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New Jersey ~~Supreme Court~~ Court of Errors and Appeals.

Notice and Grounds of Appeal

HUDSON COUNTY CIRCUIT COURT

I. Ross McCombe, Administrator *Ad prosequendum* of the Estate of Jeremiah J. Saunders, deceased, Plaintiff, vs. Public Service Railway Company,	Action at law.

To Lefferets S. Hoffman, Esq., Attorney for Defendant:

Take Notice that the plaintiff appeals to the New Jersey ~~Supreme Court~~ Court of Errors & Appeals, in the last resort in all causes, from the whole of the judgment entered in this cause, on the following ground:

1. The trial judgment directed a nonsuit, when he should have submitted the case to the jury.

Dated, March 17, 1920.

ALEX. SIMPSON,
Attorney for Plaintiff.

New Jersey State Library

Summons

THE STATE OF NEW JERSEY TO PUBLIC SERVICE RAILWAY COMPANY

(Seal) You are summoned to answer the annexed complaint of Annie Saunders, Administratrix of the Estate of Jeremiah J. Saunders, deceased, in an action at law in the Circuit Court of the County of Hudson. And take notice, that unless you file your answer to said complaint with the Clerk of said Court, within TWENTY DAYS after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, LUTHER A. CAMPBELL, Judge of the Circuit Court of the County of Hudson, at Jersey City, this thirty-first day of December, Nineteen Hundred and Seventeen.

JOHN McGOVERN,
Clerk.

Alex. Simpson,
Attorney.

Complaint

HUDSON CIRCUIT COURT

ANNIE SAUNDERS, Admx. of Jeremiah J. Saunders, deceased, Plaintiff, vs. PUBLIC SERVICE RAILWAY COMPANY, Defendant.	Action at Law.

The plaintiff who resides at 328 Main Street, in Charlestown, Massachusetts, says that: She is the administratrix of the estate of Jeremiah J. Saunders, deceased and brings into Court Letters of Administration granted to her upon said estate by the Surrogate of the County of Hudson.

1st. The defendant is a corporation of the State of New Jersey, operating an electric street railway along a public highway known as the Newark Plank Road, at

2d. The intestate of the plaintiff at Jersey City in the County of Hudson, was killed by the negligence of the defendant, on the sixth day of November, 1917.

3d. The negligence of the defendant consisted in this:

The intestate of the plaintiff was upon a public highway known as the Newark Plank Road, where the same traverses a bridge, upon which bridge the defendant operated an electric street railway, and the defendant propelled against the intestate

of the plaintiff an electric car, at great speed, without giving any signal of the approach thereof and without using reasonable care to keep a lookout for plaintiff's intestate, although it was night and without using reasonable care to illuminate its said car and illuminate the road in front of the said car so that its servants could ascertain the presence of the intestate of the plaintiff, and operated said car at great speed and did not use reasonable care to keep control of the motion of said car.

4th. The intestate of the plaintiff was at all times in the exercise of due care for his safety.

5th. The intestate of the plaintiff by reason of the accident before described died as the result of said injuries.

6th. Intestate of plaintiff left him surviving next of kin who have suffered pecuniary injury by reason of his death.

7th. The within action is commenced within twenty-four calendar months after date of death of said intestate.

The plaintiff demands $10,000.

ALEX. SIMPSON,
Attorney of Plaintiff.

Answer

HUDSON COUNTY CIRCUIT COURT

ANNIE SAUNDERS, Admx. of Jeremiah J. Saunders, deceased, Plaintiff, vs. PUBLIC SERVICE RAILWAY COMPANY, Defendant.	Action at Law.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, says that:

1. It admits the first paragraph of the complaint.

2. It denies the second, third, fourth, fifth, sixth and seventh paragraphs of the complaint.

DEFENSES

1. By way of defense the defendant alleges that the plaintiff's intestate was guilty of negligence which contributed to the happening of the accident.

LEFFERTS S. HOFFMAN,
Attorney for Defendant.

Certificate of Register Granting Administration Ad Prosequendum to Plaintiff

STATE OF NEW JERSEY PREROGATIVE COURT

I, THOMAS F. MARTIN, Register of the Prerogative Court of the State of New Jersey, DO CERTIFY that on the fourteenth day of February, in the year of Our Lord one thousand nine hundred and twenty, Administration *Ad Prosequendum* was granted by me to I. Ross McCOMBE, for the purpose of enabling him to prosecute an alleged claim of the widow and next of kin of the said JEREMIAH J. SAUNDERS, against the Public Service Railway Company, who it is alleged caused the death of the said JEREMIAH J. SAUNDERS, by its wrongful act, neglect or default.

WITNESS my hand and Seal of Office, the eighteenth day of March, in the year of our Lord one thousand nine hundred and twenty.

(Seal) THOMAS F. MARTIN,
Register.

Notice

These letters of administration do not authorize the administrator hereby appointed to receive any moneys in settlement of any claim for damages, either before or after suit, or to collect claims against the estate of his intestate or to receive assets of said estate; but are issued for the sole purpose of enabling the said administrator to prosecute a claim for damages alleged to have been sustained by reason of his intestate's death, having been caused by the wrongful act, neglect or default of the person herein named. See P. L. 1917-Chapter 180.

Stipulation

HUDSON COUNTY CIRCUIT COURT

ANNIE SAUNDERS, administratrix of Jeremiah Saunders, deceased, Plaintiff, vs. PUBLIC SERVICE RAILWAY COMPANY, Defendant.	Action at Law.

WHEREAS on the seventeenth day of March, Nineteen hundred and twenty, during the trial of the above entitled case, it was stipulated in open court that I, Ross McCombe, administrator *ad prosequendum* of the Estate of Jeremiah J. Saun-

ders, should be substituted as plaintiff in the said cause in the place and stead of the said Annie Saunders, administratrix of Jeremiah Saunders, deceased.

Now this is to ratify the said stipulation, and in furtherance of such ratification it is hereby stipulated and agreed that in all proceedings taken in the said cause on and after the seventeenth day of March, Nineteen hundred and twenty, the name of the plaintiff in the said cause shall be considered to be I. Ross McCombe, administrator *ad prosequendum* of the estate of Jeremiah J. Saunders, deceased, instead of Annie Saunders, administratrix of Jeremiah Saunders, deceased.

ALEX. SIMPSON,
Attorney of both original and substituted Plaintiff.

LEFFERTS S. HOFFMAN,
Attorney of defendant.

Rule for Judgment

HUDSON COUNTY CIRCUIT

ANNIE SAUNDERS, Administratrix *ad prosequendum*,
Plaintiff,
vs.
PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

Amended so as to read

I, ROSS MCCOMBE, Administrator of the Estate of Jeremiah Saunders,
Plaintiff,
vs.
PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

Action at Law.

This action was tried before Judge Luther A. Campbell, with a jury at the Court House in Jersey City, on Wednesday, March 17th, 1920. The evidence of the plaintiff having been given and the defendant Public Service Railway Company having moved for a nonsuit, and the Court having heard the argument of the respective counsel and having considered the matter and being of the opinion that the motion of the defendant should be granted and the plaintiff nonsuited, it is on this 17th day of March, 1920, ORDERED that judgment of nonsuit be entered in favor of the defendant and against the plaintiff.

Rule actually entered March 19, 1920.

On motion of
Lefferts S. Hoffman,
Attorney for Defendant.

Testimony

HUDSON COUNTY CIRCUIT COURT

ANNIE SAUNDERS, Plaintiff, vs. PUBLIC SERVICE RAILWAY COMPANY, Defendant.	At law.

Appearances:
Alexander Simpson for the plaintiff.
George Blake for the defendant.

The above entitled case was tried March 17th, 1920 before HONORABLE LUTHER A. CAMPBELL, Judge, and a jury.

Mr. Simpson: I would like to make the suggestion on the record in the nature of an amendment that I. Ross McCombe has been appointed by the chancellor administrator *ad prosequendum* in this case so as to keep the records clean.

The Court: Administrator *ad prosequendum* of Jeremiah J. Saunders, deceased.

Mr. Simpson: Yes, sir.

The Court: All right.

Mr. Simpson opened the plaintiff's case to the jury.

Mr. Blake opened the defendant's case to the jury.

Mr. Simpson: Is Mr. Powers here?

(No answer). I told him to subpoena Powers. I don't know whether he did or not. I will call Mr. Cavanaugh.

WILLIAM J. CAVANAUGH, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. Sixty-two Cottage Street.

Q. On the 7th of November, 1917, where were you employed? A. Hudson County bridge, Newark Avenue bridge.

Q. The bridge over the Hackensack? A. Over the Hackensack River.

Q. Now, what is the first thing you knew of the accident that night? A. When a chauffeur came up to the Boulevard and notified me to call the ambulance—

Q. After that notification you went to the bridge, didn't you? A. In the automobile, yes.

Q. Did you see Jeremiah Saunders there? A. Yes, sir, laying on the track.

Q. Where was he when you saw him? A. He was lying on the west bound track.

Q. And what was his condition? A. Why, one leg was off.

Q. Was it completely off? A. Yes, sir.

Q. Cut sharply off? A. Yes, sir.

Mr. Blake: That is directly leading.

Q. And what was the condition of the rest of his body? A. Why, his left arm was cut here, about, and he was trying—

Q. Cut where, above the elbow or below the elbow? A. No, right below the elbow.

Q. Was it completely severed? A. It was bent back.

Q. Bent back? A. Yes, sir.

Q. And what was the condition of the rest of his body? A. His other leg—his other leg was bent underneath him.

Q. And where was the leg that was cut off? Was it on the rail or not? A. On the rail.

Q. Which rail? A. On the west bound track on the south rail.

Q. And what did you do then? A. I asked the chauffeur for a blanket—it was cold that night—or a robe to put under his head. So he said he didn't have it. I run to the shanty and got a blanket and I put it underneath his head.

Q. And then what happened? A. I asked him his name. He said Harry—

Mr. Blake: I object to any conversation.

Mr. Simpson: I think it is part of the *res gestae* under Cooper against the Railway; where the man was driving a horse and the horse got shocked with electricity; and what the man said at the time was held to be part of the *res gestae*. This was exactly at the time when the man was first found.

The Court: You asked who, the injured man?

The Witness: I was talking to Saunders, the injured man.

The Court: Is there any controversy in this case?

Mr. Blake: Yes, sir; there were no conversations held with this man.

The Court: I mean any controversy over the identity of this dead man?

Mr. Blake: Oh, no. There is objection to any conversation had with the man. I am willing to admit for the purposes of the record that the man's name was Jeremiah J. Saunders who subsequently died as the result of the injury he had sustained.

Mr. Simpson: Well, I am entitled, I think, to what the man said, because they may contend that the man was so drunk that he didn't know where he was at, and I think I have a right to show that he was able to talk and that his name was whatever he said it was, and that he said what hit him, and I am going to try to prove what hit him.

The Court: That is what, for the purpose of showing—

Mr. Simpson: That it was a trolley car that hit him.

Mr. Blake: Oh, now, your Honor, that is the rawest thing I ever heard. I ask that a jury be withdrawn and a mistrial be declared because of the remarks of counsel.

Mr. Simpson: It is in response to a question by the court.

The Court: I will decline to withdraw a juror.

Mr. Blake: Your Honor will allow me an exception.

The Court: I will say to the jury that they are not to take into consideration what counsel may have said, because it is not evidence as yet, and you are only to pass

upon what is evidence and when it becomes evidence.

Q. (Repeated by the stenographer). And then what happened?

The Court: Well, the answer was really not responsive to the question as put.

Mr. Simpson: That is not an objection of the other side; that is my objection.

Mr. Blake: Then I will move that the testimony be stricken out on the ground that it is hearsay.

Mr. Simpson: Of course, I object to that on the ground that it is competent testimony, being remarks or exclamations made by a wounded man when his body was first found, and under those circumstances I think it is admissible.

Mr. Blake: May I suggest to the court the testimony of this witness—this witness was up on the Boulevard in Jersey City and that a man came up in an automobile and reported an accident down on the bridge, there was a man down there and they wanted an ambulance. This man went down on the bridge from the Boulevard and found the man there. He asked for a blanket, couldn't get it, and went to the shanty and got a blanket and came back. Now, counsel says these were exclamations made at the time the body was first found, which manifestly cannot be so if the witness is telling the truth.

The Court: *Res gestae* only applies, does it not, Senator, to remarks that may have been made immediately at the time of the happening.

Mr. Simpson: I do not think so. I think Mr. Wheatmore lays down the true test, which is that it is a remark so influenced by the main events as to be a part thereof, and that the lapse of time is only an element; that a remark may be a part of the *res gestae* although made long after the main events if it is so influenced by the main event as to be part of the main event.

