

Q. What did you first notice in regard to the 30
striking of anybody? A. The first I noticed was a jolt, and he stopped and the motorman came through, he came to a stop—

Mr. HOLMES: Don't say anything that the motorman said.

The WITNESS: I guess I can have a right to speak what he asked me; he asked me a question.

ALBERT WALKER.

Q. You noticed a jolt and the car stopped? A. The car came to a stop and the motorman came through and he says—

The COURT: Never mind what he said.

- Q. What did you see then? A. Nothing.
- 10 Q. Just then you did not see anything? A. No, sir.
- Q. Did you see anything afterwards? A. Yes, sir.
- Q. What did you do, get off the car? A. No, not till afterwards.
- Q. You did get off the car, didn't you? A. Yes, sir.
- Q. Afterwards? A. Yes, sir.
- Q. When you got off afterwards where did you go? A. We did not get off the car; we backed up
- 20 the car.
- Q. The car backed up, did it? A. Yes, sir.
- Q. How far did it back up, about? A. About one hundred and fifty feet.
- Q. Was that before or after the motorman came through? A. That was after the motorman came through the car.
- Q. Then he backed up the car? A. Yes, and he says—
- Q. Never mind what he said. A. All right.
- 30 Q. And you stayed on the back platform, did you? A. Yes, sir.
- Q. When he backed up about a hundred and fifty feet, what did he do with the car then? A. He stopped.
- Q. And then did you see anything? A. Yes, sir.
- Q. What did you see? A. I saw a body cut in half.
- Q. Of a man? A. Yes, sir; of a man.
- Q. Can you state now how he was lying? A. Yes.
- 40 sir.

ALBERT WALKER.

Q. How was he lying? A. The feet part of the body were lying on the east side and the head of the body was lying down about twenty feet south.

Q. The head of the body was south of the feet, was it? A. Yes, sir.

Q. That is, the upper part of the body, with the head, was found twenty feet south of the feet? A. Yes, sir; about twenty feet. 10

Q. In what part of the roadway was that head and the upper part? A. Well, it was in the west side, on the west side track; there are two tracks there, and it was on the west side track.

Q. Where were the feet and that part of the body lying? A. The feet were lying south.

Q. Where were they in the road? A. In the middle of the track.

Q. Of the track you were on? A. Yes, the track we were on; the car we were running on was going north. 20

Q. Then did you afterwards see any other parts of the body? A. I did.

Q. What other parts of the body did you see? A. Well, when the coroner came up there, or the undertaker, to pick up the parts of the body that was there, they wanted to go off, and so I says, "Go up about a hundred feet—"

Q. I don't care what you said, you directed them, did you? A. I directed them up and I said, "Go up about a hundred feet and you will find the rest." 30

Q. Did you go up there and see it? A. I did, but I did not pick anything up.

Q. What did you see up there about a hundred feet? A. The liver and heart and all the small parts that was left of the body; they picked him up and put him in the wagon.

Q. Where were they lying? A. Along the track, about a hundred feet up further.

Q. A hundred feet north? A. South. 40

ALBERT WALKER.

Q. North? A. South. There is where he struck the man.

Q. You mean north, don't you? A. South.

Q. You were going north? A. These pieces were south. We were going north, sure.

10 The COURT: They were where the man was struck, he says.

The WITNESS: There is where the man was struck, and the car carried him so far; carried him over two hundred feet further.

Q. You testified that the head laid between the tracks to the west, near the west track, about twenty feet south of the feet? A. Yes, sir.

Q. Now you said to the undertaker, go where, south? A. He took the body, one part here and one
20 part there, in the twenty feet—

Q. Where were the heart and liver with reference to the head or the feet, were they north or south? A. South.

Q. South of the feet, were they? A. South, sure.

Q. And south of the head? A. That is right.

Q. How far were they south of the head? A. Say a hundred to a hundred and fifty feet.

Q. So, when you said, "Go up," you meant go
30 back towards the south? A. I was going north.

Q. Your car was going north, but you directed the undertaker to go back? A. Yes, when he took the two parts of the body and put them on the wagon, I said, "You better go up there and get the rest."

Q. That is to the south? A. That is to the south.

Q. Do you know anything about that locality? Are you familiar with it? A. A little bit. I was born there.

Q. Do you know any of the cross streets there?
40 A. I only know Hamilton Avenue and Thirty-first streets. There aint many streets.

ALBERT WALKER.

Q. With regard to Thirty-first Street, that is the next street to Hamilton, is it? A. I believe it is.

Q. That is the next street south? A. Thirtieth, or Thirty-first; I cannot say which.

Q. The one you call now Thirty-first Street is the next street south of Hamilton Avenue; that is the one you have in mind? A. Yes, sir; south.

Q. With regard to that street where was any portion of this body, or the remains? A. Pretty near, the heart and the liver. ¹⁰

Q. They were right about there? A. They were right about there; that is right.

Mr. HOLMES: He did not say about there.

Q. What do you mean by "pretty near"? A. About four or five feet: ²⁰

Q. Whereabouts with regard to Thirty-first Street, which way from Thirty-first Street, north or south? A. On Bergenline Avenue, on the car tracks.

Q. But, opposite? A. Opposite; Thirty-first Street runs to Woodcliff.

Q. Thirty-first Street does not cross Bergenline Avenue, does it? A. No; it only comes into Waverly Place, what they call it there.

Q. Where were the heart and liver within the lines of Thirty-first Street, or south or north? A. East, on the east track, running up, running north. ³⁰

Q. Suppose Thirty-first Street did cross Bergenline Avenue, would the heart and liver be within the lines of Thirty-first Street, or a little south or a little north of Thirty-first Street? A. It would be about in the centre.

Q. Just before the accident, for a little time before you felt this jolt, was there any bell being rung upon the trolley car? A. I could not say anything about that. ⁴⁰

ALBERT WALKER.

Q. Did you notice any bell? A. I did not hear anything.

Q. You did not hear it? A. No, sir.

Mr. HOLMES: He said he did not notice it.

10 Q. Did you hear anything? A. I did not hear anything.

Q. Did you observe at what rate of speed you were going? A. Yes, sir.

Q. Just prior to the jolt, how fast were you going along? A. Twenty miles an hour.

Q. That is your best judgment, is it? A. Well, that is the evidence I gave before the coroner.

Q. Well, is that your best judgment? A. Yes, that is the best.

20 Q. Did you get off the car at all? A. Yes, sir.

CROSS EXAMINATION by Mr. Holmes:

Q. You were a witness before the coroner on his inquest? A. Yes, sir.

Q. Who have you spoken to about this matter since the accident? A. To none.

Q. To none at all? A. Not as I know of.

30 Q. You would know if you had, wouldn't you? A. I might have spoken with the people; that is all.

Q. You say that you told this undertaker to go further back and he would find something more there; how did you know there was something more back there? A. Can I answer you?

The COURT: Yes. He is asking you, to answer him.

A. The motorman came and he said, "I either—"

40 Q. No; I mean of your own knowledge?

ALBERT WALKER.

The COURT: He should answer responsively.

Mr. DIXON: But he asked him how he knew.

Q. Yes, how did you know there was something more back there? A. That thing that we were talking about. 10

Q. Yes, that is what you were talking about? A. Yes, that part is right; but it is something else.

Q. Now, how did you know that there was some more back there? A. Because I went up there and seen it; that is all about that.

Q. You had walked back while they were picking up the head and feet? A. I and the motorman and conductor went back and seen it, too.

Q. Which way did you walk? Up towards Marsh's? A. Towards Marsh's? No. We walked towards Gutttemberg. That is south. 20

Q. Is Gutttemberg south of Marsh's? A. Yes, sir.

Q. What was the first thing that was found on the track, the head and the body? A. Well, the first thing I saw there was the south part of the body lying there.

The COURT: The feet part, you mean?

The WITNESS: No; the head part. 30

Q. Where had he apparently been run over? A. A hundred feet further away; the liver and heart were there, and there is where he was struck, or else the heart and liver could not be there.

Q. The body was cut in two, wasn't it? A. The body was cut in two; yes, sir.

Q. About where, in the centre, the middle of the man, or nearer the head or the feet? A. Oh, just about the ribs, about here. (Indicating.) 40

ALBERT WALKER.

Q. Right over the abdomen? A. Yes, sir.

Q. And the part which laid nearest to Marsh's was the head? A. Nearest to Marsh's was the head; yes, sir.

Q. And further down was the head? A. No, up, south.

10 Q. You call south up? Why do you call south up? A. Well, call it down; towards Guttentberg is south on that line.

Q. That was about twenty feet from the legs? A. Yes, sir; the head of the body was about twenty feet from the other part.

Q. And then you say about a hundred feet further you found the heart and the liver? A. Yes, sir.

Q. Further down? A. Yes, sir.

Q. Do you characterize that as up? A. What is that?

20 Q. Do you mean that up and down are the same thing with you? A. Do I mean south, where the heart and liver laid was a hundred feet away from where the other parts of the body laid, and the body laid a hundred feet north?

