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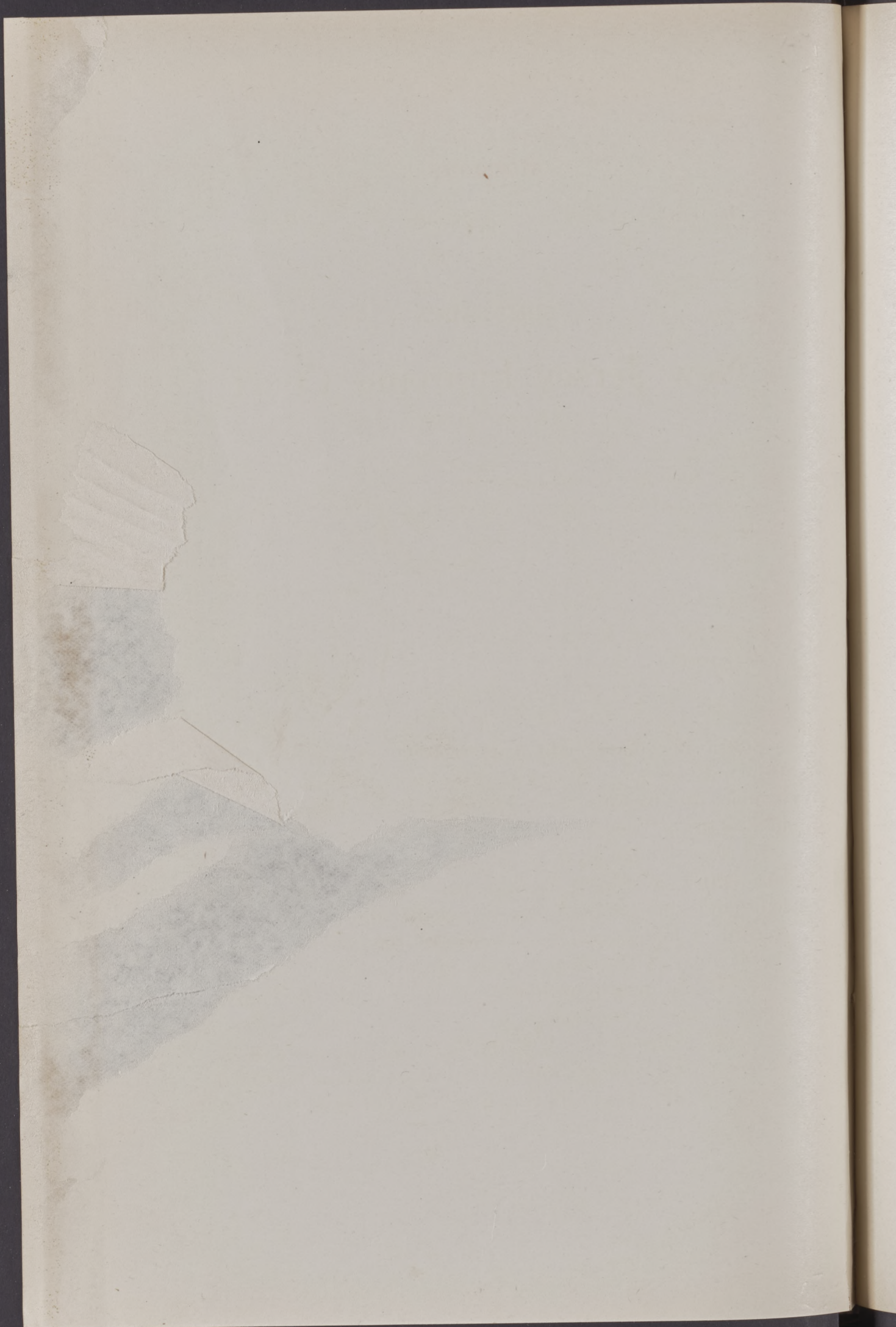
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Complaint.

SUMMONS.

The defendant was duly summoned.

COMPLAINT.

10

New Jersey Supreme Court

UNION COUNTY.

SELMA BERGMANN, administratrix *ad*
prosequendum of Henry Bergmann,
deceased,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY, a
corporation,

Defendant.

Action at Law.

20

Selma Bergmann, administratrix *ad prosequendum* of Henry Bergmann, deceased, residing at 151 East Grant avenue, Roselle Park, New Jersey, in the County of Union and State of New Jersey, says that:

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1. The defendant is a corporation and at the times hereinafter mentioned was the owner and proprietor and had possession of and by its agents and servants had control of and operated a trolley railroad in Roselle, in the County of Union and State of New Jersey, by running cars propelled by electricity over tracks laid upon public streets in said place.

2. On February 3, 1921, the defendant owned and by its agents and servants operated as aforesaid on Westfield avenue in said Roselle Park a line of trolley cars.

40

Complaint.

3. On said date Henry Bergmann was lawfully upon said highway crossing the same near the intersection of Union road.

4. The defendant at that time and place by its agents and servants did so negligently and carelessly operate and run a trolley car along said highway as to cause the
10 same to run into and over the said Henry Bergmann.

5. By reason of the said negligence and carelessness on the part of the defendant and as a result of being run into and over by said trolley car the said Henry Bergmann was immediately killed on the date aforesaid, to wit, February 3, 1921, being within two years from the commencement of this action.

6. On April 15th, 1921, the Surrogate of Union County granted letters of administration *ad prosequendum* of the said Henry Bergmann to the plaintiff, Selma Bergmann,
20 who accepted the same and qualified for the purpose of prosecuting this action.

7. The decedent left surviving him the plaintiff, his widow, and his daughter, Dorothy, who by reason of the death of decedent suffered great pecuniary injury and loss.

Plaintiff demands twenty-five thousand dollars (\$25,000) damages.

30

LUM, TAMBLYN & COLYER,

Attorneys for Plaintiff.

40

Answer.

ANSWER.

Filed May 10, 1921.

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:

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1. It admits that part of the first paragraph of the complaint which avers that it is a corporation operating a trolley railway in Roselle, Union County, but it avers that its tracks at the place of the alleged accident were not laid upon a public street.

2. Answering the second paragraph of the complaint, it avers that, on the date therein mentioned, it operated its trolley railway on a private right-of-way running parallel with and between the two halves of the said Westfield avenue, and denies that it operated trolley cars on Westfield avenue.

20

3. It denies the third, fourth and fifth paragraphs of the complaint.

4. As to the sixth paragraph of the complaint it has no knowledge or information sufficient to form a belief.

5. As to the seventh paragraph of the complaint it denies that the persons named suffered pecuniary injury and loss by the death of the decedent. As to the rest of the said seventh paragraph, it has no knowledge or information thereof sufficient to form a belief.

30

FIRST DEFENSE.

1. It avers that the negligence of the plaintiff's decedent contributed to the happening of the said alleged accident, in that he entered the pathway of the approaching trolley car when the said trolley car was so near as to endanger his safety.

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Answer.

SECOND DEFENSE.

2. It avers that the plaintiff's decedent, at the time of the alleged accident, was a trespasser upon the property of this defendant.

THIRD DEFENSE.

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3. It reserves the right to move, at or before the trial of the cause, to have the complaint stricken out as irregular and defective and so framed as to prejudice, embarrass or delay a fair trial on the action, because of the failure of the complaint to allege any specific act of negligence on the part of the defendant.

LEFFERTS S. HOFFMAN,
Attorney of Defendant.

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Reply.

REPLY.

Filed May , 1921.

The plaintiff by way of reply to the answer of the defendant, says that:

REPLY.

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1. She has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph one of the answer.

2. She has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph two of the answer.

ANSWER TO FIRST DEFENSE.

1. She denies paragraph one of the first defense.

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ANSWER TO SECOND DEFENSE.

1. She denies paragraph two of the second defense.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

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Selma Bergmann, direct.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

October Term, 1921.

10	SELMA BERGMANN, Admx., <i>ad pros.</i> , of Henry Bergmann, deceased,
	<i>vs.</i>
	PUBLIC SERVICE RAILWAY COMPANY, a corporation.

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. George S. Silzer, Circuit Court Judge, at the Union County Court House in the City of Elizabeth, New Jersey, on the fifteenth day of November, A. D. 1921, at 9:30 A. M.