The Court: Well, I have very great doubt about it. I will refuse to strike it out, however. Take your exception.

Mr. Blake: Your Honor will allow me an exception.

Q. And then what happened? A. I asked him his name and he said "Harry."

Mr. Blake: I make the same objection as to any conversation had with the deceased, your Honor, and ask that that be stricken out.

The Court: I will decline to strike it out, although I am very doubtful about it, and I will ask you to take your exception, and you may have your objection on the record.

Q. What else happened? A. Why, I then asked him how he was hurt and he said the trolley car—

Mr. Blake: Same objection to the question. He is now asking for his name; he is asking how much he was hurt. I object to it on the ground that it is hearsay, and on the further ground, of course, that it is not shown to be a dying declaration, and it is not within the rules of *res gestae.*

The Court: I am again very doubtful.

Mr. Blake, and you may have your objection on the record. I think it is irrelevant, but if counsel insists on it—

Mr. Blake: Allow me an exception.

Q. Then go on, Mr. Cavanaugh. Tell what happened after that. A. Why, I carried him up and I took the short end of his arm, and I put it on the blanket, because he was trying to rub it into the dirt, into the gutter to get up.

Q. What kind of a movement was he making to get up? A. He was trying to get over on his stomach and trying to rub—well, as if to put his hand down to brace himself up.

Q. And then what was done with him? A. I kept looking up the avenue waiting for the ambulance. I covered him up as good as I could.

Q. And where was he lying with reference to the west bound track? Can you describe which way his head was pointing? A. His head was east.

Q. That is towards New York? A. Towards New York.

Q. And he was lying in what kind of a position? In what kind of a position was he lying? A. He was just laying across the tracks.

Q. That is directly across? A. Directly across. His head was on the track nearest to the gutter.

Q. Was it on the inside of the track? A. On the inside.

Q. On the inside. And how long did he lie there before the ambulance came? A. Fully twenty minutes.

Q. Twenty minutes. And then what was done with him? A. He was still conscious until the doctor came.

Q. Which doctor came? A. Why, I don't know the doctor's name; but he gave him a hypodermic of some kind.

Q. And then after the hypodermic did he seem to become quiet? A. Yes, sir.

Q. He was taken away in the ambulance? A. I helped him put him in the ambulance.

Q. You worked on that bridge, didn't you? A. Yes, sir.

Q. How long had you worked on the bridge before the accident? A. About three years.

Q. And when you got there was there a trolley car there? A. Yes, sir.

Q. Where was it standing? Had it yet reached the man or was it standing this side of the man? A. There was one car going east, standing.

Q. Going east, standing? A. Yes.

Q. That was going towards New York? A. Yes, sir.

Q. But he was on the west bound track. And did that car have a head light on it? A. Yes, sir.

Q. What kind of a head light? Can you describe it? A. Well, an ordinary electric.

Q. Well, how far would it carry? Could you tell how far it threw? A. I judge about twenty feet.

Q. And what lights were there on the bridge that night, if any? A. There is five—five little electric bulbs, like, overhead.

Q. You mean in one cluster or singly? A. Yes, sir.

Q. How near to the draw was this man when you found him lying there? A. About two feet.

Q. That is two feet east or west of the draw? A. Two feet east of the draw.

Q. Do cars when they go over that point make any jar at all? Is there any physical condition there that makes them jump from one track to another? A. Yes, sir; jumping from the approach on to the bridge.

Q. That makes a jolt, does it? A. There is a lifted rail there.

Q. And that would make a jar? A. That makes a jar.

Q. What time had you left work on the night of this accident? A. Four o'clock in the afternoon.

Q. Had you been on duty at night on that bridge —for how long before this accident? A. A. week before I was on nights.

Q. No, I mean for how long a time, six months or a year or how long? A. We change one week days and one week nights.

Q. Yes, but how long had you worked on the bridge before the accident? A. How long have I worked on the bridge?

Q. Yes. A. Three years.

Q. A year or two years? A. Three years.

Q. Before the accident? A. Yes, sir.

Q. About what time of night was it that you found this man lying there? A. About eleven fifty-five.

Q. Had you noticed before—don't answer this question because there may be an objection to it, until we get the court's ruling—had you noticed the custom of the motormen going over that bridge, as to making speed when they hit that bridge about this time of night?

Mr. Blake: That is objected to, your Honor, what the custom was.

The Court: I will sustain the objection.

Mr. Simpson: I ask for an exception.

Q. Now, did you examine the track where the man's body was found to see whether there was any blood on the rail or not? A. Yes, sir; the next morning.

Q. And was there any blood? A. The next morning; yes, sir.

Q. Where was the blood? A. It was on the car tracks.

Q. On the car tracks. Now, which rail was that blood on? A. It was on the south track on the—

Q. And with reference to where the leg was cut off, where was the blood? A. It was on the wooden pavement and on the track.

Q. Well, I mean with reference to—at night you saw his leg cut off lying, according to you, one part outside and one inside of the track. Now, with reference to that track where you saw the leg, where was the blood? A. Well, the blood was on the bridge.

Q. With reference to the place where you saw his leg? A. Well, I judge it to be about a foot away.

Q. From where you saw the leg? A. Yes, sir.

Q. Did you find anything else there the next morning? A. Yes, sir. I found a shin bone on the bridge, on the draw.

Q. Where did the find the shin bone? A. Right between the tracks.

Q. Where with reference to where his body was lying? A. That is about three feet from where his body was lying.

Q. And what did you do with the shin bone? A. Why, we opened up the draw and I pushed it over board.

Q. Into the river? A. Into the river.

Q. How long is that bridge there, only approximately? A. It is about one hundred and seventy-five feet.

Q. And how wide is it? A. It is about forty.

Q. And where are the car tracks with reference to the bridge? Are both car tracks in the centre of the bridge or are they to the north or to the south side? A. They are right next to the gutter.

Q. Right next to the gutter. What part of the bridge do the automobiles use? A. The centre.

Q. The centre of the bridge. The tracks, you say, are close to the gutter? A. Right close to the gutter.

Q. Well, as I understand you, the track going to Newark is to the right-hand gutter and the track coming from it is to the left-hand gutter? A. Yes, sir.

Q. And in the centre is the place for the traffic, the vehicular traffic? A. Yes, sir.

CROSS-EXAMINATION by Mr. Blake:

Q. I understood you say, Mr. Cavanaugh, that you were up at the Boulevard when you first learned of the accident? A. Yes, sir.

Q. And that is how far from the bridge? A. About three-quarters of a mile, I think.

Q. About three quarters of a mile. And the first you knew was when someone came in looking for a telephone to get an ambulance? A. Yes, sir.

Q. Then you rode back to the bridge, this three-quarters of a mile in the automobile? A. Yes, sir.

Q. And when you got there you saw this body on the track? A. Yes, sir.

Q. Was it across both the rails of the west bound

track when you saw it? A. No, sir. His legs was across one rail and his head was laying on the other rail.

Q. His head was on one rail and the leg on the other. Which rail was his head on? A. His head was on the north rail next to the gutter.

Q. Next to the gutter? A. Yes.

Q. And his leg was across the south rail? A. South rail.

Q. Is that true? A. Yes, sir.

Q. And he lay in that position when you got there? A. Yes, sir.

Q. And his head was then extending up the river or north, wasn't it? A. No—well, it was in a cat-e-corner way.

Q. And his feet down the river? A. Yes, sir.

Q. The one leg was cut off, you say? A. Yes.

Q. Where? A. Just below the knee, I believe.

Q. Below the knee, and arm? A. Yes.

Q. You attempted first to get something under his head, didn't you? A. Yes, sir.

Q. And you couldn't find anything in the automobile, and went up to your shanty and then came back and picked the man up? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. You are familiar with the general situation there, aren't you? A. Yes, sir.

Q. I show you a picture and ask you if that is a correct representation of the bridge looking from Jersey City toward the Newark end? A. Yes, sir.

Q. Is that the way it looks? A. Yes, sir.

Q. On the right-hand side of the bridge there is a sidewalk, isn't there? A. Yes, sir.

Q. Commencing up with the sidewalk on the north side of Newark Avenue? A. Yes, sir.

Q. And continuing on across the bridge; there is also a sidewalk on the south side of the bridge, isn't there? A. Yes, sir.

Q. And that sidewalk is divided from the main highway by the girders of the bridge that pass up and down? A. Yes, sir.

Q. Making a distinct passage way there, isn't it? A. Yes, sir.

Q. There is also a curb to step down, from six inches, before you get to the roadway, isn't there? A. Yes, sir.

Q. The trolley cars go to Newark on this track over here marked X, don't they? A. Yes, sir.

Q. There is nothing to prevent automobiles from running on the tracks as they cross the bridge, is there? A. No, sir.

Q. And, as a matter of fact, because of the condition of Newark Avenue—rough condition—the trucks do run up on the rails all the way across the bridge, don't they? A. Yes, sir.

Q. Isn't that true, sir? A. Yes, sir.

Q. You found the body, you say, near the draw; is that correct? A. Yes, sir.

Q. The draw is on the west end of the bridge, isn't it? A. Yes, sir.

Q. The last span? A. The last span.

Q. And how far away was he from that draw, would you say? A. About two feet.

Q. About two feet. Now the draw is the place—when you speak of the draw—where it swings down to the approach of the bridge; isn't it? A. Yes, sir.

Q. And now, there is a lift there—a lift rail, as you call it, when the draw is open you have to lift that, don't you? A. Yes, sir.

Q. And then you drop that down, don't you? A. Yes, sir.

Q. When the trolley cars proceed and hit that point they go down with a jump? A. Yes, sir.

Q. Then the first trucks go over with a bang and the second trucks go over with a bang? A. Yes, sir.

Q. I mean it is quite a jar when they go over there, isn't it? A. Yes, sir.

Q. The trolley car goes down about how far? A. About half an inch.

Q. And the same way when it leaves the draw on the west end? A. Yes, sir.

Q. What time of night did you say it was that the accident occurred? A. I don't know what time of night it occurred.

Q. Now, the Koppers Coke Works that has been talked about is on the west end of the bridge, isn't it? A. Yes, sir.

Q. And to the north of the turnpike? A. Yes, sir.

Q. And this is the sidewalk on the right-hand side leading across the bridge, isn't it? A. Yes, sir.

Q. I will mark that with an S. That is the sidewalk leading off on the right-hand side of the bridge? A. Yes, sir.

Photograph marked D-1 for identification.

Q. The highway over the bridge of the Newark Turnpike leads out in connection with the Belleville Turnpike, doesn't it, about a mile or so west of the bridge? A. Yes, sir.

Q. And they have heavy traffic over that bridge? A. Yes, sir.

Q. Large trucks and automobiles and pleasure cars.

Mr. Blake: That is all.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. You say you have large traffic truck and pleasure cars. What part of the roadway do they go in? A. Centre of the bridge, mostly.

The Court: I did not get the last.

A. (Repeated by the stenographer) Centre of the bridge, mostly.

Q. Well, the traffic is where, the automobile trucks? Is it the same place as the car tracks? A. No, sir; they run in the centre of the bridge.

Q. That is what I want to know. And about eleven o'clock that night or half past ten would you have a heavy traffic of automobile trucks that you have in the day time? A. Day time—very seldom.

Q. Very seldom you have heavy trucks at night? A. It is the pleasure cars you see.

Q. At night? A. Yes, sir.

RE-CROSS-EXAMINATION by Mr. Blake:

Q. You have seen trucks go over there at night, haven't you? A. Very seldom you see trucks go over at night.

Q. And trucks don't run but very rarely over the Hackensack bridge, over the turnpike?

Mr. Simpson: I object to that.

Q. I say at night, they run very rarely? A. Yes, sir.

Q. Don't have any night express coming across there in automobile trucks? A. Very seldom you see a truck.

Q. But don't you have regular express trucks running across there nights? A. You see one about maybe every hour.

Q. About once an hour? A. Yes, sir.

Q. You see at least one an hour, don't you? A. Yes, sir.

Q. And it is not unusual for the trucks to cross that bridge on the trolley tracks, is it? A. Well, that track is so close they are liable to hook up with the girders there.

Q. But you have seen trucks going across the tracks? A. I would not say they were always on the tracks, but they run between the tracks.

Q. I didn't ask you whether they were always on the tracks. I asked you whether you had seen trucks on the tracks? A. Yes, sir.