Q. In which direction, north or south? A. North.

Q. Where did the heart and the liver lie with reference to the body? A. South, a hundred feet away from the body.

30 Q. How long is the block between Hamilton avenue and Thirty-first Street? A. Well, they are long blocks.

Q. They are long blocks, aren't they? A. Yes; that is about two hundred feet.

Q. Do you call that a long block. A. Yes, that is a long block.

Q. You never measured it, did you? A. No, sir.

Q. You are only giving your idea about it? A. Only just a rough guess.

4 Q. Isn't it nearer five hundred feet than two hundred feet? A. No; five hundred feet is a lot.

ALBERT WALKER.

Q. Have you ever been over Thirty-first Street?

A. I have walked through it.

Q. It does not cross Bergenline Avenue? A. No, not right there.

Q. It is a wild, unoccupied street, isn't it? A. Yes, on the other side, on the east side—

Q. It is unoccupied—? A. It comes in Bergenline Avenue from the east,—it comes in from the west and strikes Bergenline Avenue and stops there, because the place isn't built up.

Q. Then, Thirty-first Street, according to your idea, stops on the west side of Bergenline Avenue?

A. It stops at Bergenline Avenue.

Q. Does it stop on the west side? A. It does, as far as I know. It might go further; I don't know.

Q. It stops on the west side of Bergenline Avenue, that is your idea? A. It is very seldom I go up there.

Q. You say, do you, that Thirty-first Street approaches Bergenline Avenue from the west and ends at Bergenline Avenue, is that correct? A. I could not tell you if it runs through it or not.

Q. You don't know whether it crosses or not? A. No, I couldn't say it.

Q. But if it doesn't cross it, the part that you know, lies to the west of Bergenline Avenue? A. Not much. Thirty-first Street lies on this side.

Q. Give us the points of the compass at that place, give us the direction by the point of the compass; we cannot gather much of an idea from "this side"? I say, the part of Thirty-first Street that you are referring to lies on the west side of Bergenline Avenue?

A. Yes, sir.

Q. And as far as you know, it stops there? A. Yes, sir.

Q. How far north of Guttenberg is Thirty-first Street? A. How far?

ALBERT WALKER.

Q. Yes. A considerable ways, isn't it? A. Well we will take that about a quarter of a mile.

Q. North of it? A. South.

Q. South of Guttenberg or north of Guttenberg?

A. The street is south of Guttenberg, towards Guttenberg is south.

10 Q. Thirty-first Street is north of Guttenberg, isn't it? A. No, south to Guttenberg, and north to Nungessors.

Q. How is the grade of that street, Bergenline Avenue? Up grade or down grade? A. Right there? Well, there aint much of a grade.

Q. It is pretty nearly level? A. Yes, sir.

Q. An the street is straight up and down for a long distance? A. It is straight; pretty level.

20 Q. How far can you see to the south from, say, Thirty-first Street, or in that block, looking south down Bergenline Avenue; how far can you see? A. Oh, you can see a good ways.

Q. A half a mile anyway? A. Yes, either way.

Q. You had come up this street on the car, I understand? A. Yes, sir.

Q. And it was about two o'clock in the morning?

A. Yes, about that.

Q. There were no wagons on the street at that hour, was there? A. I dor't know.

30 Q. You did not see any? A. I did not see any, no.

Q. The street was clear when you were looking around there; the street was all clear? A. I did not take notice, because you cannot take notice, you standing on the back platform cannot take notice.

Q. And for the same reason you did not take notice whether the bell was being rung or not? A. Well, that was none of my business.

Q. That was none of your business, you were not listening for it? A. No, sir.

40 Q. Were you talking to anybody? A. Myself. And I was not talking to myself.

ALBERT WALKER.

Q. You were talking to yourself? A. I say I was by myself and not talking to anybody.

Q. You were not talking to anybody? You were not talking to the conductor? A. No, sir.

Q. Were you smoking? A. No, sir.

Q. You were standing on the rear platform? A. Yes.

10

Q. Where had the car last stopped before this occurred? A. Up at Herman Avenue.

Q. How far from the place where this man was run over was that? Three-quarters of a mile.

Q. Where is Herman Avenue, north of Guttenberg? A. That is Guttenberg.

Q. How far is Guttenberg? A. Guttenberg takes in from Ferry Street to Hudson Avenue.

Q. Just four blocks? A. That is all.

20

Q. Herman Avenue, isn't that a good deal closer to this place than you say it is? A. What is that, three-quarters of a mile?

Q. A quarter of a mile; it is not so far from Thirty-first Street, is it? A. It is not three quarters of a mile? Yes it is.

Q. That is your idea of it, is it? There is over a hundred and fifty feet from Thirty-first Street to Marsh's.

Q. Where had you been during the evening? That is to say, for a couple of hours before this, were you around that neighborhood? A. No sir: I was in the cemetery.

30

Q. Your wife was with you, wasn't she, on the car? A. She was on the car.

Q. And, had it been raining that day? A. No, sir.

Q. Was it clear? A. No, it was cloudy, at that time in the morning.

Q. When you were on this car and felt this jolt, did you look back to see what had happened? A. What is that you say?

40

ALBERT WALKER.

Q. When you felt the car jolt this time, did you look back down the track to see what happened? A. I wanted to find out what was the matter.

Q. You looked around, didn't you? A. Yes, sir.

Q. Could you see the body lying there? A. No, sir.

10 Q. Not after you stopped? A. I did not see anything until the motorman came up.

Q. The car was backed up, wasn't he? A. Yes, sir; when I told him to back up.

Q. Did he back up the car before he came out? A. No, sir.

Q. Were the lights lit on the car? A. The lights inside; yes, sir.

Q. They were all lighted? A. Yes, sir.

20 Q. Were they electric lights? Were the lights in the car electric lights? A. Well, I guess so; they are supposed to be electric lights.

Q. You were there; you ought to know? Your wife was in the car? A. Well, they get the light from the wire.

Q. Your wife was in the car? A. Yes, sir.

Q. And you could see her from where you stood without any trouble? A. There was a light in there.

Q. Wasn't there a bright light in there? A. Yes; like every car has got.

30 Q. You think this car was going twenty miles an hour? A. Yes, sir; and more.

Q. Was it making a noise? It would be making a pretty good noise, doing that, wouldn't it? It would make a pretty loud noise doing that? A. Well, just as a trolley car goes.

Q. Well, I say, it would make a noise? A. Well, every car makes a noise.

Q. I understand that. Wasn't it making a pretty loud racket running up there on that track at twenty miles an hour? A. No; like the usual car goes
40 along.

ALBERT WALKER.

Q. It was making some noise, anyway? A. Well, we will say it makes a noise.

Q. Has your business always been watchman? A. No, sir.

Q. Have you ever run a car? A. Yes, sir.

Q. You ran a car? A. Yes, sir.

Q. Where? A. On the North Hudson, four years. 10

Q. How long ago? A. About twelve years ago.

Q. That was a horse car, wasn't it? A. No, sir.

Q. They did not run trolley cars twelve years ago, did they? A. Yes, they did, I beg your pardon, when Westcott and Starr was there, I was there,

Q. You ran a trolley car twelve years ago? A. I guess that is about right.

Q. Can you tell how fast the car is going when you are standing on the back platform? A. Yes, sir.

Q. And not paying any particular attention to it? 20
A. I can tell you how fast, you want me to tell you how fast the car was going?

Q. You say it was going twenty miles an hour?
A. Yes, I gave that evidence; but it was going more.

Q. Then when you say it was going twenty miles an hour, you have not told us the truth? A. Well, that is my judgment of that; but it ran much faster than that.

Q. You think it ran still faster on this occasion? 30
A. Well, if I said twenty miles an hour, that is my statement, that is what I judge about what it ran.

Q. How far did they take the car down after it came to a stop? A. About a hundred and fifty feet.

JOHN MERKEL.

JOHN MERKEL, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Dixon:

Q. You are a brother of George Merkel, the deceased, are you not? A. Yes, sir.

10 Q. You are Mr. Merkel's son? A. Yes, sir.

Q. Do you remember the time of your brother's death? A. I don't just remember the date, but it was on Easter Sunday morning.

Q. You heard of it that morning, did you? A. Yes, sir.

Q. Did you go to the place where he was killed? A. I did, not until about eight o'clock, though.

Q. At about eight o'clock that morning? A. Yes, sir.

20 Q. Where did you go? A. Well, I went to Thirty-first Street, where the accident happened.

Q. Did you look around the ground? A. Yes, sir.

Q. What did you see there? A. I seen places spattered with blood—

Mr. HOLMES: I object; this was not until six hours after the occurrence.

30 The COURT: He is only asked what he saw and I think that is proper.

Q. What did you see there? A. I just seen the place all spattered up with blood and small pieces of intestines lying around.

Q. Where did the blood start? Where did you first see the blood from the south, for instance, from the south, where was the first spot of blood that you saw? A. About five or ten feet north of Thirty-first
40 Street.

JOHN MERKEL.

Q. North of the crossing? A. Yes, sir.

Q. That was the first blood spot? A. Yes, sir.

Mr. HOLMES: I raise the objection here that this was six hours after the accident, and is too remote to show any negligence.

The COURT: I hardly think so. They may follow it, for all I know, with evidence showing that the blood was there at the time of the occurrence. Objection overruled.

Defendant excepts.

Exception allowed and sealed accordingly.

J. FRANKLIN FORT, (Seal.)

Justice. 20

Q. How far did those blood spots extend towards the north? How far did they go towards the north?

A. North they went about a hundred and twenty-five feet to a hundred and fifty feet.

Q. Where were they with regard to the location of the car tracks; where were those spots and intestines?? They were on both sides of the track.

