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Complaint.

COMPLAINT.

Original filed April 16, 1919.

Amendment Filed November 14, 1919.

New Jersey Supreme Court

10

ESSEX COUNTY.

CATHERINE ROSE SAVAGE,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY, a corporation,

Defendant.

Action at Law.

Complaint.

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The plaintiff, Catherine Rose Savage, residing in Philadelphia, in the State of Pennsylvania, says:

1. That on the twenty-fifth day of November, 1918, the said defendant, by its servants was operating, running and propelling a certain passenger car along Bloomfield avenue, a public street in the City of Newark, in the County of Essex, for the carriage and conveyance of passengers in and along said street and other public streets in said City of Newark.

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2. On the day and year aforesaid, plaintiff was a passenger on the car indicated as a Bloomfield car, traveling in a north-westerly direction along Bloomfield avenue, in the City of Newark aforesaid.

3. That while a passenger as aforesaid, she was standing on the rear platform of the car, about to enter the body of the said car.

4. That while a passenger as aforesaid, the plaintiff was suddenly jerked from her feet and thrown to the floor of the car by the negligent operation thereof.

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5. By reason of the aforesaid, the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit: from thence hitherto, during all of which time, the said plaintiff suffered and underwent great

Answer.

10 pain and was hindered and prevented from transacting and attending to her lawful necessary affairs, by her during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages, which she might and otherwise would have derived and acquired, and the plaintiff does suffer great pain and will suffer great pain by reason of the aforesaid, and thereby also the said plaintiff was forced and obliged to lay out and expend divers large sums of money, amounting in all to the sum of five hundred dollars, and plaintiff will be put to great expense in the future, in and about endeavoring to be cured of the wounds, bruises, and injuries so received as aforesaid, to wit: at Newark, in the County of Essex aforesaid.

Plaintiff demands as damages, the amount of ten thousand dollars.

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SCHLOSSTEIN & STEINHARDT,
Attorneys of Plaintiff.

ANSWER.

Filed May 3, 1919.

30 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 remaining paragraphs of the complaint.

OBJECTIONS.

1. It avers that paragraphs three and four do not state facts sufficient to constitute a cause of action, and it reserves the right to move to strike out same at the trial of this suit.

40

FIRST DEFENSE.

1. It avers that the negligence of the plaintiff contributed to the happening of the said alleged accident.

LEFFERTS S. HOFFMAN,
Attorney of Defendant.

Reply.

REPLY.

The plaintiff, Catherine Rose Savage, in reply to the first defense of the defendant, filed in this cause, says:

1. She denies that she was guilty of any negligence that contributed to the happening of the said accident, set forth in the bill of complaint. 10

SCHLOSSTEIN & STEINHARDT,
Attorneys for Plaintiff.

I hereby consent to the filing of the above reply as of time.

LEFFERTS S. HOFFMAN,
Attorney for Defendant.

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Argument on Motion to Strike Out Complaint.

NEW JERSEY SUPREME COURT.

CATHERINE ROSE SAVAGE,

vs.

10 PUBLIC SERVICE RAILWAY COMPANY.

Transcript of shorthand notes of proceedings in the above-stated cause, at the trial thereof, at the Court House, Newark, N. J., November 14, 1919.

Before HON. NELSON Y. DUNGAN, Judge, and a jury.

Schlosstein & Steinhardt for plaintiff.

Lefferts S. Hoffman and Howard MacSherry for defendant.

20 Jury drawn and sworn.

The Court. I have just been looking at this complaint. I have grave doubts whether or not the complaint sets out a cause of action.

Mr. MacSherry. Did you look at the answer, if your Honor please?

The Court. Yes. I see there is an objection in the answer.

Mr. Steinhardt. Would your Honor hear me on that now?

The Court. I will hear you on that question. Suppose a
30 passenger was standing on the back platform of the car and the car went around a curve and the passenger was thrown and hurt. Do you think that would be negligence?

Mr. Steinhardt. I think it has been so held.

The Court. Must you not allege some unusual motion of the car? The car has to go around a curve.

Mr. Steinhardt. The doctrine seemed to be laid down by the Court of Errors and Appeals that the case of a common carrier is a little different from the case of ordinary negligence, where
40 a passenger is riding or injured without giving the reason or alleging the reason, may it please the Court—

The Court. (Interposing.) That is the case of a cash box falling?