Q. Have you seen them running across with their wheels between the tracks? A. Yes, sir.

Q. And you frequently see them running across with their right-hand wheels in the south-bound tracks, don't you, and their left-hand wheel out in the roadway? A. Well, at times; yes, sir. Pardon me. At times I have.

Mr. Blake: Certainly. That is all.

Mr. Simpson: That is all.

(Witness excused.)

DANIEL KENNY, sworn:

Direct-examination by Mr. Simpson:

Q. Mr. Kenny, you were a bridge tender on the night of this accident, November 7th, 1916, weren't you? A. Yes, sir.

Q. And where was your post? A. Well, I happened to be in the shanty at the time.

Q. Well, where is the shanty with reference to the place where the body was? A. It was on the west side of the river, right close to the draw.

Q. Right side of the river? A. Right close to the draw.

Q. And what was the first you knew about the accident? A. A motorman came in and told me there was a man laying injured on the draw. I took a white light and went out and looked him over.

Q. Where was he lying? A. He was laying face down, facing east, on the east end of the draw laying close to the north bound rail when I seen him.

Q. And what was the condition of his leg? A. Well, it was taken off clean as far as I could see. I didn't look much at him. I was very sick. I wasn't able to stand. The sight was too much for me.

Q. I see. Where was the leg that was taken off clean? A. I couldn't say. It must have laid under him.

Q. And did you notice any blood there at all? A. There wasn't much blood; probably about a pint in the gutter.

Q. Where was that? A. There was some dark spot on the rail; I couldn't see what it was.

Q. The dark spot, looked like blood? A. Well, I couldn't say that.

Q. Well, it was a dark spot, anyhow? A. Yes.

Q. And about a pint of blood that you will say was blood. Where was that? A. It laid between the curb and the rail and the gutter.

Q. Do you mean the right-hand of the rail looking towards Newark— A. I mean the north rail. It lay between the north rail and the gutter.

Q. Well, the gutter is the gutter that is north of the rail? A. Yes, sir.

Q. And that pint of blood was there? A. Well, about a pint I should judge.

Q. How long before you came to the body had you noticed a car going to Newark? A. Well, I could not say; probably fifteen minutes.

Q. Did you notice whether it went fast or slow or how it went? A. Well, now, I couldn't say that. You see, I was sick that day, and I was in the shanty all doubled up with cramps, and I wasn't paying any attention to anything outside.

Q. To anything outside of yourself. And the car that you saw came about fifteen minutes before you found the body and— A. Well, I didn't see the car go. I heard the car.

Q. You heard the car. Well, from what you heard could you tell whether it was going fast or not? A. Well, no, at an ordinary speed.

Q. Ordinary speed. What is the ordinary speed over the bridge? A. Well, they are supposed to go very slow; I could not exactly say.

Q. You don't know what speed he went over? A. Regular speed.

Q. Well, those cars that go over there have a head light on, don't they? A. Yes, sir.

Q. What kind of lights were there on the bridge? A. Well, there was a cluster of five lights on each end of the draws, and then there is a couple of "arch" lights on the bridge, east end.

Q. Well, how far is that from the place where the body was found, where this cluster is of lights? A. The cluster?

Q. Yes. A. That was right on the end of the draw, where the man was laying, right over the centre of the draw.

Q. Where he was lying. How far from where he was lying, sir? A. He was lying on the side, and right about in the centre of the draw was the cluster, back probably—

Q. How many feet from where he was lying? A. Well, I couldn't say.

Q. What? A. I couldn't exactly say.

Q. I am not asking you to say exactly. I am asking you to give me an estimate of how far this cluster was from where the body was lying? A. Well, ten foot, I guess.

Q. And how far did this cluster throw the light? A. How far away would it throw from where it was? A. Well, it would throw around twenty foot, I guess.

Q. Did you hear any cry for help that night or any exclamation before you went to find the body? A. No, I did not.

Q. What time did you go out to look for the body? A. Well, it must have been about eleven-fifty.

Q. Eleven-fifty? A. Yes.

Mr. Simpson: That is all.

CROSS-EXAMINATION by Mr. Blake:

Q. Was the leg cut entirely off when you saw it, sir? A. It looked to be so.

Q. And you don't know how long the body had been there, do you, of your own knowledge? A. Well, when I reported for duty about eleven o'clock I took a white light and went around the shanty down below, and then I went down in the

middle of the road and looked across. There wasn't anything on the draw that I could see, no wagon or anything else.

Q. The next thing the man came down to your shanty— A. The next thing the motorman came in and told me.

Q. Told you there was an accident. What was it the motorman told you? A. He said: "Do you know there is a man lying injured down on the draw?"

Mr. Blake: That is all.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. Who was the motorman? Do you see him in the room here? A. I believe his name was Duffy. I don't see him.

Mr. Simpson: Is Mr. Powers here? I won't be able to go on, your Honor, if this man Powers does not come here. He is the motorman of the defendant.

The Court: When was he subpoenaed?

Mr. Simpson: Yesterday. I told my office to subpoena him and I presume they did subpoena him. If he is not I will ask for a continuance, because I would not have moved this case if I had not thought he was here.

Now, this is testimony taken, your Honor, by consent.

ANNIE SAUNDERS, having been duly sworn testified as follows:

Direct-examination by Mr. McCombe:

Q. You are the plaintiff in the above entitled action? A. Yes, sir.

Q. The widow of Alexander Saunders? A. Jeremiah.

Q. What? A. Jeremiah J.

Q. What is that answer? A. Jeremiah J.

Q. Yes. Do you recall the night of the 6th of—

Mr. McCombe: When was that, George? November?

Mr. Blake (Handing complaint to Mr. McCombe).

Q. Sixth day of November, 1917? A. Yes, sir.

Q. Where was your husband working at that time? A. Koppers Coke Works.

Q. How long had he been working for the Koppers Coke Company? A. I think it was two weeks and five days when I got the message he was dead; he was killed.

Q. Just simply answer the questions as I ask them. A. A week or two; a week anyway; I imagine a week.

Q. Just remember as nearly as you can. Do you recall? A. About that time.

Q. Prior to that time where had he been working? A. Worked in Camp Devens.

Q. Camp Devens. Did he contribute to your support? A. Yes; he sent me down money.

Q. How much did he contribute per week to your support? A. Twenty dollars he sent down.

Q. How long had he been contributing this twenty dollars a week? A. From June to October; June to October.

Q. June 1917? A. Yes.

Q. Until October 1917? A. Yes; he was through up there.

Q. And then he started with Koppers? A. He started over this way, on the 16th of October.

Q. Yes. Do you know what he was earning at Koppers? A. Five dollars a day.

Q. Five dollars a day?

Mr. Blake: That is hearsay. I will ask that that be stricken out.

Mr. McCombe: She knows what he was earning.

Mr. Blake: Only by hearsay. That is the only way she could know it. That is my objection.

Q. Did he tell you how much he was earning at Koppers? A. No, but the man that works told me.

Mr. Blake: Objected to, and I ask that that be stricken out.

Mr. Blake: I objected to that and asked that it be stricken out.

The Court: It is hearsay.

Q. Who told you he was earning five dollars a day? A. One of the head bosses over there.

Mr. Simpson: There is no objection to that.

Q. What is his name? A. Just a minute—I can't think of it—Mr.—I can't think of his name; but they gave me his pay, anyway, what was due to him. I can't think of his name.

Mr. Blake: We can find it from the record.

Mr. Blake: Now, if your Honor will permit me, you have not ruled on that objec-

tion of mine that this was founded upon hearsay, and it should be stricken out.

Mr. Simpson: I make no objection to striking out what he objected to; but I do object to striking out the following question which reads: "Who told you he was earning five dollars a day?" "One of the head bosses over there." There is no objection to that and I object to having that struck out.

The Court: There was no objection entered to it, I do not think I should strike it out. The others, I think, should be stricken out.

Q. You say he was paying you for your support and family twenty dollars a week from June until—October.

Q. —October? A. Yes, sir.

Q. Prior to that time where had he been working? A. Before that?

Q. Yes. A. He was teaming.

Q. What? A. Teamster.

Q. What had he been earning then? A. Twenty-two dollars; some weeks more, overtime.

Q. What did he contribute to your support? A. Oh, I got it all. Whatever he made I got it all, this twenty or twenty-five; I got whatever he earned.

Q. How long had he been working as teamster prior to the June you mentioned? A. Oh, he has been always a teamster. He always was a teamster until he got this work up at Camp Devens.

Q. And he had been earning from twenty or twenty-two or more a week? A. Yes; he was time keeper and foreman on the job at Camp Devens,

when they were building the Camp up there for the soldiers.

Q. Had he been working steadily? A. Yes; he always worked steadily.

Q. How long had he been working steadily? A. Oh—

Q. Prior to his death? A. Oh, he was working from June until October, till he left to come here; that was the only time he was leaving the children to come here, the few days to get here.

Q. Have you any children to the marriage? A. I had twelve. I got these two living.

Q. You had how many? A. Twelve.

Q. How many are living now? A. Two living and ten dead.

Q. What are the names of the children? A. Chester and Helen are living now.

Q. How old is Helen? A. She will be thirteen the 21st of April. Chester will be eleven the 29th of September, this coming.

Q. When were you married to Mr. Saunders? A. 1895, the 19th day of August.

Q. Did you continue to live with him as his wife up to the day of his death? A. Yes, sir; always.

Q. Was he a continuous worker? A. He was—

Q. Was he? A. Always.

Q. Worked regularly? A. Yes, sir; teamster; always a teamster.

Q. Was he a healthy man? A. He was healthy; never sick a day in his life.

Q. During the time of your marriage at all? A. Never was sick a day from the day I married him until I got the notice he was killed; never sick a day.

Q. So that he continuously supported you and your children from the date of your marriage right up to the date of his death, on an average of twenty dollars a week? A. Twenty dollars a week.

Mr. Blake: I press the objection.

The Court: Well, what would be the objection to it except it might be said to be a leading question? Which it does become because the question puts in the mouth of the witness practically the answer she should make, and all she need to do to adopt it as an answer would be to say yes or no. I will not strike that out.

Mr. Blake: Allow me an exception.

Q. From the time of your marriage right up until he left his position as teamster what was he giving you toward the support of the household? A. Well, he always gave—

Q. Well, just stop and think before answering the question. Just stop before you answer it? A. He gave me whatever he earned. He never kept—

Q. What was the least he ever gave you in any particular week during the time of your marriage along? A. Oh, the least I ever got was about twelve to fifteen dollars, because teamster's pay wasn't high then. Teamster's pay wasn't high. Twelve to fifteen.

Mr. Simpson: Now, I do not think I will offer any more of this testimony.

The Court: Is there anything in there which gives the age?

Mr. Simpson: No. I am going to put in the death certificate. They neglected to prove his age, but I have a death certificate I will put in to prove his age.

The Court: And the widow's age, isn't that in there?

Mr. Blake: No age was proved except the age of the two children.

CROSS-EXAMINATION read by Mr. Blake:

Q. "Madam, you resided at the time of your husband's death at 328 Main Street, in Charlestown, Massachusetts? A. Yes, sir.

Q. And your husband resided there with you? A. Yes.

Q. He voted from Charlestown, Massachusetts? A. Yes.

Q. He never resided in New Jersey, did he? A. No, sir.

Q. And you yourself are a resident of Charlestown, Massachusetts, are you not? A. Yes, sir.

Q. And you have never resided in New Jersey? A. No, sir.

Q. How many times did you receive money from him—from New Jersey? A. I didn't get any from New Jersey.

Q. Didn't get any at all? A. He was only working here two weeks.

Q. And during the time he was working here you received no money from him, did you? A. No.

Mr. McCombe: You mean Jersey City? You don't mean Jersey.

Q. The only time he worked in New Jersey was the time he was killed, wasn't it, at the Koppers Plant? A. Yes.

Q. And during the time he was working here in Jersey you didn't receive any money from him, did you? A. No.

Q. And when you came down after his death

and went to the Koppers Company Plant to get his pay they gave you either twelve and a half or fifteen dollars; you are not sure which? A. Yes.

Q. And that is the only money you had from his Jersey employment? A. Yes, sir.

Q. Now, you say prior to that he had been working in Camp Devens? A. Yes, sir.

Q. And had sent you twenty dollars every week? A. Yes, sir.

Q. And that had continued from June until October? A. Yes, sir.

Q. Prior to June he had been a teamster? A. Yes, sir

Q. Working for whom? A. Well, he worked for Carter Russell and different teams.

Q. And how long had he been working for them? A. Oh, at that time he had been working quite a while.

Q. Yes. A. Yes. A year, I guess he worked there

Q. A year. And did he always give you money every week while he worked at that time? A. Yes, sir; I always got it.

Q. How much? A. Twenty dollars a week; sometimes twenty-two.

Q. And out of that you would support him; he had his living home? A. Oh, yes, his clothes.

Q. And you would buy his clothes? A. Yes, sir; everything

Q. And give him some money for other things? A. Yes, a dollar.

Q. How much would you give him altogether? A. A dollar.

Q. And how much would his board and clothes cost? A. I figured on the board and clothes—he

was very hard on shoes and overalls and jumpers; every two or three weeks I had to get him shoes because they didn't last; and every other week the overalls or jumpers. That was not considering his good clothes.