Q. They were on both sides of which track? A. Of both tracks; it was spattered all over.

Q. You spoke of seeing intestines over there; where did you see those? In between the tracks.

Q. Between what tracks? A. Between both tracks, the both of them; right in between both of them.

Q. When you speak of the tracks, do you mean the rails or the tracks? A. The rails.

Q. There are four rails there? A. Yes, sir; there are four rails there.

Q. Between what rails did you see them? A. Between the rails going north. 40

JOHN MERKEL.

Q. How old was your brother? A. He was twenty-three years old.

Q. When he died? A. Yes, sir.

Q. How old is your father? A. I believe he is fifty something; fifty-four, I believe.

Q. About fifty-one? A. Fifty-one, something like
10 that.

Q. Is your mother living? A. Yes, sir.

Q. Where are your father and mother living? A. At No. 33, Bulls Ferry Road, Guttenberg.

Q. Do you know whether your brother was working before and at the time he met with this accident?

A. He was working with the Bordens Condensed Milk Company.

Q. Do you know whether he was working? Did
20 he work? A. Yes. He worked for the Bordens Condensed Milk Company, down in the West Shore Railroad yards.

Q. How long had he worked there? A. Well, he worked there, according to my estimation, two months before the accident.

Q. Do you know whether he worked for your father or not? A. Well, he did odd jobs during the day for my father; yes, sir.

Q. What is your father's business? A. Baker.

30 Q. Was your brother married or single? A. He was single.

Q. Where did he live? A. He lived with father and mother.

Mr. HOLMES: He lived at home?

The WITNESS: Yes, he lived at home.

Q. What was the condition of his health at the
time of his death, about? A. A big muscular man,
40 a big fellow, about six feet high; he weighed about

JOHN MERKEL.

215 to 220 pounds; was away bigger than the average man.

Q. You had seen him the Saturday night, before he went out? A. Yes, sir.

Q. Where did you see him that night? A. Down at the butcher shop where I worked; he came down to Union Hill to buy some Easter rabbits for the children. 10

Q. What are they? A. Little rabbits to give to the children.

Q. Not live ones? A. No. Easter cakes and rabbits; he brought my little boy one, and from there he told me—

Mr. HOLMES: I object.

Q. Never mind what he told you. What time was that that he brought the Easter rabbits to your boy? 20

A. That was about somewheres around a quarter to ten o'clock.

Q. In the evening? A. Yes, sir.

Q. How far was that away from his home? A. That was about a mile and a half.

Q. And which way from his home was it? A. That was south from his home.

Q. When he left you, did he have any Easter rabbits then? A. Yes, sir; he did. 30

Q. He had some more? A. Yes, sir.

Q. About how long did it take him to go from your place to his home, do you know? A. Well, to make good connections, you can make it in about twenty-five minutes.

Q. Going by car? A. Yes, good connections, that is.

Q. Do you know what your brother earned in the condensed milk business? Do you know what his wages were there? A. Well, that I don't know; but I have an idea something about it. 40

JOHN MERKEL.

Q. Never mind about your idea, if you don't know? A. No, I don't know.

CROSS EXAMINATION by Mr. Holmes:

Q. Was not your brother in the employ of the New York, Ontario and Western Railroad Company?

10 A. Well, I don't know whether he was employed by New York, Ontario and Western or by the Bordens Condensed Milk Company; but I know he handled the Bordens Condensed Milk; he took it off the trains and put it on to the wagons.

Q. Do you know what wages he got? A. No, I do not.

Q. You don't know what your father paid him?

A. Well, his father paid him a small amount of wages, 20 too, yes.

Q. Five dollars a week? A. I don't know.

Q. Did your brother pay board at your father's?

A. He gave up all the money he earned.

Q. That is not what I asked you. Did your brother pay board? A. No, he did not.

Q. Didn't he buy his own clothes? He bought his own clothes, didn't he? A. No, sir.

Q. Did you live with your father? A. Yes, sir.

30 Q. And you do not buy your own clothes, either?
A. Oh, no I do not live with my father; no, I am married.

Q. How far do you live from your father's? A. About a mile and a half.

Q. How long have you lived that distance from your father before your brother died. A. Three years this coming May; four years this coming May.

Q. Then you were a good part of the time away from your father's house? A. Sir?

Q. You were not home then? A. No, I am not 40 living home.

JOHN MERKEL.

Q. What you are telling here is a good deal of what has been told about it by somebody else to you?

A. No, there is nobody to tell me anything; what I told you I know.

Q. You know that yourself? A. Yes; I know that myself.

Q. How do you know it?

10

Mr. DIXON: How does he know what?

Q. How do you know who your brother worked for? A. How do I know what he worked for?

The COURT: Who he worked for?

The WITNESS: I know that he worked for the Condensed Milk Company; handled the milk.

20

Q. How do you know it? A. I seen him there.

Q. How do you know that your father paid him any wages? A. Because I seen him pay him wages.

Q. Don't you know how much he paid him? A. No, I don't know how much; but I seen him giving him bills on a Sunday morning.

Q. He paid him for the work he did for him? A. Yes, for the work he did for him.

Q. How much was that? A. I don't know

30

By Mr. DIXON:

Q. This place that he worked at, was at the railroad company, wasn't it, at the depot? A. It was at the depot; yes, sir.

Q. He handled the milk at the depot? A. He handled the milk at the depot; yes, sir.

40

JOHN MERKEL.

JOHN MERKEL, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Dixon:

Q. You are the plaintiff, and the administrator of your son, are you not? A. Yes sir.

10 Q. Where do you live? A. I live in Bulls Ferry Road, No. 33, Guttenberg.

Q. How old was your boy George when he died? A. Well, his birthday was the seventh of September; the seventh of September he was twenty-three years old. Well, I cannot say the day, you know.

Q. How old are you, about? A. I am fifty-one.

Q. What is your business? A. My business is baker.

20 Q. Where did George live at the time of his death? A. He lived in my house, with his father and mother.

Q. Where was he employed up to the time of his death? A. He was employed down at the milk company. He only got about six hours' work, you know; he goes to work at nine o'clock in the night and he comes home about three o'clock in the morning, and he helps me along, carry out, with a horse and wagon, around, for my goods, because I am a poor business man and he carries the orders out for
30 me.

Q. Where was it that he worked? Where was the place that he worked? A. That is down in Forty-second Street, what we call the West Shore Railroad.

Q. It was the railroad yard, wasn't it? A. Yes, sir; the railroad yard.

Q. He handled the milk down there? A. Yes, sir.

Q. Do you know what wages he got? A. He got forty dollars a month, and have to work seven days
40 a week.

JOHN MERKEL.

Q. Did you pay him anything for what he did for you? A. I paid him five dollars a week. He have to pay me board because Mamma is always sick, and he says he have to buy the clothes and—

Q. Don't go along; just answer my questions; what did he do for you, what was he employed to do for you? A. He attended to forty-eight customers in the morning, with bread, driving the wagon. ¹⁰

Q. What did he do with his wages when he got them from you or from the company? A. Well, every time he brought his wages home, he gives Mama the whole wages and Mama give him so much spending money to buy his clothes and things, you know.

Q. How much would she give him back? A. Well, when he works up there, when he got fifteen a week, Mama gave him three dollars spend money. When he only got forty dollars a month, Mama only gave him two dollars spending money. ²⁰

Q. What did she do with the money? A. Well, you know every young fellow likes to smoke a cigar.

Q. What did your wife do with the money that he gave to her; what did she do with it; what did she use it for? A. Well, we have to use it in the business, because I am all alone and I ain't got nobody to help me along, and I am without a cent myself.

CROSS-EXAMINATION by Mr. Holmes: ³⁰

Q. Your son lived at home, didn't he? A. Yes sir.

Q. And you say he was twenty-three years old?

A. He didn't was twenty-three.

Q. But he was over twenty-one? A. Yes sir.

Q. He paid his board? A. No sir.

Q. Well, he got his board at your home? A. Yes sir.

Q. And you paid five dollars a week for what he did for you, didn't you? A. Yes sir. ⁴⁰

JOHN MERKEL.

Q. And you think he got as much as forty dollars a month from the company? A. That is what he gets of the company.

Q. Of course, if mother only allowed him three dollars or so a week out of that, and your five dollars a week, he did not pay you any board, he got his board at home? A. Excuse me, he did not never had any board, he lives with the family. Mama buys him his shoes and clothes what he wants and then if he wants fifty cents or five cents for a paper of tobacco or something he gets it, and of course, I am a sick man, and if I show you my leg you would not say anything. He always says "Papa, I stay with you."

Q. Never mind that. The boy had to have his clothes? A. Yes sir.

20 Q. And his shoes? A. Yes sir.

Q. And shirts? A. Yes sir.

Q. And other things? A. Yes sir.

Q. His mother furnished the money out of his wages to buy those, didn't she? A. What?

Q. I say, those came out of his wages?

The COURT: All his clothes his mother paid for, out of his wages, didn't she?

30 The WITNESS: Well, certainly, they have to come out of it.

Q. They came out of his wages? A. She gave him a few dollars, and she kept a few dollars, if he is out of work, so we got a few dollars.