Mr. Steinhardt. Now, I have the case of where the plaintiff was injured by a jerk of the car.

Argument on Motion to Strike Out Complaint.

The Court. Yes; but you do not allege there was a jerk of the car; you do not allege that there was unusual motion of the car; you just say the operation of the car; no unusual motion of the car is alleged at all, nor do you say anything unusual occurred in the car; you just say by its operation.

Mr. Steinhardt. I believe under these decisions, if your Honor please— 10

The Court. I will listen to your decisions.

Mr. Steinhardt. On actions for injuries suffered by passengers while in charge of common carriers, the rule is somewhat different.

The Court. Now, what act of omission or commission do you allege in your complaint?

Mr. Steinhardt. Perhaps rather than argue the motion, I might ask the Court for leave to amend the complaint. 20

The Court. Now, that is just what I was hoping you might do.

Mr. Steinhardt. If the Court would grant that motion; I would insert a word in paragraph four to make the paragraph read, "That while a passenger as aforesaid, plaintiff claimed to have been violently thrown to the floor of the car by the negligent operation thereof."

The Court. That will ^{not} help it. I would not permit that amendment because that would not change the situation. Unless you can show some defect in the appliances, or some unusual motion of that car in its operation which caused the plaintiff to fall, the mere fact that she fell would not be a circumstance from which any jury would have the right to infer negligence. 30

Mr. Steinhardt. If your Honor will permit me a moment, I will withdraw the amendment and re-submit it (long pause). I desire to amend paragraph four as follows: "That while a passenger as aforesaid, the plaintiff was suddenly jerked from her feet and thrown to the floor of the car by the negligent operation thereof."

The Court. That does not help it much. The very syllabus you have read says: (Reads from *Whalen v. Consolidated Trac-* 40
tion Co., 61 Law, p. 607.) Now, you see, you do not allege anything of that sort. All you allege is that there is some negligence of the defendant, but you do not state what it is at all.

Argument on Motion to Strike Out Complaint.

10 *Mr. Steinhardt.* If your Honor please, the control and management of the car was solely within the knowledge of the defendant, and the case so holds, that these facts being solely within the knowledge of the defendant, are for the defendant to come forward and disprove them; the law does not cast the burden upon the woman who was suddenly thrown to the floor to come in and prove what was the matter with the car. The mere fact that she was a passenger gives her the right to come into court.

20 *The Court.* I have never heard that suggestion before. I have read both of these cases with the utmost care, and I cannot agree with counsel that these cases hold that at all. The mere fact of the injury, without showing any defect in the appliances of the car, or showing any unusual motion of the car; the mere fact that a person falls—it is not a case where one is struck by something in a car like the bursting of an electric light in one case and the falling of a recording box in another case, when something struck them, then it is upon the defendant company to explain—but when there is not shown any unusual motion of the car, or any fault with the appliances, I do not believe that fact puts the burden upon the defendant.

Mr. Steinhardt. I would like to amend the complaint to meet your Honor's ruling.

30 *The Court.* There is not much use in your doing that if you cannot prove it. I appreciate your care and caution in making the amendment. If all you are going to be able to prove is that you were standing on the back platform of this car, or that you were thrown down, or you fell down—

Mr. Steinhardt. (Interposing.) That is it exactly; that is all we can prove.

The Court. (Continuing.) —and that the motion of the car threw you, I would have to non-suit.

40 *Mr. Steinhardt.* The plaintiff was thrown. As I say, for that reason, I believe the burden was on the defendant to show that the car was properly operated.

The Court. Mr. MacSherry, if you disagree with the Court, I should be glad to hear you.

Mr. MacSherry. For the first time today, I am glad to say I thoroughly agree with your Honor.

Argument on Motion to Strike Out Complaint.

Mr. Steinhardt. It does not seem to me that this plaintiff should be denied a right of action merely because she cannot come into court and prove that the controller guard did not operate properly, or that the car had bumped into another car, or any of a great number of reasons. It seems to me that her right should not be taken away under those cases, and I shall have to ask an exception to the ruling of your Honor. 10

The Court. The exception may be noted.