Q. Well, how much did it cost you a month for his clothes? A. I could not figure on his clothes very well then—not just now; because he always had the overalls and jumpers on all day, and in the evening he didn't go out except Sunday; once in a while he would take the children.

Q. We want to know what it would cost you on an average per month to keep him in shoes and overalls. A. I should judge it would be about four dollars a week it came to, together, anyway from three or four dollars a week for him.

Q. That is, on his clothing and shoes? A. This is his, you know, his overalls, shoes and jumpers.

Q. And in addition to that you would give him a dollar? A. I would give him a dollar for tobacco money.

Q. Now. what did it cost you to feed him? A. Well, of course, I do all my own cooking and baking.

Q. I mean for your food, how much do you consider— A. —

Mr. McCombe: How can she tell that?

Mr. Blake: We can ask.

Mr. McCombe: I object to the question.

A. I couldn't really say so now.

Q. Well, there were four of you in the family? A. Yes.

Q. That is, yourself and your husband and the two children? A. Yes.

Q. And he ate his proportion of the food? A. Yes.

Mr. McCombe: Just a minute. What time are you referring to now? She had the twelve children altogether.

The Witness: They all died in infancy, you know.

Q. What time are you referring to now?

Mr. McCombe: We will take the years 1917, 1916 and 1915. Those were the years they were getting big pay.

Q. During that time you and he and the two children lived together? A. Yes.

Q. And his food had to come out of the twenty or twenty-two dollars a week he would give you? A. I had lodgers, too.

Q. I mean the food, you had to feed him, didn't you? A. Yes, I did.

Q. And then you bought his clothing, as you have described, and gave him a dollar a week besides? A. Yes.

Q. And if your food cost ten dollars a week, why, he used about one fourth of it, didn't he? A. Yes.

Q. He was a strong man, you say? A. Strong fellow.

Q. A good eater? A. Oh, I guess so.

Q. Now, you had two children living by this marriage? A. Yes, sir.

Q. One is named Helen Saunders? A. Yes.

Q. And the other Chester J. Saunders; isn't that correct? A. Yes.

Q. You testified that during the year 1915 he supported you and gave you this twenty-two dollars? A. Yes, sir.

Q. Every week? A. Yes, sir; I am positive.

Q. Now, do you remember, Madam, on the 30th

day of April, 1915, getting a warrant out for the arrest of your husband Jeremiah J. Saunders, and alleging that for three months before that date—that he did unreasonably neglected to provide and support and maintain you, his wife, and your two children, Chester Saunders and Helen Saunders, in 1915? A. Well, I got him arrested, but I don't remember the three months.

Q. Well, it was for non-support, wasn't it? A. Yes, sir.

Q. Because he didn't support you? A. Yes; it was for non-support.

Q. That was in 1915? A. Yes.

Q. And on that the court found him guilty, didn't he? A. Yes.

Q. Do you remember? A. Yes.

Q. And sentenced him for three months on Deer Island, and then suspended the sentence and made him give you so much money a week? A. Yes; he did; but he didn't give it up for that. He came right back home and gave me the money.

Q. Do you remember having him arrested in April 1915, for non-support? A. Yes.

Q. Now, do you remember—

Mr. McCombe: When was that, George?

Mr. Blake: 1915.

Q. Now, do you remember in April, 1917—that was the year he was killed—that you had your husband Jeremiah J. Saunders, arrested because he neglected to provide for and support you and his two minor children, Ellen Saunders and Chester J. Saunders for a period of a month prior to April 5, 1917? Do you remember in April, the year that he died, having him. A. Not that I know of. I only thought I had him up the once; that is all.

Q. You thought you only had him up once? You thought you only took him up once? A. Only once. I don't remember twice.

Q. When was that, you say? In 1915 was the first one, and this one was in April, 1917? A. I don't remember; I only had him the once. It might have been; I don't remember.

Q. It might have been? A. I don't remember twce, but I remember once; but I done it through spite.

Q. You are not sure? A. I would not say sure.

Q. But at that time your name was Annie L. Saunders? A. Yes.

Q. And you had one minor child named Ellen Saunders? A. Yes.

Q. And you had another minor child named Chester J. Saunders? A. Yes.

Q. And do you remember on that that he pleaded guilty the second time; that he pleaded guilty to the charge? A. He pled guilty to the one I took him up on. I can't quite figure that other one.

Q. And that he was then placed on probation, wasn't he? A. Yes, sir.

Q. To report from day to day to October 5, put on six months probation, wasn't he? A. Yes.

Q. And did he live with you during that time? A. Yes, till he went to Camp Devens in June. He gave me from June to October—that twenty dollars was given me.

Mr. McCombe: What is the date of that first one? I want to see the complaint in it.

Mr. Blake: I will tell you.

Q. Annie Saunder, that is your name, isn't it? A. Yes.

Mr. McCombe: Can I look at it?

Mr. Blake: No.

Mr. McCombe: I would like to have it noted on the record that upon request of the counsel for the plaintiff asking to look at the paper from which defendant's counsel is reading, the same is refused.

Mr. Blake: The offer is made to allow counsel to look at the paper, but, of course, counsel knows if he looks at the papers the papers are in evidence. The papers are tendered to him. I refused to give them to him because I did not want to lead counsel into a trap; but if counsel wants to inspect them he is free to do so.

Mr. McCombe: You refused them. I asked for them and you refused them.

Mr. Blake: I want it noted on the record that counsel refused them when tendered.

I cannnot think of anything else, Madam. That is all.

RE-DIRECT-EXAMINATION by Mr. McCombe:

Q. The times referred to by defendant's counsel in which you are alleged to have made a charge of non-support, was that actually or really the cause of going to court?

Mr. Blake: Objected to.

Q. Or was it for some other reason?

Mr. Blake: Objected to as leading.

A. I done it just because I was mad. I done it just because I was mad.

Q. What was the real cause of taking your husband to court in 1915?

Mr. Blake: That is objected to, as the complaint speaks for itself.

Mr. McCombe: It has not been submitted in evidence.

A. I cannot remember that 1915; I only had him down there once.

Q. 1915 is the one you are referring to, but you don't admit it? A. No; but I had him up on the other, April, once, before he went to Camp Devens.

Mr. Blake: That is 1917?

The Witness: Yes, sir; I can't recall that other one.

Q. That is the 1917— A. From April to June, I can admit that; but I cannot recall that other one. I can't seem to think—I can't recall it.

Q. Let me get this straight. Which is the one you do recall? A. In 1917.

Q. In 1917? A. Yes; that is before he went to Camp Devens; that is just before the war.

Q. Was he a steady worker? A. Yes; he was a steady worker.

Q. Did he continue to support you? A. Yes, sir.

Q. Did he quarrel with you sometimes? A. Sometimes we quarrelled, sometimes.

Q. Was that the reason you took him to court? A. Yes, sir; through spite.

Q. It was through spite? A. Through spite.

Q. Not actually on account of non-support? A. No, it was not. I was sorry that I done it; I plead for him after the judge sentenced him. I plead for him.

Mr. McCombe: That is all.

RE-CROSS-EXAMINATION by Mr. Blake:

Q. But you did sign a complaint against him under oath, swearing that he unreasonably neglected your children and yourself, didn't you?

Mr. McCombe: I object to that unless she knows she actually did sign it.

A. Well, I don't remember that 1915.

Q. I am talking of 1917? A. 1917, yes; I think it was 1917.

Q. This is the time you remember going into court and swearing to a complaint against him? A. 1917, I think it was 1917. I was sorry that I done it.

Q. But that was one you did, wasn't it? A. Yes.

Q. You swore a complaint against him and said in your complaint he did not support you, didn't you, but that was not the real reason? A. I said that.

Q. But that was not the real reasons? A. I said that. (No answer.)

By Mr. McCombe: Q. Was it on account of some one advising you in the court to take that action?

Mr. Blake: Objected to as leading.

A. Yes. I had lots of people telling me. He got mad at me over his mother dying and his father dying, and the two dying together, and he got kind of ugly at me after that.

Q. Did anybody advise you to take that particular action, instead of the abuse and treatment that you have intimated?

Mr. Blake: That is objected to as leading.

Mr. McCombe: That is all.

(Witness excused.)

Mr. McCombe: Do you waive signature?

Mr. Blake: Yes, I will waive signature.

The Witness: I do not have to come back?

Mr. Blake: No, you do not have to come back.

The Witness: I am glad of that, because I can get that night boat back.

Mr. Simpson: Now, I want to offer the death certificate to show the age of the man, your Honor. Forty-three, it gives the age in the death certificate.

Mr. Blake: I want to object to that for that purpose. I think the man was older than that.

Mr. Simpson: Well, I will admit whatever you say. If you will stipulate the age of the widow I won't press the offer of this, but I will take whatever you say his age was.

Mr. Blake: I object to the death certificate as showing the age, sir.

The Court: (Referring himself to the evidence act.) Under the section that I read it sets up certain things that must be furnished by the physician; that is, certain data, certain information. If the certificate contains more than the statute says it should be certified, and I do not think that would be *prima faci* evidence.

Mr. Simpson: I am limiting my offer to the date of death, November 7th, 1916, Jeremiah J. Saunder, forty-three years of age.

The Court: It may be offered for that purpose.

(Paper marked P-I in evidence)

J. Ross McCombe—Cross

J. ROSS McCOMBE, Sworn:

Direct-examination by Mr Simpson:

Q. Mr. McCombe, you saw Mrs. Annie Saunders, the widow of Jeremiah J. Saunders, this week, didn't you? A. Yes, sir.

Q. And had an opportunity to observe her and talk to her? A. Yes sir.

Q. And you had seen her beefore that time? A. Yes, sir.

Q. In your opinion how old was Mrs. Saunders? A. Forty years of age.

Mr. Blake: I object to the testimony. The gentleman is not qualified to give the age with the degree of accuracy whatever.

The Court: I will overrule the objection. Take your exception.

Mr. Blake: Exception.

Q. How old would she say she was? A. Forty.

CROSS-EXAMINATION by Mr. Blake:

Q. Mr. McCombe, you were present, weren't you—you were present in the room when we were taking her testimony? A. Yes, sir.

Q. And on what do you base your conclusion that she was about forty? A. My general familarity with the opposite sex, in that I have very frequently inquired of ages and guessed ages, and from my past experiences I have never gone above between two or three years of their actual age.

Q. You have never made a mistake in more than two or three years of the actual age? A. Within two or three years.

Q. You are employed by Mr. Simpson? A. I am.

Q. Would it surprise you to know that Mrs. Annie E. Saunders at the time you saw her in the room was forty-eight years of age? A. It would, very much.

Q. Very, very much surprise you; and that she was married in 1895 and that at that time was twenty-three years of age? A. My recollection is ste told me she was—

Q. Not what she told you. A. 1896—

Mr. Simpson: I think that is a perfectly proper answer. He says I would be surprised because she told me she was forty. Now, it seems to me it is a perfectly responsive answer to say, "Yes, because she told me she was forty years old."

The Court: Really, the question is would you be surprised if you knew she was married at such and such a date, and at that time she was twenty-three years of age.

The Witness: I understood the question to be—

The Court: Well, reframe the question, Mr. Blake. We are losing a lot of time.

Q. (Repeated by the stenographer) Would it surprise you to know that Mrs. Annie E. Saunders at the time you saw her in the room was forty-eight years of age? A. It would very much.

Q. (Repeated by the stenographer) Very, very much surprise you; and that she was married in 1895 and that at that time was twenty-three years of age? A. She told me she was married in 1896.

The Court: Does that answer the question? You are asked would you be surprised to learn she was married in 1895 and at that time she was twenty-three years of age.

The Witness: I cannot judge her age twenty-five years ago or twenty-six years ago. I cannot tell what the lady was then.

Mr. Simpson: He is asking you for your mental convolutions, for an emotional state —would you be surprised? You would or you wouldn't; that is all.