Q. It amounts to this, summed up; he got his board at home? A. Yes sir.

Q. He gave his mother the wages which he got at the railroad company? A. Yes sir.

Q. You gave him five dollars a week for what he 40 did for you? A. Yes sir.

JOHN MERKEL.

Q. His mother gave him two or three dollars a week for spending money? A. Yes sir.

Q. And, in addition to that, his clothes had to be paid for out of the wages too? A. Yes sir.

Q. That is correct, isn't it? A. Yes sir.

Mr. DIXON: I offer in evidence the letters of administration granted to the Plaintiff.

ADMITTED and MARKED "Plaintiff's Exhibit P-1" of this date.

PLAINTIFF RESTS.

Mr. HOLMES: I move for a non-suit in this case on the ground that there has been no negligence shown on the part of the defendant company; the negligence charged in the declaration has not been proved and that there is sufficient evidence in the case and from the facts and circumstances proven here to show that this accident, even though there was negligence on the part of the defendant company, was contributed to by the negligence of the deceased.

(Counsel argue motion.)

Motion denied. Defendant excepts.

Exception allowed and sealed accordingly.

J. FRANKLIN FORT,
Justice.

GEORGE BARBOUR.

Mr. Holmes opens for the defendant.

GEORGE BARBOUR, sworn as a witness on behalf of the Defendant, testifies as follows:

DIRECT EXAMINATION by Mr. Holmes.

10 Q. How old are you? A. I am twenty-one, going on twenty-two, I will be twenty-two in October.

Q. Were you in the employ of the Jersey City, Hoboken and Paterson Street Railway Company on the thirteenth day of April last? A. Yes sir.

Q. What was your employment there? A. Motor-man.

Q. Do you remember the night of that day? A. Yes, sir.

20 Q. Do you remember that your car ran over somebody? A. I don't remember the date, but I know what day it was, it was Easter Sunday morning.

Q. And did it happen up between Thirty-first street and Hamilton avenue? A. I don't know the names of the streets, but there was a little land office on the corner, and Marsh's is on the north side.

Q. As you came up from the South, where had you made the last stop? A. I don't know the names of the streets, there is a saloon on the corner.

30 Q. You don't know the name of the street? A. No, I don't know the name of the street.

Q. You did make a stop though, shortly before this accident? A. Yes sir.

Q. In minutes, how long before? Or, if less than a minute, how long? A. It was one block. It is a very long block. One block.

Q. And, as you came up Bergenline avenue, did you notice anything on the track? A. No, sir; this man was lying on the track.

4 Q. Did you see the man before the car ran over him? A. About three feet from the car, three or

GEORGE BARBOUR.

four feet from my car.

Q. Did you have a head light on the car? A. Yes, sir.

Q. Was it burning? A. Yes sir.

Q. Did it throw the light ahead of the car? A. Yes, sir.

Q. Was there any bell given to you to stop? A. 10
There was a bell to stop up at Marsh's.

Q. How was it you did not see the man until he was about three feet from you? A. Well, it is a very dark spot right there, and I was looking right ahead of me, and I just happened to glance down, about three feet ahead, to the ground, and I saw this man lying there, on the side.

Q. Which rail of the track was he on? A. He was right between the two rails, as I was going up.

Q. Between the two rails? A. Yes sir, right in 20
between.

Q. How fast were you going up there? A. I was going on half power.

Q. In miles per hour, how fast were you going? A. I could not just say, about eight miles; I think it was less than that, I don't think it was eight miles.

Q. It has been testified here that you were going twenty miles an hour, were you going at any such speed as that? A. I don't think those cars have got 30
that much speed in them.

Q. Were you going at any such speed as twenty miles an hour? A. No sir.

Q. How was the car lighted, what was the character of the lighting of the car? A. I could not say, electric light.

Q. Did you see it? A. Yes, sir.

Q. What was the head light? A. Electric light.

Q. The power was on, of course? A. Yes sir.

Q. What happened, after you saw this man, what happened? A. Why, I broke up my car as quick as 40

GEORGE BARBOUR.

I could, and tried to stop it as quick as I could, and then told the passengers that I thought I ran over a man, I told the passengers of the car.

Q. After you saw this object, on the track you had run over, you thought you had run over a man, how far did your car go? A. I guess about thirty-five or
10 forty feet past the body.

Q. Before you stopped it? A. Yes, sir.

Q. Was it a little difficult to stop it? A. Yes, sir; it was.

Q. Did anything seem to slip—

Mr. DIXON: I object to his leading the witness.

Q. Did you have to use any sand to stop it? A. No, sir; I did not think of the sand in stopping the
20 car.

Q. You did not what? A. I did not think of using the sand in stopping the car.

Q. You stopped it without using the sand? A. Yes, sir.

Q. Did you take the car back; did you back the car down at all? A. I backed the car up about a hundred and fifty or two hundred feet.

Q. Did you see this man Walker there? A. This
30 man that I ran over?

Q. No, this man Walker, who was a witness here; you saw him, didn't you? A. Yes, I saw him, after a while, when I was looking around for witnesses.

Q. You heard Mr. Walker testify here this morning, didn't you? A. Yes, sir.

Q. Did he tell you to go further back, or did you hear him? Did he tell you or the motorman to go further back and you would find something else? A. Not that I remember; he may have, but I was so excited that I don't remember it.

40 Q. Did you help pick up the body? A. No, sir.

GEORGE BARBOUR.

Q. With reference to Marsh's saloon, how far from Marsh's saloon was it that this man laid, or where you ran over him? A. Well, on a rough guess it was I guess about a hundred and fifty feet.

Q. That was where you saw him lying across the track? A. This man was not walking across the track.

Q. You did not listen to me. I did not say walking; I said that was where you saw him lying across the track? A. Yes, sir. 10

Q. And that is the place where you say it occurred? A. Yes, sir.

Q. Then it was not at a street crossing? A. No, sir.

Q. How long have you been employed as a motor-man? A. I think it was about three months; two months and a half. 20

Q. Were you all alone on the front platform? A. Yes, sir.

Q. Had you seen this man at all, before you saw him lying on the track? A. No, sir.

Q. Were there any carriages or wagons in the street at that time? A. No, sir.

Q. Was there any other car around there than yours? A. No, sir.

Q. Was there any car going south? A. No; there was a car that I passed here down at this place where I stopped that block; I cannot tell the name of the street. 30

Q. The southbound car you passed where you last stopped? A. Yes, sir; where I last stopped.

Q. Was there any other car coming towards you on the southbound track? A. No, sir.

Q. Did any car go by after you stopped your car? A. No, sir.

Q. In regard to your bell, how about that? A. Well, I did not ring it, because I did not think it was 40

GEORGE BARBOUR.

necessary, as there was not much traffic up there at that time.

Q. Where did you stop ringing the bell? A. Right about where the hill is there.

Q. Did you ring it after you made the last stop before the accident? A. No, sir.

10 Q. You started up from there and kept on and had not rung the bell from that point on up? A. No, sir.

Q. You say you did not think it was necessary? A. It was not necessary on account of there was not any traffic, and I did not ring it; there was no traffic on that road on the Sunday morning at that time.

CROSS EXAMINATION by Mr. Dixon:

20 Q. Did you testify before the coroner's jury? A. I don't think I did.

Q. Do you remember when the coroner's inquest took place? A. I could not just remember it; I think it was taken downstairs here.

Q. Do you remember that there was a coroner's inquest? A. I think there was.

Q. Do you remember that there was? A. Well, there was something held downstairs.

Q. Were you there? A. I was there; yes, sir.

30 Q. Did you testify? A. No, sir.

Q. Why not? A. I don't think I did; all I done was to put up my right hand, I think.

Q. You refused to testify? A. Yes, sir.

Q. Didn't you? A. I think that is what it was.

Q. Didn't you refuse to testify? A. Yes, sir.

Q. How long have you been in the employ of this Jersey City, Hoboken and Paterson Railroad Company? A. I was motorman about two months and a half or three months.

40 Q. Always on that line? A. No, sir; I was on all lines up there.

GEORGE BARBOUR.

Q. About three months altogether, before this accident? A. About two months and a half.

Q. How old are you? A. I will be twenty-two on October sixth.

Q. You will be twenty-two? A. Yes, sir.

Q. Before you went to work as a motorman what was your business? A. Driving.

Q. Driving what? A. Driving for the United States Express Company.¹⁰

Q. This car did not have any electric light on the front of it, did it? A. Yes, sir.

Q. A very good light? A. One of those small bulbs as you see on the other cars; those small electric light bulbs as you see on the other cars.

Q. Was it a good light? A. Oh, it was a pretty plain light; a pretty fair light.

Q. Was it what you called a "bum" light? A. No, not what I call a "bum" light, it was a pretty fair light.²⁰

Q. Didn't you say to Mr. Gershon, call his attention to the light, and say to him, "Look at the bum light we have"? A. No, sir.

Q. You did not say that? A. No, sir.

Q. You were arrested that night? A. Yes, sir.

Q. Do you know Mr. Gershon? A. Mr. Gershon arrested me.

Q. That night? A. Yes, sir.

Q. Didn't you say that to him that night? A. No; I said they ought to have better lights.³⁰

Q. Didn't you say that?

Mr. HOLMES: I object; he has said what he did say.

Objection sustained.

Q. You think you were about three feet away from this prostrate man when you saw him first, do you? A. Yes, sir.⁴⁰

GEORGE BARBOUR.