Mr. Steinhardt. It seems to me that it would be highly unjust, as well as contrary to the rule as laid down in the Court of Errors and Appeals case, that she must come into court and prove what was defective about the mechanism of the car, or what was negligent in the handling of the car, when those facts are solely within the knowledge of the defendant, or its agents, and I believe that those cases are broad enough for the Court to accept the complaint as it stands under those decisions. 20

Mr. MacSherry. I think I move for a non-suit in the case.

The Court. I think that is not the proper motion; I think the proper motion is to move to strike out the complaint.

Mr. MacSherry. I move for that.

The Court. Have you said all you want to say?

Mr. Steinhardt. Yes, sir.

Mr. MacSherry. The ground of my motion being—I should like to state it—that the complaint does not state facts sufficient to constitute a cause of action. 30

Mr. Steinhardt. Will your Honor please assume that this amendment is the one asked for to the complaint: "That while a passenger as aforesaid, the plaintiff was suddenly jerked from her feet and thrown to the floor of the car by the negligent operation thereof."

The Court. The stenographer has taken down all that has been said, he tells me. I think counsel is to be commended, if your complaint states all you can prove, rather than to endeavor to set out facts which you know in advance you cannot prove, and if you are right in your contention, the review will now be a very simple one. If the Court is wrong about it, you can easily discover that fact by an appeal and with a very simple record. 40

Postea.

POSTEA.

Filed November 20th, 1919.

NEW JERSEY SUPREME COURT.

10

CATHERINE ROSE SAVAGE,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,

Defendant.

Action at Law.

Postea.

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This case came on for trial before Judge Nelson Y. Dungan, to whom the issue had been duly referred for trial, with a jury, at the Essex Circuit, on November 14th, 1919.

It having been averred in the defendant's answer that the complaint disclosed no cause of action, the Court, at the trial on motion of Lefferts S. Hoffman, attorney of the defendant, proceeded to dispose of the said matter, and heard argument thereon, and the Court being of the opinion that the said complaint disclosed no cause of action, ordered that the said complaint be dismissed, with costs.

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NELSON Y. DUNGAN,

Circuit Court Judge.

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*Notice of Appeal.***NOTICE OF APPEAL.**

Filed December 11, 1919.

NEW JERSEY SUPREME COURT.

CATHERINE ROSE SAVAGE,

*Plaintiff,**vs.*

PUBLIC SERVICE RAILWAY COMPANY, a corporation,

*Defendant.**Action at Law.**Notice of
Appeal.*

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TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following grounds:

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Because the Court granted the defendant's motion to strike out the complaint as amended, whereas said Court should have denied said motion.

Your respectfully,

SCHLOSSTEIN & STEINHARDT,

Attorneys for Plaintiff.

To LEFFERTS S. HOFFMAN,

Attorney for Defendant.

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Notice of Appeal

NOTICE OF APPEAL
IN THE DISTRICT COURT

IN THE DISTRICT COURT

10

State of Iowa
County of _____

Plaintiff

vs.

Defendant

Wherefore the Plaintiff prays that the Court will grant the relief herein requested and that the costs of this action be awarded to the Plaintiff.

11

Witness my hand and seal of office this _____ day of _____, 19____.

Notary Public

Subscribed and sworn to before me this _____ day of _____, 19____.

12

Attest my hand and seal of office this _____ day of _____, 19____.

13

New Jersey Court of Errors and Appeals

CATHERINE ROSE SAVAGE,

Plaintiff-Appellant,

and

PUBLIC SERVICE RAILWAY COMPANY, a corporation,

Defendant-Respondent.

On Appeal, etc.

BRIEF FOR APPELLANT.

Facts.

This case came on for trial at the Essex Circuit of the Supreme Court. Defendant moved to strike out the complaint as amended, upon the ground that it did not disclose a cause of action. The Court granted such motion, and delivered its opinion thereon. Plaintiff appeals from the judgment of the Court in dismissing said complaint.

The facts as set up in the complaint, are that the plaintiff, while a passenger on one of defendant's cars, was suddenly jerked from her feet and thrown to the floor of the car, by the negligent operation thereof, sustaining injuries for which she sought damages.

The question before this Court is—"Does the complaint set out a cause of action?"

1. Duty of explanation on defendant.

The allegation of complaint is that plaintiff while a passenger, was thrown to the floor of the car by the negligent operation thereof, sustaining injuries, etc.