A. Yes.

Q. You would be surprised to learn it? A. Very much.

Q. You asked her when she was married when you took her examination, didn't you, two days ago? A. Yes, I did.

Q. And she told you she was married in 1895, on the 19th day of August? A. Yes.

Q. That would be twenty-five years on the 19th day of August? A. 1896—

Q. 1895, the record shows.

Mr. Simpson: I object.

Mr. Blake: It has been read in the evidence

Mr. Simpson: He asked Mr. McCombe what she testified to, and he says 1895.

The Court: I think we are all wasting time, gentleman. Really, I do.

Mr. Blake: I think we are if we are going to take—

The Court: That is upon the assumption that she was married in 1895.

Mr. Simpson: I submit that is a waste of time; that is a conclusion, his opinion.

Q. In the testimony you took the other day you asked her when she was married, didn't you? That is the question you asked her? A. I did.

Q. And she said in 1895 on the 19th day of

August? A. My recollection is that she said in 1896.

Q. All right. It is in evidence on the plaintiff's case, he having read the testimony, that she was married on the 19th day of August, 1895. That would be twenty-five years on the 19th day of August, 1920, wouldn't it? Then if your assumption of her age is accurate, she was married when she was fifteen years of age? A. That would be so.

The Court: That would be so.

Q. That would be so, wouldn't it? A. Yes.

Q. You can say yes or no without hurting yourself? A. Yes.

Q. And you never make a mistake within two or three years in guessing ages? A. Invariably I guess within two or three, yes.

Q. How many times in your life have you been on the stand under oath estimating or giving the age of any individual A. This is the first time; in fact, any case for that matter.

Mr. Blake: That is all.

Mr. Simpson: I suppose you trust it will be your last if Mr. Blake is to examine you. That is all.

(Witness excused.)

Mr. Simpson: Is Mr. Powers here? (No answer) Your Honor, I am surprised Mr. Powers is not here.

William Maxwell—Direct

WILLIAM MAXWELL, sworn.

Direct-examination by Mr. Simpson:

Q. Mr. Maxwell, you are police officer connected with the Jersey City Police Department? A. Yes, sir.

Q. And did you make an investigation of the death of Jeremiah J. Saunders? A. Yes, sir.

Q. And what did you do to make an investigation? A. Why, I went down to the bridge, to the scene of the accident the next morning about nine o'clock.

Q. How long did you spend—I mean in days—investigating this accident? A. Three days.

Q. The Public Service Railway runs over this bridge, doesn't it? A. Yes, sir.

Q. And it was the only line of streeet railway that ran over the bridge at this time, wasn't it? A. Yes, sir.

Q. And were you able to find any eye witness at all of the accident? A. No, sir.

Q. You made an investigation among all the motormen and conductors of the Public Service that you could find were running cars, didn't you? A. Yes, sir.

Q. And you couldn't find a single eye witness, could you, of the accident? A. No, sir.

Mr. Simpson: Cross-examine.

Mr. Blake: No questions.

(Witness excused.)

Mr. Simpson: Now, your Honor, I would like to ask for a continuance of this case because I mover the case on the theory that Mr. Powers, who is the motorman of the defendant Company mentioned in this

inquest, would be here, and also under the statement that he had been subpoenaed by me, which he was not. It is an important case for this widow and two children and I want to be in such a position that I have all the evidence before I close my case. I would ask your Honor for a reasonable continuance, therefore, until can get the employees of the defendant here under subpoena . If they were witnesses other than those in the employ of the defendant and I would not ask for that privilege.

Mr. Blake: The fact that they are in our employ does not render them immune from the process of subpoena.

Mr. Simpson: No, but it does render me justifiable in drawing a conclusion that you would have here for your own defense.

The Court: Well, the difficulty is as to when I should continue it.

Mr. Simpson: In the morning would suit me.

The Court: Well, tomorrow morning we have several cases down.

Mr. Simpson: I want to prove when he first saw the object on the track, and how far the car was on the west bound track when he saw the object on the west bound track, and so forth. That is what I want to prove by him.

Mr. Blake: Well, Mr. Powers, the man that you are talking about, you said in your opening knew nothing about the accident.

Mr. Simpson: Yes, but Mr. Powers didn't say that.

Argument

The Court: Is Mr. Powers the motorman of the car that notified the bridge tender of the happening?

Mr. Simpson: Yes, sir.

Mr. Blake: Is that the man you want?

Mr. Simpson: Yes. I want him and the other man.

Mr. Blake: I just want to get the whole story of what you want.

Mr. Simpson: If you knew the whole story it might enlighten you. If you want to know what I want as to the presence of individuals, I want Mr. Powers and his conductor, and I want Mr. Newman and and Mr. Baker.

Mr. Blake: You are under the impression that they were all subpoenaed?

Mr. Simpson: Yes, sir. I was under that impression, Mr. Blake.

The Court: I will give you every opportunity. I will continue it over until ten o'clock tomorrow morning.

Mr. Blake: My witness can be here in ten or fifteen minutes at the outside.

Mr. Simpson: Well, I would prefer to have the continuance so that I can regularly subpoena them. They may be something happened; a gentleman may slip on a banana peel or something like that. I would prefer to have the continuance which your Honor says I may have, and I will put out the subpoenas myself.

The Court: Of course; Mr. Simpson, you must make every effort to have them here tomorrow morning.

Mr. Simpson: I won't leave it to anybody's promise. I will put the subpoenas out. I do not want to walk into court and have your Honor say I have not properly prepared my case. I put the subpoenas on them.

Mr. Blake: The witnesses can be here in fifteen minutes.

Mr. Simpson: I prefer to take your Honor's order that I may have the continuance.

The Court: Do you mean to say the other witness or witnesses—

Mr. Blake: Yes, sir; they are all my witnesses. He didn't try to subpoena them. He didn't even ask to have them in court here. They are all my witnesses. They are under subpoena.

The Court: Of course, if that is so, if the other witnesses you want can be here in fifteen on twenty minutes, there isn't very much value in continuing it to tomorrow morning.

Mr. Blake: They can be here in half an hour.

The Court: If they can be here I very much prefer to go on.

JOHN POWERS, sworn.

Direct-examination by Mr. Simpson:

Q. Where do you live Mr. Powers? A. 19 Ann Street, Harrison.

Q. And were you a motorman of the Public

Service Railway Company on November 7, 1917? A. Yes, sir.

Q. Did you come in on a car from Newark towards the Hackensack bridge that night around eleven o'clock? A. From Newark, no.

Q. Yes. A. I came from—

Q. Where did you come from? A. I was working all that night running between Newark and Jersey City, back and forth.

Q. Well, did you see a dark object on the track on any of your runs? A. Yes, coming from Jersey City bound for Newark.

Q. And what time was that? A. It must be between eleven and twelve o'clock.

Q. How far ahead of you was this dark object lying? A. About half a car length, I guess.

Q. About half a car length before you got to it? A. No; when I stopped the car; I didn't go closer than that to it.

Q. When you first saw it how far away were you from it? A. Oh, quite a little bit back than that; but I slowed down and I stopped, and then I says—

Q. Were you one hundred feet away from it when you first saw it? A. No, not a hundred feet I don't think.

Q. Well, about how far? A. About seventy or eighty feet, I think.

Q. Seventy or eighty. And then you slowed down and you got out to see what it was? A. I stopped and I told—

Q. I don't care what you said. You got out and saw this thing, didn't you? A. Yes, sir.

Q. What was it? A. There was a man badly cut up on the track.

Q. And how long did he lie—how was he lying on the track? A. I don't know, sir.

Q. You don't how he was lying? A. He was just lying down, and cut up. To the best of my belief he was across the tracks like.

Q. Like across the track? A. Yes, sir.

Q. And how long before you passed over the bridge had your leader gone ahead of you; that is, what length was there between your trip and the one just ahead of you? A. I don't know.

Q. You don't know who your leader was? A. Yes; I know who my leader was.

Q. Who was your leader? A. Motorman Newman.

Q. You don't know what time he passed over the bridge? A. How could I when I followed him.

Q. I don't know whether you could or couldn't. A. I don't know when he got there. He was supposed to get there about fifteen minutes ahead of me.

Q. Ahead of you? A. Yes, sir.

Q. And you got down off the car, didn't you? A. Yes, sir.

Q. And you examined this man? A. Yes, sir.

Q. Was he conscious? A. I couldn't say. He was badly cut up. I don't think he would hardly be conscious.

Q. What do you mean by that? How was he cut up? A. He was all blood and bruised up.

Q. Was there blood on the tracks? A. Well, it was right underneath him—he was just lying in blood.

Q. Where was his leg with reference to the rail? A. I couldn't say, sir.

Q. Was any part of his body over the rail or

was it inside? A. The best of my belief is that he was between the tracks.

Q. Between the tracks? A. Yes, sir.

Q. And he was all cut up according to you? A. Yes; he looked well shook up, all right.

Q. Did you examine the rails to see whether there was any blood? A. I didn't examine anything.

Q. How far was the point where you saw his body from the draw, where you jump on the draw there? A. It was not very far; about two or three feet to the best of my belief, if it was that.

The Court: Was his body on the draw?

The Witness: On the draw, sir.

The Court: On the draw?

The Witness: Yes, sir.

Q. Who was your conductor that night, Mr. Powers? A. Mr. Laird.

CROSS-EXAMINATION by Mr. Blake:

Q. When you saw that object there that made you stop your car, did you go out—A. And telephoned the inspector.

Q. I see. You staid there? A. I staid there in charge of the car.

Q. After a while somebody came and took the body away? A. Yes; somebody came and took the body away.

Q. Your didn't hit the man or run over him? A. Oh, no.

Mr. Blake: That is all.

Mr. Simpson: That is all.

(Witness excused.)

BERT LAIRD, sworn.

Direct-examination by Mr. Simpson:

Q. Mr. Laird, were you the conductor with Mr. Powers, on Mr. Power's car? A. Yes, sir.

Q. What time did you leave the ferry this night? A. Eleven twenty-eight.

Q. And what was the first you knew that anything was wrong on the bridge? A. Well, it is a rule when you come up to the draw, you are supposed to stop the car, and Mr. Powers stopped the car and I gave him a bell to go ahead and he didn't start. He said there was something on the track. He got out and looked. There was a man lying on the track.

Q. Did you go out, too? A. Yes, sir.

Q. And what was it you saw, Mr. Laird, when you got out? A. I saw him laying on the track; about sixty feet ahead of the car.

Q. What did you see lying there? A. I saw the body of a man there.

Q. And how was he lying with reference to the track? A. Well, part of his body was on the left hand track and part was off the track.

Q. And the part that was off, was it near the other track or on the other side.

The Court: You are talking about tracks or rails?

Mr. Blake: Rails.

A. No; it was not near the rails at all.

Q. It was not near the rails? A. Part of his body was on the rail and the other part was off the other rail completely.

Q. Well, which rail was it off completely? A. The left hand rail.

Q. And which was on the rail, the north side or the south side rail? A. North side.

Q. That is the rail nearest the gutter? A. Yes, sir.

Q. And what did you do? A. Why, we waited there until somebody got a telephone for an ambulance to come and take him.

Q. The man was—A. We waited there until somebody went out and telephoned for an ambulance.

Q. And then what happened? Did you pick the man up? A. No; I didn't take him up at all.

Q. You got on your car again? A. No; we staid there until they took him away in the ambulance.

Q. How light was it there when you got off? A. How light?

Q. Yes, what was the light? A. Why, it was light as day. We had a big arc light on our car.

Q. You had. And how far ahead would that throw? A. It would throw about two hundred feet, I should think.

Q. And was it the same on all cars? A. Yes, sir.

Mr. Simpson: Cross-examine.

Mr. Blake: No questions.

(Witness excused.)

ADOLPH NEWMAN, sworn.

Direct-examination by Mr. Simpson:

Q. What is your business Mr. Newman? A. Motorman.

Q. And were you a motorman for the Public

Service Railway Company on the night of November 7th? A. Yes, sir.

Q. Where were you running? A. Running west from the Jersey City line.

Q. What time did you leave the ferry that night? A. Eleven thirteen.

Q. And what intervals were you running on? A. What?

Q. What intervals between your cars? A. Supposed to be fifteen minutes.

Q. Did you have one of these arc lights on your car? A. Yes.

Q. How far ahead could you see? A. About two hundred feet.

Q. Now, when you went over the Hackensack bridge did you feel any jar near the draw there, when you jumped from one track to another? A. The only jar I felt where the draw is where the draw is connected; that is the only jar I felt.