Appearances:

Messrs. Lum, Tamblyn & Colyer, William A. Wachenfeld, Esq. (present), counsel for the plaintiff.

Lefferts S. Hoffman, Esq., Henry H. Fryling, Esq. (present), counsel for the defendant.

Mr. Wachenfeld opens the case for the plaintiff.

30 Mr. Fryling opens the case for the defendant.

SELMA BERGMANN, the plaintiff, being duly sworn according to law, on her oath saith:

Direct examination by Mr. Wachenfeld.

Mr. Wachenfeld. I offer in evidence a certificate issued by the Surrogate of Union County, appointing Mrs. Bergmann administratrix *ad prosequendum*.

(Certificate entered in evidence and marked Exhibit
40 P. 1.)

Selma Bergmann, direct.

- Q Mrs. Bergmann, you are the plaintiff in this action?
A Yes, sir.
- Q Where do you live? A 151 Grant avenue, Roselle Park.
- Q How long have you lived there? A Fifteen years.
- Q You are the widow of Henry Bergmann? A Yes.
- Q When was Henry Bergmann killed? On what date? 10
A The third of April.
- Q Of the present year? A Yes.
- Q What day was he killed? A Third of February, 1921.
- Q Did you see the accident? A No.
- Q What time did he leave the house on that night? A Twenty minutes to seven.
- Q Do you know where he was going? A He goes to Newark. 20
- Q Do you know what he was going there for? A He wanted to go to a meeting.
- Q What was his business, Mrs. Bergmann? A He was engineer.
- Q Who was he employed by at the time of his death?
A Feigenspan in Newark.
- Q That is the brewery in Newark? A Yes.
- Q Do you know how long he had been working for them? A Two years. I guess over two years. 30
- Q How long ago were you married to Mr. Bergmann?
A Twenty-nine years.
- Q Twenty-nine years ago, you mean? A Yes.
- Q Do you know where he worked before he worked for Feigenspan? A He was in an ice plant in Newark.
- Q Do you know how long he was employed by the ice plant, altogether? A He was one season there.
- Q For how long a time had he been going from the place where you lived to Newark to his work, how many years about? A Nearly two—three years. 40

Selma Bergmann, direct.

Q After the accident occurred when did you next see Mr. Bergmann? A I saw him the next day, two or three o'clock.

Q Where? A In my home where the undertaker brought him there.

Q When the undertaker brought the body down. When did you first hear about the occurrence of the accident?

A About one and one-half, two, two hours.

Q After the accident happened? A Yes.

Q Mr. Bergmann at the time of his death was how old, Mrs. Bergmann? A Fifty-two years old.

Q And how old are you now? A I am fifty-four years old.

Q Are there any other members of your family living?

A My daughter.

Q And what is her name? A Mrs. McKeever.

Q Does she live with you? A No.

Q How old is she? A She is twenty-six.

Q Will you tell us what the condition of health of Mr. Bergmann was prior to the occurrence of this accident? Was he in good health or bad health? A My husband was strong, healthy man.

Q Was he sickly or did he have any continuing ailments, Mrs. Bergmann? A He never was sick.

Q Will you tell us about Mr. Bergmann's habits? Whether he was a man who drank? A Never.

Q Do you know how much Mr. Bergmann was earning at the time of his death, Mrs. Bergmann?

Mr. Fryling. Just answer yes or no.

A Yes.

Q How much was he earning?

Mr. Fryling. I object to that.

Q How do you know how much he was earning? A \$47.

Selma Bergmann, cross.

Q How do you know it? A Of course, he handed it to me.

Q Then how much did he hand you? A \$47.

Q Did he hand you that amount every week? A Yes, sir.

Q And from that you assume that he was earning \$47 a week? A Yes.

10

Mr. Wachenfeld. It is stipulated on the record that if the American mortality tables were offered in evidence they would show the expectancy of life to be 19.49 years.

Q Did you get this amount of money from Mr. Bergmann regularly, Mrs. Bergmann? A Yes, sir.

Q And for how many years had you been getting this \$47 a week from him? A Oh, I get these wages every time when he brought it home.

20

Q Had he been earning this \$47 a week since the time he was employed by Feigenspan, which you say was for the last two years? A Not quite the whole time.

Q Not quite the whole time? A No.

Q When he was working for the ice plant how much money did you get from him? A \$35, I think.

Mr. Wachenfeld. That is all.

Cross examination by Mr. Fryling.

Q Mrs. Bergmann, you say the night of this accident your husband left your house at 6:40? A Yes, sir.

30

Q How do you know that? Did you look at the clock at the time? A Yes, sir. He sat at the table and watched the clock.

Q Did you see the clock yourself? A Yes.

Q You saw the clock, so that it was exactly 6:40 when he left? A Yes.

Q And you lived on Grant avenue. How far is that from Westfield avenue? A One block.

40

Selma Bergmann, cross.

Q And how far is 151 Grant from Dalton street? A
A half a block.

Q Do you live between Dalton street and Union road?

A Yes, sir.

Q On which side of the street? The side further away
from Westfield avenue? A Yes.

10 Q Mr. Bergmann was going then, you say, to attend a
meeting in Newark? A Yes.

Q How long had he been receiving \$47 a week? A I
don't know exactly. I guess a year and a half.

Q Weren't his wages decreased, weren't the wages cut
just before this? A No.

Q After this time? A No.

Q Wasn't he going to a meeting to complain about his
wages being reduced? A No, they wasn't reduced.

20 Q Wasn't that the reason he was going to the meeting
because his wages were being reduced? A No, this
wasn't reduced at all. They wanted to go to the meeting,
certain kinds of things, talking over.

Q Not about his wages at all? A No.

Q Mrs. McKeever, your daughter, is married, isn't
she? A Yes.

Q And she lives with her husband? A Yes.

30 *The Court.* Mr. Wachenfeld, is it your idea that
the deceased was going to Newark by way of the
trolley car?

Mr. Wachenfeld. Yes, sir.

By Mr. Fryling.

Q He usually went to Newark by trolley car, did he?
A Yes.

Mr. Fryling. That is all.

Bernhard Leffler, direct.

BERNHARD LLEFFLER, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Wachenfeld.

Q Mr. Lleffler, you live where? A 32 Marne street, Newark.

10

Q You are connected with what company? A Feigen-span corporation.

Q And in what capacity? A Chief engineer.

Q You knew Henry Bergmann in his lifetime? A Not his lifetime, as long as he was employed there.

Q Was he working for Feigen-span in February, 1921, prior to his death? A Until that night he got killed.

Q What capacity was he employed? A He was employed as a first class engineer, as well as mechanic.

Q Will you tell us whether or not he was a competent workman? A He was.

20

Q And how long had he been employed by Feigen-span? A He was employed from—

By Mr. Fryling.

Q Is this the record you keep, Mr. Lleffler? A From October 12.

Mr. Fryling. I object.

30

By Mr. Wachenfeld.

Q Mr. Fryling objects to your referring to that. Can you recall offhand, without referring to your memorandum, just exactly the dates on which he was employed? A No.

Q Tell us whether he was there a year or two years? A He was there about something over two years.

Q A little over two years? A Something over two years.

Q Do you know whether or not his services were satisfactory to the company?

40

Joseph Geores, direct.

Mr. Fryling. I object.

A They were.

The Court. I do not think that is essential, Mr. Wachenfeld.

10 Q Will you tell us whether or not you know the amount of wages he was receiving from Feigenspan? A Well the day he was—

By Mr. Fryling.

Q Do you know of your own knowledge? A Yes, \$47.

By Mr. Wachenfeld.

Q A week? A A week.

Mr. Wachenfeld. That is all.

20 *Mr. Fryling.* No questions.

JOSEPH GEORES, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Wachenfeld.

Q Where do you live? A 3 Westfield avenue, East Roselle Park.

Q What is your business? A Carpenter.

30 Q Were you on this trolley car, the night of February 3, that was involved in this accident? A Yes.

Q Where did the accident occur? A Right opposite Dalton street.

Q What town? A Roselle Park.

Q What trolley line was that? A Aldene Line.

Q Where were you going from and where had you intended to go? A I was coming from Roselle Park, going to Elizabeth.

40 Q You got on the trolley car, in question, at Roselle Park? A Roselle Park.

Joseph Geores, direct.

Q What kind of a trolley car was it? A One-man trolley.