The defendant, by its motion to strike out, admits the allegations of the complaint. It hardly need be mentioned that the car was operated by, and was solely within the custody of the defendant. This control and custody gave the defendant a peculiarly intimate knowledge of the facts surrounding the accident in question—facts not possible for the plaintiff to know. This situation required of the plaintiff, a less degree of certainty in pleading.

Chitty on Pleading No. 234.

Less certainty is requisite when the law presumes that the knowledge of the facts is more properly or peculiarly in the opposite party.

Whalen v. Consolidated Traction Co., 61 N. J. Law, 606, at p. 609.

Dixon, *J.* But in actions for injuries suffered by passengers, while in charge of common carriers, the rule is somewhat different. The rule there applicable is modified by the doctrine which seems to have given rise to the *almost absolute responsibility* of the common carrier of goods—the doctrine that the carrier's greater means of ascertaining and disclosing the cause of damage place upon him a greater duty of explanation.

It is true that a complaint with a general allegation of negligence is insufficient as against a motion to strike out, raising the objection that the allegations are too general; that the particulars of the negligence must be set forth; but it is urged that the case at bar falls within the exception to the above rule, *i. e.*, the facts are within the knowledge of the defendant and are such that the plaintiff cannot be expected to know them.

2. Plaintiff's being jerked from her feet justifies an inference of breach of duty, within the maxim *res ipsa loquitur*.

Scott v. Bergen County Traction Co., 63 N. J. Law, 408, at p. 410.

It was decided in the case of *Consolidated Traction Co. v. Thalheimer*, 30, Vroom, 474, that the occurrence of a sudden lurch or jerk of a street car of sufficient violence to throw a passenger off the platform of a car, who was then preparing to alight or awaiting the stoppage of the car to alight, justified an inference of some breach of duty and falls within the maxim *res ipsa loquitur*, and that it was held that under the circumstances, it was for the jury to say whether the defendant was guilty of negligence and the plaintiff guilty of contributory negligence.

The language of a pleading must be construed to have a reasonable intendment and construction, and where possible that meaning should be taken which would support and not defeat the pleading. It is respectfully submitted that had plaintiff's complaint been worded "jerked from her feet and thrown to the floor of the car by a sudden jerk thereof," that it would have fallen squarely within the above cited case. Would it not be a

mere play on words to say the complaint must fail because worded "jerked from her feet and thrown to the floor of the car by the *negligent operation* thereof." Could it be possible to construe the latter phrase in any other manner than that her fall was occasioned by a jerk of the car?

3. The manner and circumstances of the injury justify the application of the maxim.

By their motion to strike out, defendant admits that plaintiff was *jerked from her feet* by the negligent operation of the car. The accident is one which does not occur in the ordinary operation of a trolley car, if reasonable care be used, and in the absence of explanation by the defendant, raises the presumption that the accident happened from want of care on its part.

What are the circumstances surrounding the injury in the light of pleadings? Plaintiff assuredly was not injured or thrown to the floor by a fellow passenger. The operation of the car itself, was such that it threw the plaintiff to the floor. Can this manner of operating a car be said to be consistent with the high degree of care necessary for a common carrier to exercise in the performance of its duty? Or does not the happening of the accident itself, bespeak defendant's negligence.

For all of which, it is respectfully submitted that the judgment of the Court below, be reversed.

SCHLOSSTEIN & STEINHARDT,
Attorneys for Plaintiff.

FREDERICK W. SCHLOSSTEIN,
Of Counsel.

New Jersey Court of Errors and Appeals

CATHERINE ROSE SAVAGE,

Plaintiff-Appellant,

vs.

PUBLIC SERVICE RAILWAY COMPANY, a corporation,

Defendant-Respondent.

Action at Law.

On Appeal.

BRIEF FOR RESPONDENT.

This appeal was taken by the plaintiff-appellant on the ruling of the Trial Court striking out the complaint.

The plaintiff-appellant states on page 1 of her brief that she appeals from the judgment of the Court in dismissing said complaint, but we note that the printed book fails to disclose any such judgment.

The ruling of the Court was based on the inadequacy of the allegation of negligence in the complaint. This allegation, as amended, after considerable discussion between the Court and counsel for the plaintiff, reads as follows (p. 1, l. 40; p. 7, l. 30): "4. That while a passenger as aforesaid the plaintiff was suddenly jerked from her feet and thrown to the floor of the car by the negligent operation thereof."