- Q. Were you standing in the front of your car?
A. Yes, sir.
- Q. With your hand on the brakes? A. With my hands on the handles.
- Q. How many handles did you have? A. Well, the controller handle and the air handle.
- 10 Q. And is there any grade there on that street?
A. Yes, sir.
- Q. Which way does it run? A. It runs north.
- Q. Going up hill? A. No, going down hill.
- Q. How many notches did you have on your controller? A. Six. Half power.
- Q. Was the air brake all right? A. Yes, sir.
- Q. You did not use your sand box? A. No, sir.
- Q. Did you put your air brake on hard? A. Yes, sir.
- 20 Q. Going at eight miles an hour, within what distance can you stop a car of that size with an air brake, if it is in good condition? A. Well, about a block.
- Q. About a block? A. Yes, sir; no, less than that; half a block.
- Q. Less than half a block? A. Yes, sir.
- Q. How much less than half a block? A. Well, about half a block.
- Q. In other words, if you want to stop, going at eight miles an hour, with the air brake, you have got to start putting it on a half a block before you get to the crossing, isn't that so? A. Yes, sir.
- 30 Q. Don't you know that that is not true? A. Why not?
- Q. Don't you know it is not? A. No, sir.
- Q. Do you know whether it is or not? A. I say, I generally take a half a block to stop if it is going eight miles.
- Q. To stop it as quick as you can? A. Yes, sir.
- Q. That is as quick as you can do it? A. Yes, sir.
- 40 Q. A half a block? A. Yes, sir.

GEORGE BARBOUR.

Q. What do you consider a half a block, a hundred feet? A. Well, half a city block.

Q. What do you consider it in feet, in that distance? A. Well, I don't know how many feet there is to a block, say just from Oakland Avenue to Cook Street.

Q. This man was lying between what streets? A. 10
I don't know the names of the streets.

Q. Haven't you been inquiring what names they were? A. No, sir.

Q. You have never been in that locality since you ran over the man? A. No, sir.

Q. Don't you work for the company any more? A. No, sir.

Q. How long is it since you stopped working for the company? A. That same night.

Q. And you never went back there to that locality? 20
A. No, sir; not to that place.

Q. Do you know where Marsh's saloon or Hall is? A. Yes, sir.

Q. Where is that? A. It is on Bergenline Avenue, I think, where the car tracks is.

Q. Do you know what corner it is on, what street? A. I don't know the name of the side street at all.

Q. Did your car stop in front of that place? A. What do you mean? After I run over the body? 30

A. Yes. A. No, sir.

Q. Do you remember that you went after a telephone? A. Yes, sir.

Q. Where did you go? A. I went into the saloon there.

Q. You know where that saloon is? A. Yes; it is Marsh's saloon.

Q. You know it, don't you? A. Yes, sir.

Q. Where did you go in there, and who did you see? A. I forget; I think this man, Mr. Gershon; I think that he was the man who telephoned. 40

GEORGE BARBOUR.

Q. When you went in there to telephone, where was your car in regard to that saloon? A. About twenty-five feet this side of the crossing.

Q. What do you mean by "this side," north or south? A. South of the crossing.

Q. South of that corner? A. South of that corner; yes, sir.

10 Q. With regard to that where was the body, or the man lying, when you saw him first? Taking that as a fixed point at Marsh's saloon, a fixed point there, that you know about, where was the man lying with regard to that street and that saloon when you first saw him? A. Well, I don't know how long that block is there; he was about from this little land office, there is a little land office on the corner, he was about twenty feet, I think, from that corner.

20 Q. He was just south of that street? A. I don't know the name of the street.

Q. I am not giving you the names of the streets; you have got the saloon located, haven't you, that you went into? A. Yes, sir.

Q. You know where that is? A. Yes, sir.

Q. With regard to that saloon where was the man lying when you first saw him? A. Well, from this corner to the saloon was about one hundred and fifty feet; it was about one hundred and twenty feet
30 this side of the saloon.

Q. Do you mean south of the saloon? A. Yes; south of the saloon.

Q. You know the direction in which you were going? A. I was going north.

Q. You say he was lying across the tracks about one hundred and twenty-five feet south of the saloon? A. No; about one hundred and twenty feet south of the saloon.

40 The COURT: That is before you got to the saloon.

GEORGE BARBOUR.

The WITNESS: Before I got to the saloon; yes, sir.

Q. Before you got to the saloon about one hundred and twenty-five feet away? A. One hundred and twenty feet.

Q. He was lying on the track? A. Yes, sir.

Q. When you first saw him? A. Yes, sir. 10

Q. That is, he was between the corner of that street on which the saloon stood, and the next street to the south, was he? A. Yes, sir.

Q. In that block? A. Yes, sir.

Q. That is as you remember it? A. Yes, sir.

Q. Is that saloon on the corner? A. Yes, sir; it is on the corner.

Q. What house is it you speak of as being about twenty-five feet from that? A. I think it is a little land office; I am not sure. 20

Q. Where is that? A. It is one block south of this saloon.

Q. That would be on the next corner then, would it? A. Yes, sir.

Q. What did that have to do with it, what did you speak of that for? A. Well, it was about twenty or twenty-five feet from this place where the man was lying on the track.

The COURT: And that little building, as 30
I understand you, was on the corner of the street.

The WITNESS: Yes, sir; I am pretty sure it is on the corner of the street.

Q. One block south of the saloon? A. One block south of the saloon.

Q. So that between the saloon and this little building there is a whole block? A. Yes; I think it is a whole block. 40

GEORGE BARBOUR.

Q. And the man was where with regard to that little house? A. About twenty-five feet from this little house.

Q. North of that house? A. North of that house; yes, sir.

Q. That is where he was lying when you first saw him? A. Yes, sir.

10 Q. Which way was he reclining? A. I think his face was toward the car; I aint sure.

Q. Did he have his hat on? A. I could not say.

Q. You did not see that? A. No, sir; I did not see that.

Q. You saw this Mr. Walker there, didn't you, that gentleman you saw here? A. I seen him after I got off the car trying to get the names of some witnesses.

20 Q. Did you get any names? A. I got Mr. Walker and Mrs. Walker.

Q. You saw him then? A. Yes, sir.

Q. Mrs. Walker. (Lady stands up.) Was that lady on the car? A. I did not see them on the car, but after I got off they told me they were on the car and I got their names then.

Q. You backed your car back to where the body lay, didn't you? A. The conductor stood on the rear end and gave me the bells to back up and I backed up.

30 Q. Then you did not stand on that end of the car and back up? A. No, sir.

Q. Did you go through the car before you backed up or not? A. I am pretty sure I walked through the car and told the passengers.

Q. Didn't you, when you went in the car, say to the passengers, including Mrs. Walker and Mr. Walker, that you did not know whether you had hit a dog or a man? A. Yes, sir.

Q. You did? A. Yes, sir; I said I was pretty sure
40 I run over a man, I thought I ran over a man.

GEORGE BARBOUR.

Q. Didn't you say you did not know whether you had hit a dog or a man? A. Yes, sir.

Q. That is true, isn't it? A. Yes, sir.

Q. You did say that? A. Yes, sir.

Q. How do you explain the fact that you saw this man lying there, and can describe exactly the position in which he lay, and that his face was to you and you were looking in his face? A. I did not say that. 10

Q. One moment—and you were looking in his face, and still, you went back immediately afterwards and told the passengers you did not know whether you hit a dog or a man? A. Well, I will tell you the position he was in, the position this man was lying in—

Q. You saw his face, didn't you? A. That is what I say; I say I was not sure whether his face was to the car or his back, I say, I was not sure of that. He was in a crunched up position, that is the reason I said I did not know whether it was a dog or a man. 20

Q. Didn't you saw that his face was looking towards the car? A. No, sir; I said I was not sure whether his face was towards the car or not.

Q. Didn't you say he was lying on his side? A. He was lying on his side.

Q. How do you know he was lying on his side? A. You could tell from the crunched up position he was in. 30

Q. Couldn't you tell whether it was a dog or a man, if he was on his side? A. No, sir; I was so dazed when I looked down and saw the body there.

Q. When you saw him three feet away? A. Yes, sir.

Q. Didn't you see his feet outside of the tracks? A. No, sir; his feet were not outside of the rail.

Q. Didn't you testify on your direct examination that he lay across the rails with his body in the track and his feet outside of the track? A. No, sir; not that I remember, saying anything like that. 40

GEORGE BARBOUR.

Q. Didn't you testify to that? A. I don't think so.

Q. Is that a fact that you did see him there that way? A. He was in a crunched up position when I looked down at him.

Q. Tell us how he was crunched up, where his feet were and which way was his head? A. He had his hands drawn up like that, (indicating). He was that way.

Q. Where were his hands, with regard to the rail?

A. His hands were inside the rail.

Q. Where were his feet? A. I could not say whether they were inside or outside the rail.

Q. Did you see them? A. No, sir; I did not.

Q. You did not see his feet? A. No, sir.

Q. Where were his hands? A. His hands were that way. (Indicating.)

Q. How? A. He was that way.

Q. His head was on his hands? A. He was on that way; he was drawn up some way, that way.

Q. You could not see that unless he was facing you? A. No, sir; that is the reason I think he was facing the car.

Q. You did see his hands? A. I did see his hands.

Q. You are sure of that? A. I am pretty sure of it; he was that way.

Q. When you show us that, tell which way was his head; how did he have it? A. I say, I think he was facing the car; I aint sure.