Q What do you mean by a one-man trolley? A Well, it is operated by a motorman and he acts as conductor at the same time.

Q You pay your fare as you get in, do you? A Yes, sir. 10

Q What stop did the car make prior to the accident in question? A Walnut street.

Q How many blocks is that from Dalton street? A Well, it is one good block.

Q One good block? A Yes.

Q Where were you sitting in the car? A Second seat, in front, on the right, facing the motorman.

Q From where you were sitting, could you see the motorman or the back of him? A I couldn't see him. He had the curtain down. 20

Q What prevented you seeing him? A He had the curtain around him.

Q After the car started from Walnut street will you tell us whether it went fast or slow? A Well, he was going fast.

Q Will you tell us how fast? A Well, I don't know what speed they make, but I think he was going as fast as he could go.

Q You think he was going as fast as he could go? A Yes. 30

Mr. Fryling. I object to that statement. I think that is an improper statement for the witness to make. I do not think we are entitled to hear what he thinks as to how fast this car could go and whether it was going as fast as he thinks it could go.

The Court. I presume what he means is that the speed was the maximum speed of the car. 40

Joseph Geores, direct.

By the Court.

Q Is that what you mean? A To my knowledge, it was.

The Court. I will allow it.

10 *By Mr. Wachenfeld.*

Q What happened as the car reached Dalton street?

A Why, the motorman shut off his control, I believe that is what they call it and we hit something. I thought we hit a wagon or an automobile.

Q Was the control shut off before the accident happened or after the accident happened? A Just before he hit him.

Q How long before? A Well, I should say as he shut off he hit this man.

20

Q Just as he shut off you felt the impact, is that it? A Yes, sir.

Q Could you tell from where you were what he hit, whether it was a wagon or a man? A Well, I didn't see until I looked out the window and seen this man's body even with the bottom of the window where I was sitting.

30

Q As he approached Dalton street did this motorman sound the gong or give a signal of warning of any kind? A Not to my knowledge. I don't remember hearing it.

Q Will you tell us whether or not the speed of the car, as it approached Dalton street and immediately before he shut off his control or shut off his power, whether the speed of the car was increased or decreased prior to that? A Well, I couldn't say whether it was increasing or not, but it was going at a great rate of speed. It wasn't decreasing.

40

Q Was there any gradual decreasing of that speed as he reached Dalton street? A No, sir.

Joseph Geores, direct.

Q Where was the body of this man when you first saw it? A Just opposite my seat, his back was even with the window, he was in the air.

Q Where did the body land? A It landed right alongside the trolley track, then rolled over to the curb.

Q Are you familiar with the location there at Dalton street and Westfield avenue? A Yes, sir. 10

Q Does that picture show a fair representation of that location? A Yes, sir.

Mr Wachenfeld. I ask to mark that in evidence.
(Photograph marked in evidence P. 2.)

Q Will you by using this picture please indicate on it where this accident occurred and where the trolley was at the time it struck Mr. Bergmann? Indicate with your finger? A He hit him here (indicating).

Q About there (indicating)? A Yes. 20

Mr. Wachenfeld. The spot indicated by the witness is marked with an X in lead pencil.

Q After the car came in contact with this man will you tell us how far it proceeded before it was brought to a halt? A I should say about two lengths of the car.

Q How long would you say one of these one-man cars were? A Well, I couldn't say exactly how they are.

Q What would you estimate them to be? A About thirty feet. 30

Q After the body landed in the roadway, in which portion of Westfield avenue was it? A On the right-hand side facing Elizabeth, about four feet from the curb.

Q Four feet from which curb? A The right-hand curb facing Elizabeth.

Q After the car was finally stopped what did you or any of the other passengers do? A Motorman opened the door and I got out first and went over to the body. 40

Joseph Geores, cross.

Q And where did the motorman go? A He came out after I came out and there was another young man came after I did and he followed this other man.

Q Do you know what was done with the body then? Did you stay there? A This young man and I, we turned him over, he was lying on his stomach, and I stayed there about ten minutes and I proceeded on to Elizabeth.

Q Were there any signs of life at the time that you examined the body? A Why, I would call it reaction of the body. I don't think he was alive.

Cross examination by Mr. Fryling.

Q Mr. Geores, where was the body when the trolley car stopped? A On the right-hand side of the road just from the curb.

20 Q With respect to the trolley car, where was the body? Was the trolley car alongside of the body? A When he landed?

Q When the trolley car stopped? A No, sir.

Q Where was it? A About two lengths ahead of him, toward Elizabeth.

Q That was when the car stopped? A When the car stopped.

Q The car was about two lengths ahead of the body? 30 Are you referring now to the rear of the car? A Yes, sir.

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

Q You didn't see this man at all before the accident?

A Did I see him before the accident?

Q Yes. A No, sir.

Q So that the first that you saw that there was going to be an accident was when you heard the thud, when the man was struck? Is that correct? A Yes.

Q Did you hear him put on the reverse before that?

40 A Just before he hit him, he did, yes.

Joseph Geores, cross.

Q Is that what attracted your attention? A Yes, sir.

Q When you felt the reverse you could not see ahead of the car because the curtain was down, is that correct?

A I couldn't see the motorman because he had a curtain around him.

Q Well could you see ahead of the car? A Yes, I could, but I could not see what was in front of the car, that is, when it was close to the car. 10

Q Where were you sitting? A Second seat from the front on the right facing the motorman.

Q Seats that ran cross way in the car? Did the seats run lengthways? A No, sir.

Q Or at crosswise? A Crosswise.

Q You were the second seat on the right, and ahead of you was a lengthwise seat? A No, sir.

Q Seats ran crosswise all the way through the car, did they? A Yes, sir. 20

Q Where was the body when the car stopped? A Just in front of the lamp post, that is on Westfield avenue. You haven't got it on the picture. I should say east of it.

Q That is toward Elizabeth? A Yes.

Q You are referring to the lamp post now that stands on Westfield avenue a little east of the east side of Dalton street? A I think it is just opposite Dalton street, that is opposite the east side sidewalk.

Q East side sidewalk? A Yes. 30

Q The lamp post stands opposite that? A Yes, sir.

Q And the body, when you got off the car, was just a little east of the lamp post? A Yes, sir.

Q So it was just a little east of the east sidewalk of Dalton street? Now, can you tell us about how far east?

A Five or six feet I should say.

Q Dalton street does not cross Westfield avenue, does it? A No, sir.

Q And Union road does not cross Westfield avenue?

A No, sir. 40

Joseph Geores, cross.

Q About where would you say the rear of the car was when it stopped? A Two lengths past this man when he was laying on the ground.

Q Do you know any point in the road that you can designate the place where that was? A There is no point. If I could stand there I could just about point
10 where it was.

Q But you don't recall anything that you can describe as being a point in the rear of the car? A No.

Q Where did you get on the car? A Chestnut street, Roselle Park.

Q How far is that back of Dalton street? A Two blocks.

Q Did the car stop at Walnut street? A Yes, sir.

Q I understood you to say on your direct examination that as you were passing Walnut street the car was run-
20 ning slowly? A I didn't say that; no, sir.

Q It did stop at Walnut street? A Yes, sir.

Q And about how far from Walnut street is it to Dalton street? A One good block.

Q Can you give us any idea of about the distance? A Say about five hundred feet, I guess.

Q Do you mean to say that you saw this man up in the air? A Yes, sir.

Q How far from the ground? A His back was even with the bottom of the window, face downward.
30

Q Had his face down and his body was even with the bottom of the window? A Yes.

Q Not the floor of the car but the bottom of the window? A Bottom of the window.

Q And the car was going then, you think, as fast as it could go? A Well, he had shut off then when I saw him.

Q The car wasn't going so fast then? A Well, he had shut off before he hit him, that is exactly as he hit him—as he shut off he hit this man and of course, he was
40 applying the brakes then when I saw him in the air.

Joseph Geores, re-direct.

Q But you say that he hit him just about the time that he shut off his power? A Yes.

Q And put on his brakes? Notwithstanding the fact that he struck him just about the same time that he put on his brakes the car was going slow enough from the time that he came past your window that you could see that he was flying in the air and he had his face down? A 10
He was going fast enough because we had almost passed him before he hit the ground. I had to look back to see him.

Q What? A He was going fast enough that we had almost passed him when he hit the ground.