It was clearly pointed out to plaintiff's counsel during the discussion between him and the Court that the allegation of negligence was defective in that it did not set forth any unusual or extraordinary motion of the car which caused the plaintiff to be thrown to the floor of the car.

The amendment necessary was a very simple one, and had the plaintiff been able to prove the facts necessary to sustain such an amended allegation no doubt the amendment would have been made. We assume, therefore, that all the plaintiff could prove is that the plaintiff was thrown to the floor of the car, and, of course, it would have been useless to make the necessary amendment.

In support of her contention that the complaint set forth a good cause of action, the plaintiff cited the cases of *Whalen v.*

Consolidated Traction Company, 61 N. J. Law 606, and *Scott v. Bergen Traction Company*, 63 N. J. Law 408.

In the Whalen case, decided by this Court in 1898, it appeared in the evidence taken at the trial that the plaintiff was injured by being thrown from the car by reason of the conductor thereof stumbling against him. The non-suit which was granted by the Trial Court was held to be erroneous by this Court on the ground that the stumbling of the conductor against the plaintiff was sufficient to call upon the defendant for an explanation, and that it was not necessary for the plaintiff to go further to prove the cause of the stumbling.

The plaintiff in his brief cites a paragraph from the opinion of the Court, but he fails to cite the following paragraph which contains the rule regarding the relations of carrier and passenger. It is as follows (p. 609): "The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised."

In our present case all the plaintiff says in her brief is that the car was negligently operated, but, of course, this is only a conclusion, although the plaintiff insists that on our motion we admitted all the facts stated in the complaint. The only facts that are admitted on the motion are the facts that are well pleaded, and certainly the expression "negligently operated" is not well pleaded.

In the Scott case, above cited, decided by the Supreme Court in 1899, it appears that the plaintiff was a passenger on a street car of the defendant and notified the conductor that she wished to alight at a certain crossing, that on approaching that crossing the conductor rang the bell of the car, as she supposed to stop, and as the car slowed down she arose from her seat and went to the rear platform to await the stoppage of the car, and while so waiting on the rear platform the car gave a lurch forward and she was thrown off to the ground; that the car was going so slowly as she stood on the platform that she thought it came to a standstill when the lurch forward took place. The conductor also was standing on the platform.

This case is not in point, because it brings in the very important element of invitation, as it might be considered that

when a passenger has requested the conductor to be allowed to alight at a certain point, and in response to that request a signal is given to stop the car at that point, the question as to whether or not the passenger has been invited to alight at that point must be considered. Further than that, however, the quotation from the Scott case set forth in the plaintiff's brief is *obiter dictum*, because it appears that the plaintiff had a verdict and an appeal was taken from the judgment entered thereon on the sole ground that the Trial Court erred in refusing to grant a non-suit because of the contributory negligence of the plaintiff. The Court could readily have affirmed the judgment on the ground that the question of contributory negligence was for the jury. The opinion goes further, however, and discusses the negligence of the defendant, and if it is to be considered as an authority to sustain the plaintiff's contention in our present case, we beg to call the Court's attention to the case of *Raeuber v. Public Service Railway Co.*, decided by our Supreme Court in 1915, and affirmed by this Court in 1916, 98 Atlantic 192. This citation is the affirmance by this Court and contains the opinion of the Supreme Court.

In its opinion the Court says (p. 192):