Q. You put your head down on your shoulder, don't you? A. Yes, sir; his head was that way, I think.

Q. And your arm up toward your face? A. Yes, sir.

Q. And you show us then how his hands were? A. Yes, sir.

Q. Do you mean to say that they were clasped or not? A. No, sir; I could not say that, whether his hands were clasped or not.

GEORGE BARBOUR.

Q. You are not quite sure whether they were clasped? A. No, sir; I am not.

Q. You could see his hands? A. No; I don't think I could see his hands; I think his hands were up this way.

Q. How could you tell his face was in his arm? A. That is the crunched up position he was in; that way. 10

Q. You would see his hands, wouldn't you, if you had a good light? A. His hand might have been under his head.

Q. He had two hands? A. Yes, sir.

Q. I don't know where they might have been; where did you see them? A. I don't think I saw them at all.

Q. Did you see his back? A. No, I did not, only just like that, the side.

Q. What part of the side did you see? A. His left 20 side, I think.

Q. Which side did you see? A. I could not say what side it was.

Q. You did not see his feet? A. No, sir.

Q. Did you see his legs? A. Well, about the knee.

Q. Could you see the knee? A. Yes, sir.

Q. You could see the knee? A. I could see the knee.

Q. Then you did see the front part of the leg, did you? A. I am pretty sure I did; but I could not say; 30 I cannot say whether it was the front or the back.

Q. Didn't you walk back with Mr. Walker to the street called Thirty-first Street and there see his heart and liver? A. No, sir.

Q. You and the conductor? A. No, sir.

Q. Did you go back at all? A. I went back and just looked at the body.

Q. Where was the body? A. It was about twenty or thirty feet from the car when I backed up.

Q. When you backed up? A. Yes; it was about twenty or thirty feet from the car. 40

GEORGE BARBOUR.

Q. Was it all together? A. Well, the two tracks were about like that (illustrating). I think the head part of the body was over this side, and about four or five feet further was the lower part of the body.

Q. You think the lower part of the body was which way, north or south of the other part? A.
10 Nor.th.

Q. North? A. That is what I think.

Q. The head and shoulders of the body were in the southbound track? A. They were not in the track; they were between the northbound and the southbound track.

Q. And the feet and under part of the body were in the southbound track, weren't they? A. They were in the northbound track.

Q. I mean in the northbound track? A. Yes, sir.

20 Q. So that after you hit that body, the man was lying which way when you first saw him? A. On his side, I am pretty sure.

Q. Which way was the head facing, east or west? A. I think to the west.

Q. That is the way he was then? A. Yes, sir.

Q. So that when you hit him and ran over him, you put the head and upper part of the body over towards the west? A. Over towards the west; yes,
sir.

30 Q. And the other part remained in the track? A. In the northbound track.

Q. You are sure the head was on the west side? A. Yes, sir. Between the north and southbound tracks.

Q. Were his feet on the east side? A. On the east side of the northbound track; yes, sir.

Q. Inside or outside of the track? A. In between the northbound track.

Q. His feet were? A. His feet were.

40 Q. You are sure of that? A. I am sure of that.

GEORGE BARBOUR.

Q. You are swearing to what you saw, not what you believe. You are sure his feet went in the track?

A. Yes, sir.

Q. You saw them there? A. Yes, sir.

Q. Were his hands outside of the northbound track, or in between the rails? A. When the body was seen?

Q. No, when you first saw him; before you hit¹⁰ him? A. I could not say whether they were outside. I don't think they were outside. His body was in between the tracks.

Q. So that, really his shoulder about, or his neck, would have been nearer to the rail? A. That would have been nearer to the rail; yes, sir.

Q. The westerly rail? A. The west side rail; yes, sir. The west side rail of the northbound track.

Q. You think his head was about on that, do you?²⁰
A. I don't think it was on it; it might have been on it; I was so dazed when I looked down that I could not say.

Q. You never looked down? A. I did look down; I saw the man and I was very much dazed when I saw him.

Q. What kind of a night was it that night? A. It was a kind of heavy night.

Q. That is a very dark spot? A. Yes, sir; it is a dark spot.

Q. Isn't there an electric light near there?³⁰
A. There is an electric light at the saloon.

Q. Is there none on the street? A. I think there is one on the corner; I aint sure; I am pretty sure there is one at the corner at Marsh's saloon there.

The COURT: On which side of the street as you were going north, on the left or the right?

The WITNESS: On the west. The left hand side going up.⁴⁰

GEORGE WARNECKE, JR.

The COURT: On which side was this little land office?

The WITNESS: On the right hand side.

10 GEORGE WARNECKE, Jr., sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION by Mr. Holmes:

Q. Where do you live? A. I live at Grand View.

Q. Where is that? A. Grand View, Bergen County.

Q. How old are you? A. I am twenty-two years old.

20 Q. Do you remember the day of this accident?
A. Yes, sir.

Q. Where were you at that time? A. In the car.

Q. On the car? A. Yes, sir; in the car.

Q. Did you get off the car after it occurred? A. Afterwards, yes, sir.

Q. Were you inside or on the platform? A. I was inside.

Q. Did you see anything of it? A. No, sir.

Q. The car stopped? A. Yes, sir.

30 Q. Did you get out of the car? A. Yes, sir.

Q. And did you go back to see what was the matter? A. Yes, sir.

Q. Did the car back up? A. Yes, sir.

Q. Did it back up before or after? A. After.

Q. After you got out of it? A. No; before I got out of it.

Q. Do you know where this saloon is that has been spoken of, Marsh's? A. Yes, sir.

Q. With reference to that, when the car first stopped, how far from the saloon was it? A. About one
40 hundred and fifty feet.

GEORGE WARNECKE, JR.

Q. Which way? A. South of the saloon.

Q. How far did the car back up before you got out? A. About fifty feet.

Q. When you got out what did you see? A. I seen a man cut in half.

Q. How close was the car then to the man? A. About twenty-five feet, I guess.

Q. North of him? A. North of the man. 10

Q. Did you stay there until the remains were picked up and taken away? A. Yes, sir.

Q. Did you go back any further from that, where the body lay? A. No, sir.

Q. Did anybody else go back any further? A. I don't know.

Q. Did you see anything picked up further on down the track? A. No, sir.

Q. Further south? A. No, sir.

Q. Which way did the body lay? A. The head was on the southbound rail. 20

Q. On the southbound track? A. On the southbound track.

Q. The head was? A. Yes, sir; on the southbound rail of the northbound track.

Q. The track runs north and south, and the other directions are east and west? A. Yes; the car was going north.

Q. The southbound track is the upper track on the street which lay to the west of the northbound track? A. Yes, sir; that laid to the west. 30

Q. But the head, that part of the body, was on the track that your car had run on, was it? A. Yes, sir; it was on the west side.

Q. Which way was the head pointing, east or west? A. It was pointing west.

Q. And the feet were over on the east side? A. They were on the east side.

Q. Were the lights burning in the car? A. Yes, 40

GEORGE WARNECKE, JR.

Q. And had they been all the way up? A. They were all the way up; yes, sir.

Q. Do you recall where the car last stopped before the accident happened? A. No, sir; I cannot recall that.

Q. How fast was the car going? A. About ten miles an hour, I should judge.

10 Q. Where were you going? A. I was going home.

CROSS EXAMINATION by Mr. Dixon:

Q. What part of the car were you sitting in? A. I was sitting in the centre.

Q. Were there any other passengers in the car? A. Yes, sir; there were.

20 Q. How many of them were there? A. I could not tell you just how many.

Q. What were you doing in the car? A. I was sitting down talking to a friend of mine.

Q. How long had you been talking to your friend before the accident occurred? A. I was talking to him all the way up from Fourth Street where I got on.

Q. What is your business? A. Clerk.

Q. For what? A. For a railroad company.

30 Q. For what railroad company? A. The Norfolk and Western.

Q. Just describe again, when you saw the part of the body on which the head was attached, after the accident? A. On the west side, where the head was on.

Q. The body was cut in about the centre, wasn't it? A. Yes, sir.

Q. There are two rails to the northbound track and two rails to the southbound track? A. Yes, sir.

40 Q. And the space between the southbound track and the northbound track? A. Yes, sir.

GEORGE WARNECKE, JR.

Q. Just tell me in what space the upper part of the body lay when you saw it after the accident? A. It lay just a little this side.

Q. I don't know what this side is? A. West of the southbound rail of the northbound track.

The COURT: How do you mean that? West of the west rail? Is that what you mean? ¹⁰

The WITNESS: West of the west rail; yes, sir.

Q. Do you know which is the west rail of the southbound track? A. Yes, sir; this is the northbound track.

Q. I am asking if you can fix in your mind the west rail of the southbound track? A. Yes, sir. ²⁰

Q. That is the one farthest west? A. Yes, sir.

Q. Call that No. 1? A. Yes, sir.

Q. Take the east rail of the southbound track and call that No. 2? A. Yes, sir.

Q. Take the west rail of the northbound track as No. 3? A. Yes, sir.

Q. Now, where was it with regard to one, two and three? A. Right this side of No. 3.

Q. What do you mean by "this side"? A. West.

Q. West of No. 3? A. Yes, sir. ³⁰

Q. Between No. 2 and No. 3? A. Yes, sir.

Q. Where was the other part of the body? A. It was east of the rail, in the middle.

Q. In the middle of the track? A. Yes, sir.

WILLIAM ZEILMANN.