Q And you could see, notwithstanding the speed of this car, that he was going in the air face downward past your window and up as high as the bottom of your window? A Well, as soon as I saw him I followed him back as far as I could see him. 20

Q And during all that time was he in the air? A Until we had almost passed him and then he hit the ground and rolled over to the curb.

Q You were subpoenaed here by the defendant company, too, were you not? A Yes, sir.

Mr. Fryling. That is all.

Re-direct examination by Mr. Wachenfeld.

Q Will you tell us what the condition at that location was in reference to a light, whether there was an arc light anywhere near it? A Yes, sir; there is an arc light. 30

Q And is that the arc light which is shown here on the picture in the left-hand corner? A Yes, sir.

Q Will you tell us whether or not the telegraph pole on which the power wires are that has here on the picture "Cars Stop Here" whether or not that was a regular stopping place for cars going to Elizabeth? A Yes, sir. 40

Joseph Geores, re-cross.

Q Mr. Geores, did you know Mr. Bergmann before he met with this accident? A No, sir.

Q Did you know Mr. Bergmann or any of Mr. Bergmann's family? A No, sir.

Q They were utter strangers to you? A Yes, sir.

10 *Re-cross examination by Mr. Fryling.*

Q Where was the car when you heard this bump? Do I understand the place you have marked with the X on the photograph? A Yes; right where we hit him there.

Q And that was before he came to the far side of Dalton street, is that correct? Do you remember making a statement on February 9th to a representative of the Public Service Company? A Yes, sir.

Q Do you remember stating to him that you heard a bump when the car reached the far side of Dalton street?
20 A I did.

Q Do you remember whether or not you did state that to him? A Well, if it is down there I must have said it; yes, sir.

Q Well, now, do you still want to say that it was where you put this X or was it at the far side of Dalton street?
A I think that X is on the far side, isn't it? It is past the middle.

Q I don't know whether that is what you intend or
30 not. When you point out the point where this accident occurred on the photograph, where the X is, you intend that that should be opposite the east side of Dalton street, do you? A Yes, sir.

Q This car was lighted, was it not? A The inside was lit.

Q All the lights were lit? A Yes, sir.

Q You don't know anything about the front of the car? A No, sir. I don't remember.

40

Mr. Fryling. That is all.

Louis Cisto, direct.

LOUIS CISTO, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Wachenfeld.

Q Mr. Cisto, where do you live? A 1028 E. Grand street, Elizabeth, N. J.

10

Q What is your business? A Chauffeur.

Q Where do you drive? A Why, at the present time I am driving a jitney bus.

Q Do you mean at the time of this accident? A Yes, sir.

The Court. At the present time?

A No, at the time of the accident.

Q At the time of the accident you were driving a jitney bus? A At the time of the accident.

20

Q Did you see the accident that occurred on Westfield avenue and Dalton street in Roselle on the night of February 3, 1921? A Yes, sir.

Q Where were you at the time the accident occurred? A Why, I was on the right-hand side of the street, going to Roselle.

Q You were on the right-hand of Westfield avenue going to Roselle? A Yes, sir.

Q Did you see Mr. Bergmann? A Yes, sir.

30

Q Did you know him at the time this accident happened? A No, sir; I did not.

Q You just saw the man who was struck by this trolley? A Yes, sir.

Q Where was he when you first saw him? A Whereabouts was Mr. Bergmann when I first saw him? Why he was just crossing the street and as he was crossing the street, why when he gets past the third rail going over, why, he put his hand up about twenty-five feet before the car come and as he put his hand up why, the con-

40

Louis Cisto, direct.

ductor on the one-man car, and the motorman, it is all the same, see, it is only one man on the car, why, he kept right on going and furthermore he didn't have any headlight on his car.

Q What do you mean by "He didn't have any headlight on his car"? A Why, there is supposed to be a
10 round light in the center of the car in front of it.

Q Was the headlight which was on the front of the car burning at the time this accident occurred? A No, sir; it was not.

Q You say that this trolley car was how far from Mr. Bergmann as he approached what you say was the third rail? What do you mean by the third rail? Look at this picture, please.

By the Court.

Q There are two tracks and four rails? A Yes.
20 sir. Mr. Bergmann was coming over this way you understand on that side, on the right-hand side, is one, two, three, and on the last side on this side here coming down is the fourth rail.

By Mr. Wachenfeld.

Q It is the first rail of the car track which runs to Elizabeth? A Yes, that is the idea. Mr. Bergmann was coming this way. He was going across the rail.

Q Was he going across straight or diagonally? A
30 Well, just going across about straight, see, and just as he got over on the last rail on that side for car to stop, the car never stopped, the car kept right on going and simply hit him and drove him into the middle of the street on his back and fractured his skull.

Q Where was he when he gave this signal? A Why, he was there on the opposite side there at the first rail for the car to stop.

Q Did he give this signal before he started to cross
40 the tracks running to Elizabeth? A No. After he was

Louis Cisto, direct.

in the middle of the street there he raised his hand for the car to stop.

Q That was before he started to cross the track? A Yes; before he started to cross the track.

Q And at the time he raised his hand for this car to stop, how far was this trolley car away from him? A About twenty-five to thirty feet, I would not say exact. 10

Q Did you hear this trolley car sound any gong or give any warning of any kind? A No, sir; not a thing.

By the Court.

Q How far is it from here to that door back there? A About how far? I should judge about twenty-five feet.

Q It was about as far as from here to the door, was it? A I wouldn't say for sure.

Q Suppose you were the man how far away was the trolley car when he put his hand up? A Into that room, the window inside the door, that is about how far the man was. 20

Q That is what you refer to as twenty-five feet? A About. Well, I ain't sure now, about twenty-five or thirty feet.

By Mr. Wachenfeld.

Q Will you tell us whether or not there was an arc light at this intersection there? A Yes, sir; there was an arc light. 30

Q Was that arc light burning on the night after the time in question? A Yes, sir; it was.

Q Could you see, from where you were, the motorman that was operating this car? A Yes; I could see him.

Q And could you from your observation of him tell whether he was looking to the right, front, or left or what he was doing? A He was looking down, he wasn't looking out of the car at all. 40

Louis Cisto, cross.

Q At the time that Mr. Bergmann gave this signal what was the motorman doing? A Motorman doing? Why he was looking down and he had this here hand on the controller, and he had this here hand down here and he was looking down like that (indicating).

10 *The Court.* I suppose you can agree that is more than twenty-five feet, can't you?

Mr. Wachenfeld. Yes, sir.

The Court. I think somebody said it was sixty. I asked to have the court room measured once, but I am not sure. What do you say, gentlemen? It certainly is more than twenty-five.

Mr. Fryling. About sixty feet, counsel agree.

The Court. I think it is about that.

Mr. Wachenfeld. That is all.

20 *Cross examination by Mr. Fryling.*

Q The car was going fast? A He was going about average about twenty miles an hour—twenty-five miles an hour.

Q Which, twenty or twenty-five miles an hour? A Yes, sir.

Q Where were you standing? A I was standing on the right-hand side of the street going to Roselle.

30 Q That is away from Elizabeth? A Sir?

Q You were going away from Elizabeth? A No, yes I was going to Roselle; yes, sir.

Q Going what? A Yes, sir.

Q Were you in the jitney bus at that time? A Yes, sir.

Q Where about were you with respect to Dalton street? A What is that?

40 Q Where was your jitney with respect to Dalton street? A Why, I was just on the next corner, this here

Louis Cisto, cross.

side. I was leaving off of the last passenger I had on the car.

Q Did you stop at Dalton street? A Not at Dalton, the block up further from Dalton.

Q Union road? A Union road.

Q That is about forty feet from Dalton street, isn't it? A I wouldn't say for certain. I don't know how many feet it is. 10

Q You had stopped at Dalton street? A Yes.

Q The near corner or the far corner? A The near corner.

Q And then you were going along past Dalton street? A I just started off as I seen the car coming.

Q As you saw the trolley car coming? A Yes, sir.

Q When you stopped at Union road you had already passed Dalton street, hadn't you? A No, sir.

Q What is that? A No, I did not. 20

Q Union road is further from Elizabeth than Dalton street, isn't it? A I just stopped a block before the accident, one of the short blocks.

Q Well, do you know the names of the streets down there? A No, sir; I do not.