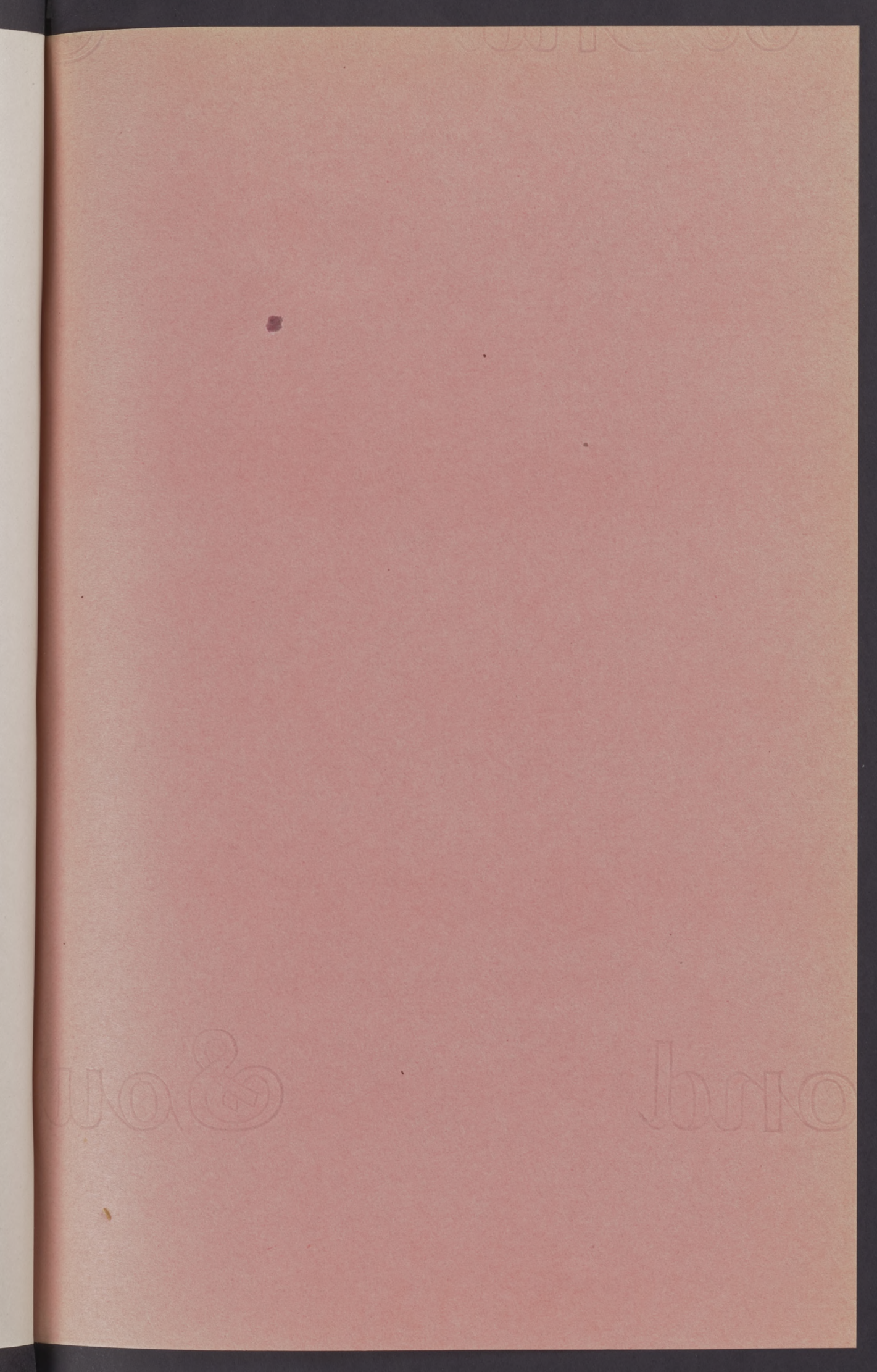
"Plaintiff's case was that, being a passenger on the defendant's car, and desiring to leave the car at Eighth street, he advised the conductor of his wish; that, upon arriving at Seventh street, he again told the conductor to let him off at Eighth, and the conductor gave the necessary signal to the motorman; that after the signal was given he (the plaintiff) went out on the platform; that the car slacked up; that he stepped onto the step, and that just at that moment the car gave a jerk which threw him into the street."

"We think this judgment cannot be sustained. There is no proof that the jerk of which plaintiff complains was abnormal, or anything more than was merely incidental to the proper operation of the car. Consequently no negligence was shown which rendered the defendant company responsible for plaintiff's injury. The plaintiff, in taking his position upon the step, assumed the risk of accident which might result from normal operation, and had only himself to blame for the injuries which he received.

"It is true that the motorman testified that there was no observable jerk after he began to slow down the car. But, conceding that the jury had a right to disbelieve this statement, the nullifying of his testimony will not supply the evidence which the plaintiff was bound to produce, namely, evidence showing abnormality in the operation of the car."

THE HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1880
BY
JOHN B. HENNING

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