WILLIAM ZEILMANN, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION by Mr. Holmes:

Q. Where do you live? A. At 48 Fifth Street, Guttenberg.

10 Q. How old are you? A. Nineteen years of age.

Q. Do you remember this accident? A. Well, I don't really remember anything of it. All I know is that I was over at my uncle's at the time and I came up in a Hudson Heights car, and I saw a lot of people running up there, and I asked them what was the matter.

Q. You did not see the accident happen? A. I did not see the accident at all.

20 Q. Did you see the limbs picked up? A. I seen them when they were all laid together.

Q. Did you see them picked up? A. I saw parts of them picked up.

Q. Do you know the names of the streets in this locality? A. Yes, sir.

Q. There is Hamilton Avenue there, isn't there? A. Yes, sir.

Q. What is the next street below that? A. Below that is Thirty-first Street.

30 Q. What is the distance between Thirty-first Street and Hamilton Avenue? A. How many feet?

Q. Yes. A. Well, about three hundred feet.

Q. That is about a three hundred foot block? A. Yes, sir.

Q. Where were these limbs which were being picked up, between what streets? A. The parts I saw were right in the centre of the track.

Q. With reference to Thirty-first Street and Hamilton Avenue, where were the limbs? A. Right between both Thirty-first Street and Hamilton Avenue.

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WILLIAM ZEILMANN.

Q. Were they all the way along the track between the streets or were they in some particular place?

A. Well, there were some parts lying down a little further towards Thirty-first Street; yes, sir.

Q. Was there any part in Thirty-first Street? A. Not that I know of; I came up too late to see that.

Q. Does Thirty-first Street cross Bergenline Avenue? A. No, sir. 10

Q. Where does it stop? A. It stops at Bergenline Avenue.

Q. On which side? A. Down on Bergenline Avenue.

Q. It runs from the east side of Bergenline Avenue over towards Bulls Ferry Road? A. Yes, sir.

The COURT: Does this witness know anything about this little building there? 20

Q. Is there anything on the corner of Thirty-first Street and Bergenline Avenue? A. On the corner of Thirty-first Street and Bergenline Avenue there is a little real estate office.

Q. On which side of Thirty-first Street is it; on the north or the south side? A. It is on the south-east corner of Thirty-first Street.

Q. That is, the farthest corner from the saloon? A. Yes, sir.

Q. And the saloon and the little building are in a diagonal direction from one another? A. Yes, sir. 30

Q. How far is this building that you say is on the corner of Thirty-first Street from the saloon? A. Well, it must be about three hundred feet; it is the whole block.

Q. And that is on the east side of Bergenline Avenue? A. Yes, sir.

Q. And the saloon is on the west side? A. Yes, sir.

(No cross Examination.) 40

ANDREW GERSHON.
DEFENDANT RESTS.

ANDREW GERSHON, recalled as a witness on behalf of the defendant, testifies as follows:

¹⁰ DIRECT EXAMINATION by Mr. Dixon:

Q. You arrested this motorman and recognize him as the man? A. Yes, sir; that is the man.

Q. After the accident, and that night, did he say to you, call your attention to the headlight and say to you, "Look at the bum light they give us"?

Mr. HOLMES: That is objected to.

²⁰ (Question withdrawn.)

Q. You saw George Merkle shortly before he left the ball, I understand? A. Yes, sir.

Q. Was there anything in his condition, which you could observe, that would make him lie down in the street; anything in his conduct?

Mr. HOLMES: Objected to.

³⁰ The COURT: There is nothing here to indicate that the man was at all under the influence of liquor.

Mr. DIXON: Was there any reason for his lying down, sickness or anything? It seems to me that is rebuttal. I want to show facts that would make the story told by this motorman extremely improbable.

⁴⁰ The COURT: So far as the case now shows, this man was sober, and there is noth-

ing to indicate to the contrary. I don't think this is proper rebuttal.

Objection sustained. Plaintiff excepts.

(No cross examination.)

TESTIMONY CLOSED.

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Mr. HOLMES: I ask the Court to instruct the jury to return a verdict for the defendant on the same grounds on which I moved for a non-suit, and, in addition, on the additional ground that the evidence on the part of the defendant has overcome any presumption in the evidence which has been offered for the plaintiff. The plaintiff's case does not disclose anything more than the car came along and ran over the deceased, and your Honor says that there is a presumption that he was taking due care of himself. Now, the defendant has given positive evidence which shows that he was not taking due care of himself. 20

The COURT: In what respect, what evidence?

Mr. HOLMES: In respect to the motorman's statement that this man was lying in the street. We are not expected to find a man lying in the street. We had a case before in which the plaintiff's intestate was presumed to have crossed the street and used care in doing that; now we have a case that he was not crossing the street; that he laid across this car track. I do not say how he got there. The fact is there by a witness. That is the state of the case. I say, upon that, that throws the burden back on the plaintiff to show by other evidence that the presumption that that was not so, and that he was struck and 30 40

was injured through the negligence charged in the declaration.

Motion denied; defendant excepts.

Exception allowed and sealed accordingly.

J. FRANKLIN FORT, (Seal.)

Justice.

Mr. Holmes then sums up for the defendant.

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The Court then took a recess.

AFTER RECESS.

Mr. Dixon sums up for the plaintiff.

The Court then charged the jury as follows:

Gentlemen of the Jury: Under the proof in this case it appears that, on the morning of April 14th, of
 20 this present year, George Merkle was killed, by being run over by a trolley car of the Jersey City, Hoboken and Paterson Railway Company, the defendant in this case, and the plaintiff has brought suit as the administrator of the deceased, alleging that this running over of George Merkle and the killing of him was due to the negligence of the Company, and asking for damages to the extent of the pecuniary loss to the next of kin, because of George Merkle's death.

30 There were no witnesses, save one, to the running over of Merkle by the trolley car. Mr. Berbour, the motorman, was the only witness, who has been called and testified in this case, who saw the accident. He says, as he was coming along with his car, he saw something in the road. He was apparently, from his testimony, not quite clear whether it was a man or an animal. He says that he did not see it until he was practically upon it. He at one time said, I think, that he was as near to him when he first saw him, as three feet; but, evidently, from his testimony, he did
 4 not see him until he was quite close upon him.

At the place where he came upon the body, it was dark, according to his testimony; to use his exact language: "It is a very dark spot right there." Now, just what he meant by that, how dark, you must judge as best you can, from the way he gave his testimony.

Of course, if Merkle went upon that track for the purpose of taking his life, then the Court charges you that he contributed to the accident which resulted to him, and there can be no recovery in this case. But, we are without proof upon that fact, even conceding the story of the motorman in this case to be true, if it is found by you to be true. 10

A motorman running a trolley car would not be free from negligence if he ran over a prostrate body in the highway, if, when he saw it, by the exercise of ordinary care he could have prevented the accident. If by the exercise of ordinary care he could have prevented the accident, it was his duty to prevent it. 20 The law gives him no privilege to run over people, because he has a car upon a track on the highway. As a matter of legal right, whether there was a prostrate body upon the track, or a pedestrian crossing the track, he is bound to exercise that degree of care which a reasonably prudent man, operating the car would exercise under the circumstances surrounding him, and that care must be exercised for the protection of the life and the property of others lawfully upon the highway. 30

Unless you can find from the evidence, that the fact that the deceased was upon the track was an act of his own which contributed to his death, that fact, of itself, would not otherwise justify a verdict in this case for the defendant.

But, if you conclude, under the evidence, that the motorman did exercise all the care which a reasonably prudent man would exercise when he discovered him; and that he discovered him as soon as he reasonably could under the circumstances, and he exer- 40

cised the care that a reasonably prudent motorman would exercise, and he ran over him under those circumstances, then there must be a verdict in this case for the defendant.

If you conclude, however, from the proof, that he was not upon the track, as the witness Barbour has testified, but that he was injured as he was crossing the track, then a number of other interesting questions arise in this cause.

If he were walking, and he walked in any way to his own injury, there can be no recovery in this case.

I am requested, by the defendant, to charge this proposition, which I do, namely:

20 "That the deceased was bound to use some care and caution before he attempted to cross the track in question, to see that the way was reasonably safe for him to do so; and, if the jury are satisfied that deceased used no care, and this absence of care contributed to cause his death, then their verdict must be for the defendant."

The Court has no difficulty in charging that proposition. If anything, the law is stronger with regard to the obligation of the deceased to be free from contributory negligence than that which is stated in the request. The care required is that care which a reasonably prudent man would take to protect himself under like circumstances.

30 The deceased left this dance hall early in the morning, going out upon Bergenline Avenue, starting toward his home,—the proof would seem to indicate that he went in the direction of his home. As he reached or drew near Thirty-first Street, the contention of the plaintiff is that he started to cross the track. The defendant's car was coming on Bergenline Avenue going north. He was going south. He had left the saloon on the west side of the street, and started to go, as the plaintiff contends, to Thirty-first street. He had to go along Bergenline Avenue 40a distance variously estimated by the witnesses at

one hundred and fifty to two or three hundred feet from the dance hall. On the southeast corner of the street was this little real estate building. There is no allegation that that was not his way to go home. It may not have been a well paved street, as has been suggested here, but there is no proof on that subject. It was a street. At least, something was open there known as Thirty-first Street.