Q How long did you run a jitney? A I run a jitney about two weeks; I know the names of some streets.

Q Did you know Dalton street? A Not all of them.

Q Did you know Dalton street? A No, sir. 30

Q You didn't know Union road? A No, sir.

Q Do you know where those two streets come together, about forty feet part? A I ain't exact sure whether they do. It is only a real short block.

Q When you got to that real short block did you stop at the first street? A I stopped just one block before the accident, and I left off a passenger and just as I left off the passenger I put the car in gear and looked where I was going and as I looked where I was going I seen the car come along, the street car. 40

Louis Cisto, cross.

Q Did you get to the first of these two streets that are close together when you saw the trolley car coming? A Yes, sir.

Q Did you get to that street? The first of those two streets that were close together. A Yes, I got to the first one. That is where I left the passenger off.

10 Q These that come close together, you stopped at one of them, did you? A I stopped at the first one on this side.

Q The one furthest from Elizabeth? A No. Yes, the one this side.

Q That does not mean anything at all. The one towards Roselle? A No, the one from Roselle.

Q Is that toward Elizabeth? A Toward Elizabeth; yes, sir.

20 Q Was that before this accident? A That was before the accident. I was stopped there on a dead stop.

Q Does not this picture show the two streets that you refer to? This street and this street (indicating on photograph)? A Here is where I stopped (indicating).

The Court. The corner shown on the right-hand side of the picture?

A I don't mean on this side, I mean over there. I was going that way and as I got here I was putting the car in gear, I seen the street car coming down this side, see.

30 Q Yes. A And as I seen that I seen the man walking across the street and put his hand in the air for the car to stop.

Q This street that you refer to is Dalton street? A Yes.

Q You stopped at your near side? A Yes, sir.

Q And then you started up? A Yes.

40 Q And you got past the street? A No, no, I didn't go past the street at all. I got right there and I stopped dead again.

Louis Cisto, cross.

Q Past the center of the street? A Stopped in the center of the street.

Q Center of Dalton street? A When I seen the trolley car coming.

Q What did you stop there for? A Why, no more than I seen the old man come across, I was going to holler. 10

Q What were you going to holler for? A So the man wouldn't get killed.

Q By what? A By a street car.

Q Well, where was he then? A What?

Q Where was the man then? A Why he was just starting, going across the street.

Q He was over to your right-hand side, then? A No, he was starting to come across here. The first rail coming across. And before I had a chance to holler, why the car had already hit him. 20

Q Did he get at the first rail before you stopped? A Sir?

Q Did he get to the first rail before you stopped? A He was at the first rail; yes, sir; going across the second rail.

Q He was going across the tracks when you stopped in the middle of Dalton street, is that right? A When I stopped here.

Q In the middle of this street, which is Dalton street? A Yes. The old man was going across, put his hand in the air and I seen the car coming. 30

Q Was he walking or running? A What? He was walking across.

Q Walking? A Yes, sir. He had an idea the car was going to stop, same as I would.

Q And you didn't see him run at all any time? A No, sir.

Q He didn't run at any time? A No, I did not see him running. 40

Louis Cisto, cross.

Q Well, did he run any time? A No, I did not see him running.

Q Where did he come from? A How do I know where he come from?

Q Where did you first see him? A I am telling you where I first seen him, on that side there, coming across.

10 Q You are pointing now at the corner of Dalton street and Westfield avenue? A Yes.

Q On the west side of Dalton street and that is the point you say you first saw him? A I seen a man I am telling you at the first rail coming across.

Q Is that the first you saw him? A Certainly that was the first I saw him.

Q You didn't see him then at all until he got to the rail? A Until he got to the rail.

Q When he was crossing the first or second rail? A
20 At the first rail. When I seen the man at the first rail that is the time I seen him.

Q You didn't see him at any time before that? A I beg your pardon, I did not.

Q And at the time when you first saw him, where was the front of your jitney? A Where was my jitney? Right there.

Q The center of the street, Dalton street? A Certainly.

Q And you immediately stopped? A I sure did.

30 Q Did you have any passengers on? A No, sir.

Q Did you see any other automobiles around there?
A Not at the present time.

Q At the time of this accident? A Yes, sir.

Q Did you see any other automobiles there? A No, sir.

Q Do you know the sheriff? A No, I didn't see him there.

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

Q Did you get out of your jitney? A After when I
40 seen the old man walking across the street—

Louis Cisto, cross.

Q Did you get out of the jitney? A Yes, I seen the old man walking across, I wanted to holler at him, see.

Q Well, did you holler? A And I didn't get a chance to holler at him, before I had a chance to holler at him why, the street car had already hit him.

Q Did you get out of the jitney? A Certainly I got out. 10

Q And left your jitney standing there? A Certainly.

Q How many passengers did you have on? A I didn't have any passengers.

Q Where did you come from? A I was coming from Bayway.

Q Were you running your jitney for passengers that night? A Yes, sir.

Q Where were you running to? A I was running to Aldene.

Q Well, now, where was this man when you saw him have his hand up? A I am telling you he was at the first rail. 20

Q He was at the first rail when he had his hand up?
A He had his hand up for the car to stop.

Q For the car to stop? A Yes, sir.

Q You say he walked directly across the street? A I am telling you I don't know where he walked. I seen him at the first rail.

Q I understood you to say, to counsel on your direct examination that you saw him walking across the street, directly across and not at an angle? A He wasn't walking at an angle at the time I seen him coming. 30

Q He was going directly across? A He was going directly across.

Q And was he opposite the sidewalk on Dalton street?
A What do you mean, "Was he opposite the sidewalk?"

Q Well, you know what the sidewalk is. Here is the sidewalk on one side of the street and here is the sidewalk on the other? A Yes. 40

Louis Cisto, cross.

Q Was he opposite either one of those sidewalks? A He was coming this way. Whether he was in the opposite or whether he was in the center I don't know. I didn't take that very particular notice.

Q Well, when you are pointing at the sidewalk you are pointing to the sidewalk on the west side of Dalton street, weren't you, over here? A That is where I seen
10 the old man coming over this way.

The Court. What was the name of the street the trolley was on, Mr. Fryling?

Mr. Fryling. Westfield avenue.

By the Court.

Q What Mr. Fryling is trying to find out is whether this man crossed where a cross walk would be or whether he crossed in the street, outside of a cross walk. A
20 There ain't any cross walk there.

Q But if you had cross walks where they ought to be?

A Yes, sir.

Q Was he walking anywhere near the cross walks, or in the street, that is what Mr. Fryling wants to know. A That is something I couldn't swear to.

The Court. What is the name of the side street, Mr. Fryling?

Mr. Fryling. Dalton street.

30

Q He wants to know whether as he crossed Westfield avenue, he crossed in what would be a continuation of the middle of Dalton street, whether it would be a continuation of the cross walks of Dalton street? A He was over towards the curb walking across.

By Mr. Fryling.

Q Over toward the curb furthest away from Elizabeth?
40 A You see whereabouts the curb to the sidewalk is?

Louis Cisto, cross.

Q Yes. A Well, he was walking across that way, understand?

Q And the curb sidewalk you are referring to was the curb sidewalk further away from Elizabeth? A Further away; yes, sir; that is going to Roselle.

Q And when you were going to holler, how far away was the trolley car? A How far away? Why, he was almost on top of him. Only about three foot away from him, four feet away. I expected the trolley car to stop and instead he kept right on going. 10

Q Where was the man then? A Where was the man? Why, he just got over the rail as to raise his hand and the car never stopped, kept right on going.

Q Well, you say the first you saw the man he had gotten on the first rail? A Yes, sir.

Q And then you immediately saw the trolley car? A When I seen the old man on the first rail I knew he was going after the car. 20

Q When you first saw the man he was on the first rail? A Yes.

Q Where was the trolley car then? A Where was the trolley car then?

Q Yes. A Why he was about ten feet away from him.

Q Ten feet away from him? A Yes; ten or fifteen feet away. 30

Q And he was going fast? A He sure was.

Q And the man ran right in front of the trolley car? A He didn't run, exactly, in front of the car. The old man was already across, understand, he was ready to cross and he wanted the car to stop.

The Court. Just a moment.

Q When you say the man was on the first rail the trolley car was ten or fifteen feet away? A Yes, sir. 40

Louis Cisto, cross.