Q. Well, that is the jar that is always there? A. Always a jar.

Q. Always a jar at that point? A. At that point, yes.

Q. And you went right on the Newark; you didn't know you had hit anybody or not, did you? A. I did not; no sir.

Q. And the first thing you knew was when you got some information the next morning? A. Yes.

Q. Now, what car did you have? A. I had 1672.

Q. 1672? A. Yes.

Q. Did you make any other trips that night? A. No.

Q. That was your last trip, was it? You didn't have occasion to come back again; did you? A. (No answer.)

Q. What time of the morning did you get to the house in Harrison? A. Why, 11:51.

Q. What time? A. 11:51.

Q. And who was your conductor that night? A. Baker.

Q. Mr. Baker? A. Yes.

Q. Now, do you remember coming to the bridge that night? I mean the Hackensack bridge, on this trip, the last trip? A. I do.

Q. And did you stop before you got on the bridge? A. I did.

Q. And looked ahead of you? A. I did.

Q. And then you went over the bridge, didn't you? A. Yes.

Q. And you say you felt no jar except the jar when you jumped down? A. Yes; same as usual.

Q. Did you get that same car the next day? A. No.

Q. You didn't examine the car afterwards to see whether there was any blood on it? A. No.

Q. Who had the car after you, do you know? A. Couldn't tell you.

Q. Where did you turn in the car after you got through running it that night? A. The car house.

Mr. Simpson: That is all.

CROSS-EXAMINATION by Mr. Blake:

Q. You stopped before you went on the draw that night, you said? A. I did.

Q. Your arc light was burning? A. Yes.

Q. Was there anybody in front of you when you stopped? A. If there was I would see him.

Mr. Simpson: I object to that.

The Court: The question is whether there was anybody in front of you when you stopped.

A. No; I didn't see nobody there.

Q. Were you looking in front of you? A. Yes I did.

Q. Nobody in front of you when you stopped? A. No.

Q. Was anybody in front of you when you started? A. No.

Q. When you started, after you started, your trucks dropped from the bridge down on the draw, didn't they? A. Yes, sir.

Q. With a bang? A. Yes, sir.

Q. First the front trucks, and then the back trucks? A. Yes, sir.

Q. Was that the only jar you heard there that night? A. That was the only jar I felt.

Q. When you started up your car did the front of your car hit anybody and knock them down? A. No, sir.

Q. And you were on the front of your car running it, weren't you? A. I was.

Q. Looking straight ahead? A. Straight ahead.

Q. And you started from a standing start at the draw to go across it? A. Yes.

Q. And there was nobody in front of you when you crossed it? A. No.

Q. And you didn't strike anybody there that night, did you? A. No.

Q. And the first you knew about it was when somebody called your attention to it at the barns? A. Yes.

Mr. Blake: That is all.

The Court: This stop you speak of making, that was, as I understand it, just before you came to the draw of the bridge.

The Witness: What is that?

The Court: This stop that you have spoken of making, was made just before you came to the draw of the bridge?

The Witness: Just before.

The Court: How far before coming to the draw of the bridge was it? How far was the front of your car away from the draw when you stopped?

The Witness: Oh, fifteen—twenty feet; between fifteen and twenty feet.

The Court: Did you come to a dead stop?

The Witness: Dead stop.

The Court: That is all.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. You say you didn't see anybody. You mean you didn't see anybody standing up? A. I didn't.

Q. You didn't look for people lying down, did you? You didn't look for any object lying down ahead of you? A. I looked the same as usual.

Q. Yes, but when you are talking about people ahead of you you are referring to people walking or standing? A. I can see them if they are laying down, too, if they are there.

Mr. Simpson: I ask to have that stricken out as not responsive.

Q. When you say people in front of you, aren't you referring to people running or walking or standing? Isn't that what you are referring to? You were not looking for anybody lying on your track, were you? A. I didn't look—but I could see if there was anybody laying there.

Q. You say did or didn't? A. I did look ahead.

Q. But you didn't see anybody standing up ahead of you, did you, didn't see anybody walking or staggering? A. No.

Q. And that is all you know you didn't see. Whether they were there or not you don't know? A. Well, if there was anybody there I could, yes.

Mr. Simpson: I ask to have that stricken out as not responsive.

Mr. Blake: It is re-direct-examination.

Q. (Repeated by the stenographer) And that is all you know you didn't see. Whether they were there or not you don't know?

Q. (Continuing) You didn't see. That is what you are testifying, isn't it? You didn't see anybody? Or did you see somebody? A. I didn't, no.

Q. But after your car went over the bridge you know a man was found all cut up on the tracks over which your car had gone? A. I did the next day.

Q. Although you didn't see anybody? A. No.

Mr. Simpson: That is all.

RE-CROSS-EXAMINATION by Mr. Blake:

Q. When you started your car from this standing position, twenty feet away, was there anybody lying on your track in front of you? A. No.

Q. Could you see on the tract in front of your when you started your car? A. Yes.

Q. Was there anybody lying there on the draw two or three feet from the edge of the draw? A. No.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. What kind of an examination did you make of that track before you crossed over? When you stopped your car and looked where you did look? A. Looked ahead.

Q. How far ahead could you see? A. I could see about two hundred feet.

Q. With this light? A. With this light.

Q. And then you went on, didn't you? A. Yes.

Q. And you learned the next morning that after you passed over that track a man had all been cut up, didn't you? A. Yes.

Q. You never examined this car after you learned that to see if there was any blood on the wheels, did you? A. No.

Mr. Simpson: That is all.

(Witness excused.)

JOHN BAKER, sworn.

Direct-examination by Mr. Simpson:

Q. Mr. Baker, where do you live? A. I live in Plainfield, Connecticut.

Q. You were the conductor on this car the night of November 7th, 1917, that Mr. Newman was motorman of? A. Yes, sir.

Q. And do you remember coming to the Hackensack bridge that night? A. I remember stopping at the bridge, yes.

Q. You remember stopping on this eleven fifteen trip? Was that from the ferry? A. Yes. Eleven thirteen we left the ferry.

Q. How long a stop did your car make before it started over the bridge? A. Why, we made the usual stop; I never took any time of how long we stopped there.

Q. About how long was it before, a second or two seconds or five minutes or how long? A. Just

long enough to bring the car to a dead stop and then start in again.

Q. And, Mr. Baker, you went right on, did you, over the bridge? Did you feel any jar at all? A. Nothing but the jar that we make when we are passing over the draw.

Q. Is that quite a serious jar when you can feel it? A. Oh, yes. You know you are passing over it.

Q. And you knew nothing of the accident until the next morning, did you? A. No, sir; nothing at all.

Q. Did you have this same car the next day? A. No, sir; I don't remember what car I had the next day.

Q. You didn't examine the car you were on that night and to see if there was any blood on it, did you? A. No, sir.

Mr. Simpson: That is all.

Mr. Blake: That is all.

Mr. Simpson: One more question I do want to ask.

Q. You didn't look for anybody, did you? A. No.

Q. Because nobody boards the car on the bridge, you didn't look out to see if there was anybody around at all, did you? A. We—

Q. You, I am talking about. I am not talking about "we." I am talking about you. A. What was it you asked me again?

Q. I asked you if it was not a fact because nobody boards the car on the bridge, because they get the car before it reaches the bridge, you did not look for anybody, did not look outside? A. Yes, we did.

Q. You did look? A. Yes.

Q. Didn't you swear at the Coroner's Inquest as follows: "The fact is that you did not look?" And you answered: "No, not outside, no. Nobody boards the car on the bridge. They get the car before it reaches the bridge, at the first street there; that is where they board the car. Nobody boards the car on the bridge." Didn't you so testify at the Coroner's Inquest, that you did not look? A. I testified—

Q. Did you testify that way? A. That is two years ago.

Q. I know it is. Did you testify that way? A. If that is recorded, of course, I did. It is two years ago since I was on this case.

Q. Well, isn't it a fact that you didn't look because nobody boards the car on the bridge? A. Why, we do look out—

Q. You, not the whole system. A. As near as I can remember I did, yes.

Q. Although you swore at the Coroner's Inquest that you didn't? A. Well, it is two years ago that I was on the case.

Q. All right. When you got off the car what did you find? A. I didn't get off the car.

Q. You staid on the car? A. Yes.

Q. You staid on the car and the car went on? A. Yes.

Q. Then you knew nothing about any accident until the next morning, did you? A. That is correct.

Mr. Simpson: That is all.

Mr. Blake: That is all.

(Witness excused.)

Mr. Simpson: That is the case.

DEFENDANT'S MOTION FOR A NON-SUIT

Mr. Blake: I respectfully ask for a non-suit on the ground that no negligence has been shown on the part of the defendant company that proximately caused the accident and death of Jeremiah J. Saunders. All that is shown is that a body was found on the rail with an arm severed and a leg cut off. There is no proof of any negligence on the part of the operator of this car, the motorman on the car. The motorman testified that he stopped his car before crossing and he could see the tracks, ahead of him, and there was nothing on the tracks, and he proceeded in the usual way. The motorman following testified to having found the body. There is no proof of negligence in this case on the part of the defendant company. They would have, in order to get to the jury with the case, to base it upon an assumption based on an assumption, and your Honor knows, of course, that is not permissible in law. You would have to presume that he was struck by a trolley car, and that the trolley car was negligently operated, and your Honor knows that cannot be based upon a presumption. The most they have in this case is the happening of an accident without any proof to show negligence on our part. Of course, while I know the rule is that plaintiff is not supposed to be guilty of negligence, the same thing applies to the defendant, and in the ordinary course of events it will go back to what a reasonably, prudent man would do in the exercise of reasonable care.

Mr. Simpson: (After referring to Electric Light Company vs. Ruddy) This is a motion for a non-suit, not for a direction of verdict. I have

put in all the evidence I have. I have shown all the evidence I have. They know; they have this car that was operated by this man; they know whether there was blood on it or not. They know whether they made any examination of it or not; and I have put in all the evidence. At least, the most that can be said against me on the motion to non-suit under that doctrine—they should be driven to their proof.

The Court: I am inclined to think that a motion for a non-suit should prevail.

Mr. Simpson: I ask an objection in the nature of an exception.

The Court: You may have your exception.

8 1 JUN.T. 1920

New Jersey Court of Errors and Appeals

I. Ross McCombe, Administrator *ad prosequendum* of the Estate of Jeremiah I. Saunders, deceased, Plaintiff-Appellant, vs. Public Service Railway Company, Defendant-Appellee.	Action at Law. Appeal from Hudson Circuit.

BRIEF FOR PLAINTIFF-APPELLANT

Facts

This is an appeal from a non-suit in an action for death. The non-suit was on the ground that there was no question for the jury. The proof was circumstantial and the facts proved were as follows:

The defendant ran an electric street railway line across the Hackensack Bridge which crosses the Hackensack River at Jersey City. The defendant propelled a car across these tracks at about the hour of 11:28 p. m. (pp. 58-59); 15 minutes afterwards the car following the first car saw a dark object on the track (pp. 53-54) and the

motorman stopped the car and on investigation (pp. 54-56) it was found that the body of the decedent was lying across the track; one of his legs had been cut off clean (p. 26; p. 19), as if by a metal wheel and there was blood on the tracks (p. 26; p. 19); one of his arms was cut off and the body was otherwise badly mangled (p. 26; p. 19). The body was found on the part of the bridge almost exclusively devoted to the operation of street cars (pp. 16-20; p. 24). Another portion of the bridge lying between this track, which was the westbound track and the track on the other side of the bridge, the eastbound track, was used by motor vehicles (p. 24). In the day time motor trucks passed over the bridge but not at night (p. 24, l. 20-30). The only machines passing over the bridge at night were pleasure vehicles. The motorman of the first car testified that his car was equipped with a search light which would throw a light 200 feet ahead (p. 58, l. 17-20) but he did not see any one on the track and did not feel any jar of his car except the usual jar when it jumped from one part of the iron rail to another part where the draw was; the rails being separated there so as to allow the bridge to be moved, and in passing over this part of the track it was customary for the car to make a jar (p. 58, l. 18). It was about this point where the body was found. There was no eye witness to the accident. The plaintiff had subpoenaed all those who knew anything about the accident, either strangers or employees of the defendant and there was no eye witness to the accident. Upon these facts the trial judge said there was nothing for the jury to decide and took the case from the jury.

POINT I

Argument.