Where was he when he was struck, and was he struck while walking? Because, he was either struck when crossing the street, or he was struck lying down; and, if you do not believe and accept the story of the motorman that he was lying down, then, how much credit will you give to the story of the motorman in this case. 10

If Merkle was crossing the street, what care was he bound to exercise? If you were crossing the the street in a populous part of the city, where traffic was heavy and active, in the middle of the day, you might say that a reasonably prudent man would be required to exercise a different degree of care from that which he might be required to exercise in the very early morning when there was no traffic around the street, when there were no care, practically, travelling, when there were no people about; he might then go along quite differently. 20

The degree of care which a man is required to take is the degree of care that a reasonably prudent man would take under the circumstances that surround him. 30

Now, what was the care that you think the deceased should have taken.

The law does not presume negligence in any person dead. Because, the law presumes that reasonable men act reasonably. 40

Contributory negligence is a defense. Of course you may gather contributory negligence from all the evidence in the cause, that which was introduced by the plaintiff and that which was introduced by the defendant; but the defendant has to establish the contributory negligence. It is a defence, and you must be satisfied under the evidence, that there was contributory negligence. You must be satisfied of
10 that, by the proof in the cause, some of the proof, either in the plaintiff's case or in the defendant's case, you may not infer it and you may not guess it out, you must have evidence of contributory negligence.

So, it is for you to say, what this man did which helped to cause this accident. If you cannot find any evidence in the case which tends to prove that his own negligence helped to cause this accident,
20 then you cannot find contributory negligence in the deceased.

If you do find anything in the proof which leads you to think that there was contributory negligence in the deceased, that is, that he did not exercise the degree of care in crossing which a reasonably prudent man would exercise under the circumstances, then you can find contributory negligence.

30 If you cannot find proof of contributory negligence, then you pass to the other proposition; because, the mere fact that he is not guilty of contributory negligence is not enough to hold this defendant. You must find more than that. You must find the defendant to be guilty of negligence which in some way was the proximate cause of the injury of the deceased. If this motorman, by the exercise of reasonable care in the management of his car could not have prevented the accident, of course, the defendant is not liable, notwithstanding the deceased
40 had not done any act of negligence. Or, if they both

were negligent, if you find the deceased was negligent, and the railroad company was negligent in the management of the car, there can be no recovery, because, when two persons are each guilty of negligence, the law leaves them just where they are, it will not settle the degrees of negligence.

Was this defendant company guilty of negligence which was the proximate cause of the killing of the 10
deceased?

The theory upon which the plaintiff comes to you, gentlemen, is, I think, two-fold, possibly three-fold, with regard to negligence:

FIRST. Under the proof in this case, this was a dark place. That is the defendant's proof.

SECOND. The car was being run at a speed not 20
less than eight miles an hour. That is the testimony of the motorman. The testimony of another witness in the cause called by the defendant, is that it was ten miles an hour. The testimony of a witness called by the plaintiff, a watchman, is, that it was running at twenty miles an hour. Now, it might be, that it would not be negligence to run a trolley car at this time in the night, when there was no traffic upon the street, at a much greater rate of speed than it would be proper to run it in a part of the day when the 30
street was filled with people and traffic. You might say that a certain speed would be negligence in the one case when it would not be in the other. But you must take all the surrounding circumstances in this case into consideration; the condition of the street, the condition of the light, the condition of the weather, the day of the week, the speed of the car, and the failure to sound the bell, and everything that has been testified to, and, on the question of 40
negligence reach your result from those facts.

How fast was that car going? You have heard the proof as to how far it went beyond the body, after the body was struck. It may have carried the body some distance. It would appear so, if you accept the testimony in this case that different parts of the body were scattered along the tract. The car was run back, some of the witnesses say, fifty feet. You will recall what the motorman said. I think he said thirty. And then he says, the car was twenty-five or thirty feet from the body, after he ran back.

Now, what rate of speed was he going? Did he have his car under such control as a reasonably prudent man in operating a car would have had, for the purpose of avoiding danger if danger was imminent? That is the degree of care cast upon him. The trolley cars have no rights in the public streets superior to the legal rights of anyone else. It is their duty to exercise the same degree of care in the operation of their cars that other persons are required to exercise in the operation of other vehicles in traveling upon the public highway.

Consider all the circumstances, and say whether you find, under the proof, that this defendant company was guilty of any act of negligence in the operation of this car which resulted in the death of the deceased. If you do, then you can render a verdict in this case, if you find no contributory negligence in the deceased, in favor of the plaintiff.

If you reach that conclusion, then, of course, you must approach the question of damages, and, gentlemen, this is a class of case in which the damages are peculiar. They are not like the ordinary accident case which you try, where a man loses his limb; there is nothing for pain and suffering, there is nothing for injury to feelings of friends and kindred. This is the coldest class of damages that the law recog-

nizes, and the statute fixes them, and I know of no other case where the statute does fix the character of the damages, in this State, it reads:

“In every such action, the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person.”

10

The deceased was a single man. He had no wife, he had no children; he had a father, and he is entitled to this fund under this statute, if you find a verdict.

Now, what is he entitled to? He is entitled to recover the pecuniary injury which resulted to him as the next of kin from the death of his boy.

In determining that there are many problems for you to consider.

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Chief Justice Beasley in the first case of this character that went into the Supreme Court, declared that this was the only class of cases in which a jury seemed to have the right to speculate, “and yet” he says, “the jury must not speculate.” And so, gentlemen, you must not speculate. You must take into account in reaching the damages, first the fact that this father may not live a year, and that he may live ten or twenty years or more. You must take into account the fact that this boy might have been killed in some other way, or might have died from some other natural cause, within a year. He might have died within five years. You must take into account the fact that this boy might have married and failed to contribute or give anything to his father. Because, it is just what he would have done for the father if he had lived. It is absolutely a matter of grace, so to speak, of this boy, toward the father. 40

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How much would he have given his father? That is how much pecuniary benefit would have resulted to the father if the boy had continued to live? And you must fix that sum now. This boy, if he had continued to live, and the father had continued to live, and he had remained single, would have given his father from time to time, they claim, certain sum of money out of the wages which he was earning, whatever the amount may be, about sixty dollars a month out of which he would have given his father as much as he saw fit. Now, you will have to consider what is he to receive today; you must, so to speak, capitalize it. That is the language of one of the opinions of the Court of Errors and Appeals. He is to get the money now, and the money, of course, carries with it, its interest from this time, so that you are to fix it not upon the basis of the boy's earnings for the next twenty years, of six hundred dollars a year and say he would have given his father three hundred dollars for twenty years. Nothing of that sort. You are not to figure that way. But you are to get at this upon some reasonable basis which you think—let me quote the statute—"which you think is just and fair." Listen to the language of the statute:

"The jury are to give such damages as they deem just and fair with reference to the pecuniary injury."

Now, gentlemen, that is the principle; just and fair damages under all proof in this case, for the pecuniary loss which this father has suffered as a result of this boy's death. How much would it have been? It is hard for you to ascertain, and you need to be careful. It is no advantage to be excessive. Do what you think is right, what the statute says, is just and fair, and no one can call in question your verdict.

Mr. HOLMES: I draw your Honor's attention to the part about sixty dollars a

month, I put it this way, the boy gave his mother forty dollars a month, and the father gave him five dollars a week, that he retained and three dollars he had from his mother out of the forty, and in addition he had his clothes out of that, and the cost of his board, so that all he actually contributed was 480, out of his earnings which were placed beyond his control, and out of that he got back the articles which I have just mentioned.

The COURT. It is not probable gentlemen, that he contributed even \$480. He got his board and clothing and spending money out of it, and all of that you want to take into account, of course. I did not go into all the details as to those matters of clothing, spending money and board. You must take all those things into account arriving at your verdict. 20

(The jury then retired.)

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NEW JERSEY SUPREME COURT.

	_____o)	
	JOHN MERKL, Admr., &c.,)	
	Plaintiff,)	
	Defendant in Error,)	
10	vs.)	
	JERSEY CITY, HOBOKEN)	In Tort.
	& PATERSON STREET)	Assignments
	RAILWAY COMPANY,)	of Error.
	Defendant,)	
	Plaintiff in Error.)	
20	_____o)	

And now, at this day, the said defendant, plaintiff in error, assigns the following causes of error.

1. Because after the plaintiff rested his case the Court refused to non suit the plaintiff, although a non suit should have been granted.
- 30 2. Because it clearly appeared from the evidence produced by the plaintiff that the plaintiff had been guilty of such contributory negligence as would bar a recovery in said action, and a non suit should have been granted.
3. Because the plaintiff proved no actionable negligence upon the part of the defendant and a non suit should have been granted.
4. Because the Court refused to direct a verdict 40 for the defendant upon the following grounds.

(1) That no negligence had been shown upon the part of the defendant, and

(2) That the plaintiff was guilty of contributory negligence.

Dated November 22, 1906.

BEDLE, EDWARDS & HOLMES,

Attorneys for and of Counsel 10
with the Plaintiff in Error.

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