Q And then the man ran right in front of the car, didn't he, with his hand up? A He was passing the rail when he had his hand up for the car to stop.

Q I am calling your attention to the fact, and I want you to tell me—I want you to answer my question? A I will.

10 Q When you say that the man was on the first rail or just passed the first rail the trolley car was then ten or fifteen feet away? A I didn't say that.

Q Isn't that right? A No, sir.

Q Well, where was the trolley car? A When the man crossed the first rail the car was about twenty feet away from him.

Q The man was twenty feet away? A Yes.

Q And after he got across—just a moment now. When the man passed the first rail the trolley car was about
20 twenty feet away? A Yes, sir.

Q And it was going then about what speed? A He was going about twenty miles an hour.

Q And the motorman was looking down? A He was looking down, positively.

Q And the man had his hand up and was looking towards the trolley car, wasn't he? A He sure was.

Q And the car had lights inside? A Yes, sir.

Q You could see the trolley car very distinctly,
30 couldn't you? A Sir?

Q You could see the car, couldn't you? A I could see the car; yes, sir.

Q And there was an arc light in the street? A There sure was.

Q And the man then ran over in front of the trolley car? A He run across. He didn't run exactly in front of the car. He ran across and no more than he got to the rail he wanted the car to stop.

Q Never mind what he wanted. I am asking you
40 what he did. He ran across in front of the trolley car,

Louis Cisto, cross.

'didn't he? A Yes, sir. Well, he ran across, certainly, he ran across.

Q And the trolley car struck him? A The car struck him, certainly.

Q I thought you said before that the man didn't run?
A What is that?

Q I thought you said before that the man didn't run? 10
A He went across the street. Why, certainly, he went across.

Q He did run, did he? A No, he did not run.

Q What did he do? A He walked across the street.

Q And he didn't run in front of the trolley car? A
No, sir; he did not run.

Q When he got to the third rail? A Yes.

Q How far was the trolley car away? A Why, the
car was almost on top of him, about five foot away from
him. 20

Q The man kept right on straight ahead, he didn't
stop, didn't hesitate at all? A No, sir.

Q When did you first notice the trolley car? A When
did I first notice it? When the car was about twenty-five
feet away or more I seen the car coming.

Q Did you notice the car before you noticed the man?
A I sure did.

Q Did the man go in front of your automobile, your
jitney? A He passed me, why certainly. 30

Q In front of it? A Yes. But I didn't know where-
abouts this here man was going or what the man was
going to do.

Q Then you didn't see him pass in front of you, did
you? A In front of where?

Q In front of your jitney? A Why, certainly, I seen
him pass. I seen a man pass but I don't know who he
was.

Q You saw the man that was killed pass in front of
your jitney, didn't you? A Why, yes. 40

Louis Cisto, cross.

Q Then you didn't see him first when he got to the first rail? A Just a minute. I seen a man going across and that man I seen agoing across was the man that was killed.

Q You saw him going across, all right. Now, where did he come from? A What is that?

10 Q Where did he come from? A Where did he come from?

Q Where did you first see him? A I am telling you where I first seen him, no more than he went to work and passed me and then no more than the man got out to the rail, why, he went to work and raised his hand.

Q Where did you first see him? Was he in the street or on the sidewalk? A He was on the first rail going across where I seen him.

20 Q Then you didn't see him pass in front of you, did you? A Sir?

Q Then you didn't see him pass in front of you, did you? A Certainly I seen him pass in front of me.

Q Did you cross the railway tracks? A No, I did not cross the railroad tracks.

Q You still want to say that the first you saw the man was when he got to the first rail? A The man that was killed, yes.

Q Well, did you see any other man cross over there?
A No, sir.

30

Mr. Fryling. That is all.

Mr. Wachenfeld. That is all.

WE REST.

Defendant's Motion for a Non-suit.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

October Term, 1922.

SELMA BERGMANN, Admx. *ad pros.*
of Henry Bergmann, deceased,

vs.

PUBLIC SERVICE RAILWAY COMPANY.

10

Transcript of stenographer's notes of proceedings in the above-entitled cause, taken before Hon. Carlton B. Pierce, Common Pleas Judge, and a Jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the ninth day of October, A. D. 1922, at 10:00 A. M.

20

Appearances:

Messrs. Lum, Tamblyn & Colyer, William A. Wachenfeld, Esq., (Present), attorneys for the plaintiff

Joseph Coult, Jr., Esq., Henry H. Fryling, Esq., (Present), attorneys for the defendant.

Mr. Wachenfeld. It is stipulated by and between counsel that the testimony on this trial, and the exhibits, shall be the same as the testimony and the exhibits offered at the last trial, on behalf of the plaintiff.

30

Mr. Fryling. The defendant moves for a non-suit on the ground that the evidence does not show any negligence on the part of the defendant, first. And secondly, that the evidence shows conclusively contributory negligence on the part of the plaintiff's decedent.

40

Defendant's Motion for a Non-suit.

The Court. As I understand it, the case has gone up and the Court holds that there was contributory negligence and that a non-suit should have been granted.

Mr. Fryling. Yes.

The Court. I will grant the motion for a non-suit.

10

Mr. Wachenfeld. Prays exception.

The Court. Yes.

Mr. Wachenfeld. I suppose I had better state the ground of my exception.

The Court. If you like.

Mr. Wachenfeld. Upon the ground that the question of the negligence of the defendant is thoroughly established by the evidence.

20

And upon the ground that contributory negligence, as appears in this case, is a question of fact to be decided upon by the jury, and not by the Court.

30

40

NEW JERSEY SUPREME COURT

Statement

Selma Bergmann, Administratrix
ad Prosequendum of Henry
Bergmann, deceased,

vs.

Public Service Railway
Company

Action

at Law

On Postea
Non-Suit.

Judg't entered Oct. 16, 1922

Damages

No Costs

} Attorney
} Disbursements

Enoch L. Johnson,

Clerk.



*Postea.***POSTEA.**

Filed October 3, 1922.

NEW JERSEY SUPREME COURT.

SELMA BERGMANN, administratrix, *ad*
prosequendum of Henry Bergmann,
 deceased,

*Plaintiff,**vs.*

PUBLIC SERVICE RAILWAY COMPANY,
Defendant.

10

*Action at Law.**Postea.*

This case was tried before Judge Carlton B. Pierce,
 Judge of the Court of Common Pleas of the County of
 Union, acting as Circuit Court Judge, to whom the said
 cause had been duly referred for trial, with a jury, at the
 Union County Circuit on October ninth, Nineteen Hundred
 and Twenty-two.

20

After the evidence on the part of the plaintiff had been
 given, and the plaintiff's case had been closed, the said
 judge determined from the said evidence that the plaintiff
 had not made out a case for the consideration of the jury,
 and the plaintiff being called upon to procure further evi-
 dence failed so to do; whereupon, the said judge dis-
 charged the said jury from giving any verdict.

30

(Signed) C. B. PIERCE,

Judge.

40

Notice of Appeal.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

UNION COUNTY,

10	SELMA BERGMANN, administratrix, <i>ad</i> <i>prosequendum</i> of Henry Bergmann, deceased, <i>Plaintiff-Appellant,</i>	}	<i>Notice of</i> <i>Appeal.</i>
	<i>vs.</i> PUBLIC SERVICE RAILWAY COMPANY, <i>Defendant-Respondent.</i>		

To Henry H. Fryling, Esq., attorney of Defendants:

20 TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated October 20, 1922.

Yours, etc.,

LUM, TAMBLYN & COLYER,
Attorneys of Plaintiff-Appellant.