The facts presented in this case would have warranted a jury in drawing the inference that the intestate of the plaintiff was struck and injured by a car of the defendant; his position on the track, the nature of his wounds, the absence of any other vehicle at the time, all would warrant the inference that he was struck by a car of the defendant company. If he was so struck and this car had a search light throwing a light 200 feet ahead, then it was for the jury to say whether or not the motorman of the car kept a proper lookout or if he had a light which would reveal objects 200 feet away and did not see the intestate of the plaintiff in a place of danger, then the jury would have been warranted in finding he was not in the exercise of reasonable care. Of course, the absence of an eye witness is not conclusive so as to make the question a non-jury question. If from all the facts and circumstances reasonable men might find inferences which would warrant a finding of negligence in the defendant then there was a jury presented. See the case of *Merkl v. J. C. H. & P.*, 75 L., 654. It is from circumstances, in cases where direct evidence is not obtainable that the verdict can be drawn by the jury.

See

Nugent vs. Suburban Electric Line, 58 N. J. L., 658;

Austin vs. Penn. R. R., 82 L., 416;

Wigmore on Evidence, Sections 26 to 43.

Smith v. Charlotte Electric Ry. Co., Supreme Court of North Carolina, 173 Nor. Car., p. 489, American Negligence Cases, Vol. 16, p. 579, is a case similar to this one, where deceased's body was found on the track, although there was the additional element there of a bad fender on the car.

The United States Supreme Court, in *Choctaw R. R. v. McDade*, 191 U. S., 96, says:

> "There was no eye witness as to the exact manner of the injury to McDade, and it is urged that the Court below should have taken the case from the jury because of the lack of testimony upon this point. It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration and the Court distinctly charged that unless satisfied of this there could be no verdict against the railroad company. While the evidence was circumstantial, it was ample, in our opinion, to warrant submission of this question to the jury under the instructions given."

In this case, the United States Supreme Court, speaking through Mr. Justice Day, held: That although there were no eye witnesses, the circumstances were such as to require submission to the jury. In this case in the United States Supreme Court all that was proven was the position of the body, the position of a water spout and the injuries upon decedent's body.

Other cases on this point where there is the finding of a dead body and there are no eye witnesses, are:

Hughes v. Cincinnati, N. O. & T. R. Co., 15 American Negligence Cases, (p. 184);
Borden v. D. L. & W. R. R., 15 American Negligence Cases, (p. 810);
Guiette v. Fitchburg R. R., 15 American Negligence Cases, (p. 461);
Carruthers v. Chicago Ry., 15 American Negligence Cases, (p. 59);
Lunde vs. Cudahy Packing Co., 21 American Negligence Cases, (p. 635).

Also there is a long line of cases collected under same subject as to the presumption, in the absence of eye witnesses under the case of *Joseph vs. Peoria & Pekin Union R. R. Co.*, an Illinois case, which is reported in the Negligence Compensation cases, Annotated Volume 7, page 1041 with many citations in the notes; all of which are authority for the statement that even in the absence of eye witnesses, the circumstances may be such that the jury could on ground of probability, as is said in this State in the case of ~~*Larsen*~~ *v. Penn. R. R.*, rather that on the grounds of certainty, draw the inference of negligence. Also the case, *Cincinnati R. R. v. Jones*, 192 Fed., 769. The class of cases, of which the plaintiff contends this is not one, to which the rule applies, which was adopted by the trial judge is described by Mr. Justice Brawer in *Patten v. Texas Pacific R. R.*, 179 U. S., 658. The distinction there clearly pointed out between cases where the circumstances warrant an inference of negligence and cases where the circumstances show that any one of a number of causes might have been the occasion of death, but some of which causes the defendant was responsible and for others not.

Austin

See also

Philadelphia Rwy. Co., v. Maryland, United States Circuit Court of Appeals for this Circuit, 239 Fed. (p. 3).

Why cannot it be said that it was a reasonable inference that the decedent was struck by a car of the defendant company? He was injured only as a car could have injured him; no motor truck or automobile could have injured him in this way. There was no automobile or motor truck in the vicinity when he was hurt. He was found upon the track of the defendant company with his injuries manifestly those inflicted by a trolley car; there was blood on the rails and track; there was a trolley car which had passed about 15 minutes before he was found. It was a legitimate inference that he was injured by a trolley car; it was also a legitimate inference that he was injured because the motorman did not give him any warning of the approach of the car and did not use reasonable care to keep a lookout for if he had used reasonable care to keep a lookout, with the lights in the condition that he said they were, with his own search light he must have seen the decedent immediately in front of him on the track. The motorman admits no warning was given because he saw no person. If his failure to give a warning was founded upon the failure to use reasonable care to keep a lookout, clearly the defendant was guilty of negligence; of course not as a matter of law, but under the facts of the case, it was for the jury to say first, whether the defendant was injured by the trolley car; second, whether such injuries were produced by reason of the negligence of the defendant.

Resume

This therefore is one of the class of cases described where, although there is no eye witness, yet the physical circumstances are such as to warrant inference, which inferences in turn may be used as a foundation for negligence. It is not in any sense founding a conjecture upon a conjecture, but founding an inference upon proven facts. The position of the body of the decedent and the injuries indicated that he was struck by a car; no other vehicles would have inflicted the injuries upon him. There were no motor trucks or automobiles about at the time he was injured. The position where he was on the track indicated that he was run over by the car preceding that which found his body. The car, therefore, which the jury could have said inflicted the injuries was equipped with a search light throwing a light 200 feet ahead. There was a straight-away track and if this car struck him and injured him in the way that he was injured so as to leave his body across the track, it can be differentiated from a case where the car might have struck him with its side and thrown him off the track. From the position in which he was the jury could have said with reason, that he was directly in front of the car when he was struck. If he was directly in front of the car then there was no excuse for the motorman not seeing him, consistent with the exercise by the motorman of reasonable care and the jury might well have said that the lookout he kept was so careless that under the circumstances convicted him of negligence in not keeping an adequate lookout, which is one of his duties. If the jury found these facts to be so, they had a right to

base a finding of negligence thereon. It was therefore, not a court question, but a jury question; it should have been left to the jury to say whether upon the proven facts the defendant's motorman was guilty of negligence.

In the *Anderson Case*, 81 N. J. Law, 704, the Court said:

> "The facts established by the plaintiff's evidence show that there was no physical obstruction to the view of the motorman who was in charge of the car * * * and that any motorman keeping a reasonable lookout ahead should have seen the plaintiff."

Also in the case of *Aquino v. Morris County Traction Co.* (Court of Appeals), 106 Atl., 802; this was a case where the intestate was struck by a trolley car but there was one eye witness who simply testified that the decedent was struck sitting close with his head between his knees on the inside rail of the track; but this was a killing on a private right of way and in this case it was held to be the duty of the decedent on the private right of way to look for a car, but it was not suggested that there was no negligence if the car ran against him on a public street, because of failure to keep an adequate lookout.

It is respectfully submitted that the judgment below be reversed.

ALEX. SIMPSON,
Attorney for Plaintiff-Appellant.

JUN. 1. 1920

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

I. Ross McCombe, administrator *ad prosequendum* of the estate of Jeremiah J. Saunders, deceased,
Plaintiff-Appellant,

vs.

Public Service Railway Company,
Defendant-Appellee.

Action at Law. Appeal from Hudson Circuit Court.

BRIEF OF DEFENDANT-APPELLEE.

This case is based on the death of Jeremiah J. Saunders, plaintiff's intestate, who was found badly injured, so that death ensued, on a bridge which crosses the Hackensack River on the Newark Plank Road, Jersey City. The decedent was found on the tracks of the defendant company which crossed the bridge.

The plaintiff claimed that his decedent was killed by being struck by an electric car of the defendant, and alleged in his complaint that the car was negligently operated in that it ran at great speed, without giving any signal of its approach, without using reasonable care to keep a lookout for plaintiff's intestate and without using reasonable care to illuminate its car and the road in front of it.

The case was originally brought in the name of Annie Saunders, general administratrix of Jeremiah Saunders and afterwards there was substituted I. Ross McCombe, administrator *ad prosequendum* of Jeremiah J. Saunders.

This case was tried March 17, 1920, before Honorable Luther A. Campbell and a jury at the Hudson Circuit, and at the end of the plaintiff's case the Court granted the defendant's motion for a non-suit, whereupon the plaintiff took an appeal to this Court from the judgment of non-suit.

Statement of Facts.

The statement of facts in the plaintiff's brief is not entirely accurate or complete. The defendant propelled its cars across the bridge on the night in question, where the plaintiff's decedent was found, on a fifteen-minute headway. The car which

immediately preceded the car the motorman of which discovered the body on the track, left the ferry in Jersey City in charge of Motorman Newman at eleven-thirteen P. M. (p. 58) bound for Newark. This car was equipped with an arclight which enabled the motorman to see 200 feet ahead, and he stopped his car 15 or 20 feet before reaching the draw (p. 61) in accordance with the rules of the company (p. 56); the arclight on the car was burning (p. 59); the motorman (p. 60) was looking in front of him and there was nobody on the track when he started the car, and the only jar he felt of the car was when the car went from the main part of the bridge onto the draw.

Conductor Baker of this car testifies (p. 64) that when the car went over the draw of the bridge on the night in question he felt no jar other than that incident to passing from the main bridge to the draw.

The next car that crossed the bridge, fifteen minutes later, was operated by John Powers, whose car left the ferry (p. 56) at eleven-twenty-eight. Powers testified that when he was within 70 or 80 feet of where the body lay (p. 53) he saw a dark object on the track and stopped his car about half a car length from it; that on getting off the car he discovered the dark object to be a man badly injured; that (p. 54) he lay across the track on the draw two or three feet from the main part of the bridge (p. 55).

Bert Laird, the conductor of Powers' car, testified (p. 56) that it was a rule to stop the car before going over the draw. This witness says that part of the decedent's body was on the left-hand rail and part was off the rail.

William Cavanagh, who was employed on the bridge, was notified of the accident and when he arrived there some little while afterwards found (pp. 11 and 12) that the man had his arm below the elbow cut off and one of his legs was cut off sharply. He lay on the south rail of the west-bound track; that the bridge was lighted (p. 17) and the man lay two feet east of the draw; the next morning this witness discovered blood on the car track (p. 19) at about the place where he had seen the body the night before; that (p. 20) the tracks are on either side of the bridge and that automobiles use the center of the bridge between the tracks. He identifies the photograph (p. 21) as a correct representation of the bridge looking from Jersey City toward Newark; that there are sidewalks on both the north and south sides of the bridge, which are divided from the highway by the girders of the bridge, and there is a curb guarding the

sidewalk from the roadway about six inches high; that there is nothing to prevent automobiles from running on the tracks as they cross the bridge; that, as a matter of fact, owing to the rough condition of the Newark highway trucks run up on the rails all the way across the bridge; that Kopper's Coke Works (p. 23) are at the west end of the bridge north of the turnpike; that there is heavy traffic on the bridge.

On re-direct examination this witness testifies (p. 24) that the large traffic trucks usually run in the center of the bridge; that at ten or eleven o'clock at night there would not have been much traffic although heavy express trucks go over the bridge at least once an hour during the night, and that he has seen trucks going across the bridge in the car tracks (p. 25, l. 20).

Daniel Kenny, bridge tender, says (p. 27) he heard a car going toward Newark about fifteen minutes before the body was discovered, and that as far as he could judge from hearing it, it was going at an ordinary speed, which is slow; that there is a cluster of five lights at each end of the draw on the bridge; that one of these clusters of lights was within about ten feet of where the body lay.

Annie Saunders, decedent's wife, testified (p. 30) that on the 6th of November, 1917, her husband was working at Kopper's Coke Works.

The plaintiff makes the statement in his brief on page 2 that one of the decedent's "legs had been cut off clean *as if by a metal wheel.*" The part relating to the metal wheel is entirely a conclusion; there is no evidence of that fact. The plaintiff states that the body was found on the part of the bridge almost exclusively devoted to the operation of street cars, but it was not so exclusive but that many trucks went in the tracks, as shown by the testimony above.

The statement is also made in plaintiff's brief (p. 2) that trucks did not pass over the bridge at night. This is a direct misrepresentation of the facts, because the evidence is as pointed out above, that they passed regularly over the bridge at night, there being a regular line of trucks, evidently, that went over there at least once an hour.

In the plaintiff's argument he speaks first of the right of a jury to draw an inference that the intestate of the plaintiff was struck and injured by a car of the defendant, giving among other

reasons the nature of his wounds and the absence of any other vehicle at the time, but, as pointed out before, there is no evidence that there were no other vehicles passing this point during the interval of fifteen minutes elapsing between the passing of the two cars of the defendant, and the presumption would naturally be that on a public highway such as the Plank Road, there would be no period of fifteen minutes between eleven and twelve o'clock at night when no vehicles passed over there, especially when we consider it is one of the only two thoroughfares between Jersey City and Newark.