30

40

Grounds of Appeal.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

SELMA BERGMANN, admrx. <i>ad pros.</i> of Henry Bergmann, deceased, <i>Plaintiff-Appellant,</i> <i>vs.</i> PUBLIC SERVICE RAILWAY COMPANY, <i>Defendant-Respondent.</i>	}	<i>Grounds of Appeal.</i>	10
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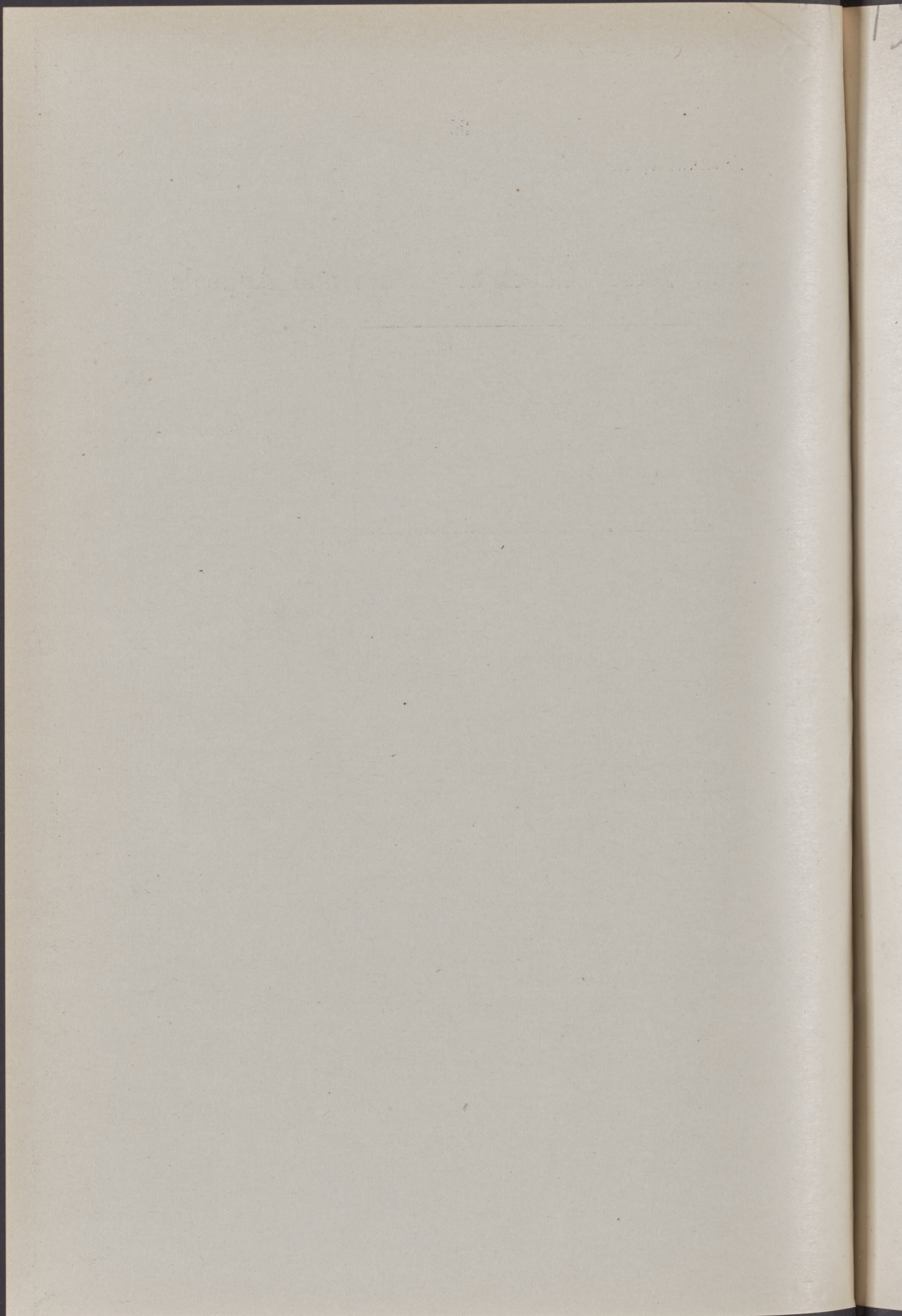
To Leonard J. Tynan, Esq., Attorney for Defendant-Respondent:

TAKE NOTICE that the following are the grounds of appeal which the plaintiff hereby assigns and upon which it will rely at the hearing. 20

1. That the Court erred in granting a non-suit against the plaintiff.

2. The negligence of the defendant and the contributory negligence of the plaintiff's deceased were questions of fact for the jury.

LUM, TAMBLYN & COLYER,
Attorneys of Plaintiff. 30



New Jersey Court of Errors and Appeals

SELMA BERGMANN, administratrix *ad*
prosequendum of HENRY BERGMANN,
deceased,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,

Defendant.

Action at Law.

*On Appeal from
Supreme Court.*

BRIEF OF PLAINTIFF-APPELLANT.

This case brings up for review a judgment of non-suit entered in the New Jersey Supreme Court, Union County Circuit, on October 9, 1922, page 37, line 10, etc.

Selma Bergmann, administratrix of Henry Bergmann, deceased, brought suit against the Public Service Railway Company to recover damages occasioned by the death of her husband through the negligence of the defendant, record, page 1.

The case was first tried before Judge Silzer and a jury on November 15, 1921, and resulted in a verdict for the plaintiff of five thousand dollars (\$5,000). Upon this judgment the defendant sought a review by a rule to show cause. This was argued before the New Jersey Supreme Court at the February Term, 1922, and a *Per Curiam* opinion was rendered making the rule absolute. No appeal could be taken direct and the case came back for trial. The same testimony as taken before was presented and a judgment of non-suit was thereupon entered, pages 35-36, and from the judgment entered thereon the plaintiff-appellant has appealed.

The non-suit was improperly granted, for the record clearly showed the negligence of the defendant and pre-

sented a situation in which the contributory negligence of the decedent was surely a question for the jury.

The Court takes cognizance of its own judgments and opinions, but for convenience the *Per Curiam* opinion of the Supreme Court is printed at the end of this brief.

This *Per Curiam* opinion assumes that undisputed evidence establishes the fact that the decedent desired to board a car bound for Elizabeth; that he saw the car coming along Westfield avenue, and attempted to cross the track in front of it when it was some twenty-five feet or more away from him, in order to be on that side of the car where passengers entered, and that he held up his hand as he was about to cross the track, apparently for the purpose of notifying the motorman of his intention. The opinion finds that the great preponderance of evidence supports the conclusion that as the car approached the point of the accident it was running at a moderate rate of speed.

Geores testified that the car was going as fast as it could go, page 13, line 23; that it was going at a great rate of speed, page 14, line 37. This witness thought that the power was shut off, as the man was hit, page 14, line 12. The motorman put on the reverse just before he hit the decedent, page 16, line 40. From where the witness sat, he saw the man's body as it was in the air, and while the car was passing it. The rear of the car was two lengths past the man when he was lying on the ground, page 18, line 2. The car hit the man with such force that this witness thought they hit a wagon or automobile, page 14, line 14. The witness had no knowledge of hearing any gong or the giving of any signal or warning of any kind. Just prior to the accident the speed of the car was not decreasing, page 14, line 40. The car was about thirty feet in length. This witness said that the power was shut off exactly as the man was hit. "As he shut off he hit this man and, of course, he was applying the brakes then when I saw him in the air," page 18, line 37.

There was an arc light at the spot and there was a regular stopping place for cars; the white pole shown in the picture P. 2 at the rear of the book bears the notice "Cars stop here."

This witness was a carpenter, a passenger on the trolley and an entire stranger to the Bergmanns whom he had never met, page 20, line 1.

Sisco was a driver of a jitney and the only man who apparently observed all the happenings. From this witness' testimony it is apparent that Mr. Bergmann came from his home to take the trolley in question. As he crossed the street he put up his hand when the car was some twenty-five feet away and he was on the third rail crossing to the other side apparently to get on the car. He apparently assumed that the motorman was on the outlook, as was his duty, and that he did see and would heed the signal to stop and he proceeded across the tracks. The motorman was however, looking down, not looking out of the car at all, page 23, line 40.

This witness stated that at the time Mr. Bergmann raised his hand the car was twenty-five or thirty feet away. "I would not say exact," page 23, line 10.

The Supreme Court apparently took twenty-five feet as an exact and established monument. All of the testimony, however, must be taken together and when that is done we find that there is a clear question of fact for the jury. After the witness had further said that no gong or warning of any kind was given, Judge Silzer asked him how far he thought it was from the Judge's bench to the door at the rear of the court and the witness thought it was about twenty-five feet. The witness was then asked:

"Q Suppose you were the man how far away was the trolley car when he put his hand up? A Into that room, the window inside the door, that is about how far the man was.

Q That is what you refer to as twenty-five feet? A About. Well, I ain't sure now, about twenty-five or thirty feet." Page 23, line 15, etc.