It is quite possible, if the decedent was lying with his leg on the rail, that it could be cut off by crushing it between the metal rail and the hard rubber tires of a heavy laden automobile truck. In fact, there are trucks which have metal wheels on the rims instead of rubber, and, for that matter, we do not doubt but that a very heavy laden horse-drawn truck would cut off a man's leg by crushing it between the metal rims of the wheel and the rail.

In the face of this possibility, and the positive testimony of the crew of the car that went over the bridge immediately before the body was found to the effect that their car did not run over the decedent, how can any presumption arise that a trolley car ran over the decedent, unless it be coupled with his having stumbled out from behind one of the girders of the bridge after the front of the car had passed or was passing. In order to find that a trolley car did in fact run over the decedent (except for his stumbling out as above suggested) the jury must presume the crew of this car to be mistaken or committing perjury, notwithstanding neither of them are discredited or impeached in the slightest degree. If under the evidence any presumption arises as to the cause of the decedent's injuries we submit that the natural presumption that arises from the evidence is that the decedent was run over by a heavy truck or else he was carried to the place where found after receiving the injuries at some other place.

A glance at the photograph of the bridge, attached to this brief, and identified by Cavanagh (p. 21) convinces one that the motorman could hardly have avoided seeing any man who was on the track, unless the man stumbled out from behind one of the girders of the bridge when the front of the car had passed or was passing.



On the doctrine of the exclusion of other causes this cause should not be submitted to the jury even on the question as to how the decedent received his injuries. In the case of *Stumpf* v. *D., L. & W. R. Co.,* 47 Vroom 153, we find the following syllabus:

> "Where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause; if, under the testimony, it is just as probable that it was caused by the one as the other, he cannot recover."
>
> See also *Chester* v. *Cape May Real Estate Co.,* 73 Atlantic 836 (N. J.).

However, assuming there is sufficient testimony to submit to the jury the question as to whether or not the decedent's injuries were caused by a trolley car, a finding that a trolley car was the cause of them would only be an inference and the question of the defendant's negligence would still be open. Now, as there is no direct evidence of the defendant's negligence and such negligence could only be presumed from the presumption that the decedent was run over by the trolley car by reason of the motorman not keeping a careful lookout for persons on the track, in order to find the defendant liable for the death the jury would have to base a presumption on a presumption. In fact, it is admitted in the plaintiff's brief that such is the case. On page 6 of the brief he says: "It was a *legitimate inference* that he was injured by a trolley car; it was also a *legitimate inference* that he was injured because the motorman did not give him any warning of the approach of the car and did not use reasonable care to keep a lookout, for if he had used reasonable care to keep a lookout, with the lights in the condition that he said they were, with his own searchlight he must have seen the decedent immediately in front of him on the track."

The principle that the right of a jury to draw an inference from certain proved facts does not extend to drawing an inference from an inference or permit a presumption to arise from a presumption is well established not only in this but many other States.

In the case of *Price* v. *N. Y. C. R. R. Co.,* 105 Atlantic 187, decided by this Court in 1918, it was distinctly held that a presumption cannot be based upon a presumption. In that case, it will be remembered that a fireman on a locomotive was found injured. On behalf of the plaintiff it was claimed that a poker on an engine going in the opposite direction had extended out far enough to hit the fireman, and that, in fact, it did hit him. There was a judgment for plaintiff, from which the defendant appealed. A new trial was granted the defendant, the Corut remarking "With these circumstances we are asked to presume, without proof, that the rod may have changed its position, from one of safety to one of danger to the plaintiff, and upon this presumption to further presume that it did in fact strike him, which is not allowable." The Court quoted from *Manning* v. *John Hancock Mutual Life Ins. Co.,* 100 U. S. 694, "The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

Cunard S. S. Co., Ltd., v. *Kelly,* 126 Federal Reporter 610, First Circuit. The first paragraph of the syllabus reads:

> "It is not permissible for a jury to base an inference of fact upon another fact which is only established by presumption. Whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed."

Swenson v. *Erlandson,* 90 Northwestern Reporter, 534.

> "Circumstantial evidence is, of course, competent and proper and often the only obtainable evidence in such cases; but, as such evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist, the process is fatally vicious and defective if the circumstances from which we seek to deduce the conclusion depend also upon conjecture and speculation. Rice, Ev."

Cauble v. *Hudson,* 59 N. E. Rep. 866 (Ind.). In this case the decedent, who was *non compos mentis* and was a smoker and was known to carry a pipe and matches, was found burned and dead in a burned barn. The Court held that this did not prove that the decedent had caused the barn to burn down. The Court said:

> "His going to the barn in the first place can be established only by an inference; and, if he did go, it is only

through an inference that it can be said he burned the property. A fact may be proven by circumstantial evidence, but the circumstances themselves must be proved and not presumed. It is not found that he burned the barn, nor is it found as a fact that he went to the barn. The fact that his headless body was found in the ruins is a basis for conjecture merely. The Trial Court was right in denying a judgment resting on inferences based on inferences."

Atchison, &c., R. Co. v. *McFarland*, 43 Pacific (Kan.) 788. In this case children were killed by a train. No one saw the accident. The Court said:

"The inferences drawn from the testimony are, for the most part, based upon other inferences and presumptions which just as reasonably warrant different conclusions. Mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from facts proven."

United States v. *Ross*, 92 U. S. 281.

"They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or law is reliable drawn from premises which are uncertain. *Whenever circumstantial evidence is relied upon to prove a fact,* the circumstances must be proved, and not themselves presumed."

Globe Accident Ins. Co. v. *Gerisch* (Ill.), 45 N. E. Rep. 563. In this case it appears that a janitor whose duty it was to remove ashes suffered a fatal strain about the time when ashes which he was supposed to remove were in fact removed. The Court said, "If from the fact that he lifted a box of ashes, and from the further fact that he not long afterwards suffered from the effects of a strain, it can be inferred that such strain was caused by so lifting said box of ashes, the missing link in the chain will be supplied." But the Court refused to allow such double presumption.

In most, if not all, of the cases cited by the plaintiff it will be found that where the proof as to how the decedent came to his death was by circumstantial evidence, the fact that the instru-

mentality of his death was caused by some negligent condition for which the defendant was responsible was apparent.

In the case of *Nugent* v. *Suburban Electric Co.*, 58 N. J. L. 658, the only presumption was that decedent came to his death through a shock of electricity. The decedent, a policeman, was found dead at the foot of an electric light pole. A post mortem examination showed death was not caused by disease, and the blood was in an abnormal condition, and such as to be found in persons who died from an electric shock. There was a burn on the left hand. From this evidence, in connection with the fact that on the pole at the foot of which the man was found dead there was a wire rope on a reel heavily charged with electricity, arose the presumption that he came to his death by an electric shock from the wire on the reel, but that having been established there was no question but that it was negligence on the part of the defendant to maintain a heavily charged wire on a public street in such a position that one was apt to come in contact with it.

The *Austin case,* 82 N. J. L. 116, where there was a fire set by a locomotive, does not recite the evidence, but if it is like most locomotive fire cases, there was only one presumption, viz., either that sparks from the locomotive caused the fire or, that fact being proved affirmatively, that there a defect in the locomotive.

In the *McDade case,* 191 U. S. 96, the only presumption was that a brakeman on a train was struck by a water spout of a water tank as a train was passing the tank, but that fact having been established by circumstantial evidence, which, by the way, was very strong, there was no question but that the water tank was improperly constructed, as shown by direct evidence.

In the *Jones case,* 192 Federal Reporter, 769, the presumption was that a railroad employee had been killed by coming in contact with the roof of the tunnel at its center, where it was somewhat lower than it was at its entrance. The fact of the death having been established by presumptive evidence, there was direct evidence as to the improper construction of the tunnel.

We do not quite get the point of the plaintiff citing the case of *Patten* v. *Texas Pacific R. R.,* 179 U. S. 658, which the plaintiff cites as an illustration of the rule adopted by the Trial Judge in our present case, but we cannot see any application of the Patten case except as sustaining the defendant's position, because it merely points out the distinction that in cases of passengers the

fact of an accident may carry a presumption of negligence, but in the case of an employee negligence must be proved.

In our present case, of course, the decedent had no status as a passenger.

In the case of *Merkl* v. *J. C. H. & P. St. Ry. Co.,* 75 N. J. L. 654, there was no question but that the trolley car killed the decedent. This was testified to by the motorman operating the car who ran the man down, thinking it was a dog on the track. There was plenty of direct evidence from which the jury could find negligence in the operation of the car.

The case of *Smith* v. *Charlotte Electric Ry. Co.,* 173 North Carolina 489, referred to at the top of page 4 of the brief of plaintiff-appellant, can be found in 92 S. E. Rep. 382. It has little similarity to the case at bar. The decedent in that case "was run over and killed by its car on College street, Charlotte." The quotation is from the report of the case. The question as to the instrument that caused decedent's death was not involved in the case. The case concerns itself principally with the question as to whether or not the trolley company was negligent in not having the car equipped with a modern fender, and should have been submitted to the jury, and also whether or not the doctrine of the last clear chance applied.

The other cases cited by the plaintiff-appellant from the American Negligence Cases we have not at hand to consult, but no doubt they are of little importance or application in our present case, as we presume the plaintiff-appellant discussed and quoted from cases which he considered of more importance, and these latter cases, as we have pointed out, have no application to our present case.

Even assuming that there was direct proof that the decedent was killed by being struck by a trolley car still there is no negligence proved nor facts from which negligence can be inferred. We certainly cannot infer negligence from the mere happening of the accident. The motorman of the car which passed the point where the man lay immediately before the finding of the body says the man did not get on the track in front of the car, so assuming this car ran over him he must have got under the wheels of the car in some way after the front of the car passed him. There is no evidence as to how or when the decedent got on the track or where the car that ran over him was at that time.

The case of *Erbe* v. *Philadelphia Rapid Transit Company,* 100 Atlantic Reporter, 966 (Pa.), says:

> "Assuming this testimony to be sufficient to show deceased was struck by the car, there still remains the total absence of proof to show death occurred by reason of negligence on the part of the defendant. Proving that an accident happened, or the existence of an opportunity for it to happen, in the manner alleged, is entirely insufficient to establish negligence. * * * For all that appears in the evidence deceased may have been seized with a sudden illness and fallen on the track immediately in front of the car. * * * There being nothing in the evidence tending to show what deceased was doing, or whether or not she was about to cross the track at the time of the accident, the doctrine of presumption of negligence is not applicable."

A case somewhat similar to our present one is that of *Helen Patton, Administratrix,* v. *Public Service Railway Company,* 227 Fed. Rep. 810, decided by the Circuit Court of Appeals on writ to the United States District Court of New Jersey in 1915. In that case plaintiff's decedent was killed by the backing of one of the defendant's cars on its private right of way near a station. The Court said:

> "No one saw the accident and no one knows, as a matter of fact, how it happened. The plaintiff contends that from the circumstances of the accident, negligence of the defendant must be inferred, that is, had the defendant not been negligent, the accident would not have occurred. When or how the plaintiff's husband got upon the track between the two rails is not disclosed. Whether he heard the bell ordering the car to back or whether he saw the lighted car in time to avoid his peril, is not shown. Whether the car knocked him down, or whether he fell down and while in the forward position in which his body was found was run over by the car, is a mystery. Whether the conductor upon the rear platform of the car could have seen the decedent or by the exercise of care should have seen him, is not proved, nor is it proven that in backing the car, under the circumstances, the conductor was engaged otherwise than in directing the car's movements and in the proper exercise of care for the safety of those upon the track. In fact, it is not shown how the accident occurred.

> While it is certain that the plaintiff's husband was killed by the car, there is no evidence that his death was caused by negligence, or that the proximate cause of his death was the negligence of the defendant. * * * The circumstances connected with the death of the plaintiff's husband, in so far as they are disclosed, do not show that it was necessarily occasioned by the negligence of the defendant. It may have been occasioned by negligence of his own, or may have been the result of pure accident, in which no negligence was present. In this state of the evidence, it is clear that there was nothing from which the jury could properly have found that the death of the plaintiff's husband was due proximately to the negligence of the defendant."

The rule relating to proving negligence appears to be laid down very clearly in the case of *Nugent* v. *Suburban Electric Company,* 58 N. J. 658. "It must be conceded that the plaintiff below was bound to show something more than that the defendant was possibly responsible for the decedent's death in order to entitle him to a verdict. It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected."

This is just one of those cases where the cause of the death and how it occurred are susceptible of proof, but the plaintiff has not the witnesses, but the fact that he has not the witnesses is no reason why the defendant should respond in damages for the death.

Respectfully submitted,

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