The Court then said: "I suppose you can agree that is more than twenty-five feet, can't you?"

It was then agreed by counsel that the distance indicated was about sixty feet, page 24, line 17.

If, under these circumstances, the Court held as a question of law that no facts are presented for consideration of a jury, the rights of a pedestrian on the highway have little value.

ARGUMENT.

There are in this case two grounds of appeal.

1. The Court erred in granting a non-suit against the plaintiff.

2. The negligence of the defendant and the contributory negligence of the plaintiff's deceased were questions of fact for the jury.

In the Supreme Court the opinion was rested apparently wholly upon the case of *Brown v. Elizabeth, etc., R. R. Co.*, 68 N. J. Law, 618. In that case it appears from the opinion that the plaintiff started to cross a trolley track and did not see any trolley car approaching and the first thing that drew his attention was the light he saw on the track and that he then stepped as quickly as he could, thinking it was the trolley. Upon that condition of fact, the Court held that as he did not discover what the light was or whether it was the light of an approaching vehicle, he did not place himself in the position of one who having occasion to cross a track of this sort, having observed an approaching car, exercises his judgment as to his being able to cross safely without risk of a collision. The facts of the present case establish quite a different situation and one which the plaintiff-appellant contends falls within the rule as laid down in the case of *Kraut v. Public Service Railway Co.*, 82 N. J. L., page 437. It appears clearly in the present case that the plaintiff-appellant's decedent was aware of the approaching trolley car;

that he had ample time to cross had the motorman respected his rights in the highway.

The general principle covering the relation of the street railway to the traveling public is that their respective rights on the public highway must be exercised by each of them with due regard to the right of the other in a reasonable and duly careful manner.

Kraut v. Public Service, supra;

Glasco v. Jersey City H. & P. Street Railway Co.,
52 Vroom 469;

Migans v. Jersey City H. & P. Street Railway Co.,
47 Vroom 535.

At the point where the deceased undertook to cross the trolley track, there was a trolley pole marked "Cars stop here." See Exhibit P. 2. The testimony of the witness Geores, Book, p. 15, lines 24-30, shows that the trolley car proceeded at least two lengths of the car after striking the deceased. Under cross examination on page 16, lines 29-30, the same witness says that when the car stopped the rear of the car was about two lengths ahead of the body. It was the duty of the motorman when approaching this point of crossing, which the witness Geores, at the foot of page 19 of the book says was a regular stopping place for cars going to Elizabeth, to have his car so far under control that he would not endanger the safety of pedestrians engaged in the lawful and customary use of such crosswalk. *Consolidated Traction Co. v. Glynn*, 30 Vroom 432. *Searles v. Elizabeth, etc., Railway Co.*, 41 *Id.* 388. Whether there was negligence in the present case in the operation of the car which collided with the deceased depended largely upon the speed of the car and the distance which the car had to go at the time the motorman saw or ought to have seen the plaintiff in the act of crossing the track. *Zolpher v. Camden Suburban Railway Co.*, 40 Vroom 417.

The deceased undertook according to the record to cross in front of the trolley car, holding up his hand to indicate that he desired to cross and the trolley car

was sixty feet away as he was standing upon the outside rail of the track running in the opposite direction from that upon which the trolley was being operated. The deceased had the right to assume that the motorman saw him and had his car under control and would respect the right of the deceased to cross the tracks safely. Whether the car was in such close proximity with the place where the impact occurred and was going at such a rate of speed that would have made it apparent to a person of ordinary prudence that the motorman did not intend to respect such right and therefore made the crossing perilous, was clearly a jury question. *Wilhelm v. Public Service Railway Co.*, 113 Atl. 239, Court of E. & A., Kalisch, Judge. *Bauer v. North Jersey Street Railway Co.*, 45 Vroom 624.

From the testimony the jury could legitimately find that when the plaintiff started to cross the tracks, it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car running at a pretty fair rate of speed and sufficiently distant to be checked or if need be stopped before it should reach him. The question of the plaintiff's contributory negligence was therefore one to be submitted to the jury. *Migans v. Jersey City H. & P. Street Railway Co.*, *supra*. *Bauer v. North Jersey Street Railway Co.*, *supra*.

The decision of the Supreme Court in this case can only be supported on the assumption that the defendant possessed a right on the street superior to that of the plaintiff. *Zindler v. Public Service Railway*, 74 Atl. Reporter, 478.

It is respectfully insisted that there was in this case a question of fact for the jury and that if when the plaintiff was about to cross the track he looked and saw a car sixty feet away coming pretty fast, he is not as a matter of law guilty of contributory negligence because he is struck just as he is leaving the tracks, and that the judgment of

non-suit in the Union County Circuit must be reversed and a new trial granted.

Respectfully submitted,

LUM, TAMBLYN & COLYER,
Attorneys of Plaintiff.

RALPH E. LUM,
Of Counsel.

Per Curiam Opinion.

This suit is brought to recover the pecuniary loss sustained by the next of kin of Henry Bergmann, the plaintiff's decedent, who was knocked down and killed by a trolley car of the defendant company on February 3, 1921, in the Town of Roselle. The liability of the defendant is predicated upon the negligence of the motorman operating the trolley car. The principal defense interposed was that the negligence of the plaintiff's decedent contributed to the happening of the accident. The proofs showed that the car which struck down the decedent was bound for Elizabeth; that decedent desired to board it; that he saw the car coming along Westfield avenue, and attempted to cross the track in front of it when it was some 25 feet or more away from him, in order to be on that side of the car where passengers enter, and that he held up his hand as he was about to cross the track, apparently for the purpose of notifying the motorman of his intention. The great preponderance of evidence supports the conclusion that as the car approached the point where the accident occurred it was running at a moderate rate of speed.

Under the facts recited it seems plain to us that the decedent's death was due largely to his own reckless conduct. He apparently thought that he could get across the tracks in front of the car, and took the chance of doing so. His judgment was wrong, and the accident was the result of his own recklessness. The underlying principle in *Brown v. Elizabeth, &c., R. R. Co.*, 68 N. J. L. 618, is applicable.

The fact that the motorman did not ring his gong as the car was approaching the decedent (if that be a fact) is immaterial, for the only purpose to be accomplished by doing so, so far as decedent was concerned, was to warn him of the approach of the car, and, as has been pointed out, no warning was necessary to apprise him of that fact, for he knew it himself. This failure on the part of the motorman, therefore, was not the producing cause of the accident.

The rule to show cause will be made absolute.

New Jersey Court of Errors and Appeals

SELMA BERGMANN, administratrix *ad*
prosequendum of Henry Bergmann,
deceased,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY,

Defendant.

Action at Law.

*On Appeal from
Supreme Court.*

BRIEF OF PUBLIC SERVICE RAILWAY COMPANY, Defendant-Respondent.

The plaintiff's decedent was killed by a trolley car which he desired to board, as he was passing in front of it from its left side to its right side for the purpose of being in a position to board it.

This case was tried, and resulted in a verdict of \$5,000. The defendant obtained a rule to show cause, and the Supreme Court set the verdict aside. The opinion of the Supreme Court is annexed to the brief of the appellant.

While the opinion of the Supreme Court does not expressly so declare, the inference from that opinion which the parties have adopted, is that the plaintiff should have been non-suited. The opinion says:

“Under the facts recited it seems plain to us that the decedent's death was due largely to his own reckless conduct. He apparently thought that he could get across the tracks in front of the car, and took the chance of doing so. His judgment was wrong, and the accident was the result of his own recklessness.” The “facts recited” are all taken from the plaintiff's case, except the following:

“The great preponderance of evidence supports the conclusion that as the car approached the point where the

accident occurred it was running at a moderate rate of speed." The latter utterance is based upon the defense, which in the printed book before us does not appear, as this appeal is from a non-suit based solely upon the plaintiff's case. On our theory of the case, the more moderate the speed of the trolley car, the better the case that the plaintiff has made out; but for the purpose of this argument, the defense not appearing in the state of case, that part of the opinion of the Supreme Court which refers to "moderate rate of speed" has no bearing, except this, that *despite* the moderate rate of speed which the defense showed, the Supreme Court still thought that the plaintiff's decedent had been negligent.

In this brief we will not concern ourselves with the question of the alleged negligence of the defendant's motorman, but will confine ourselves to the question of the contributory negligence of the plaintiff's decedent.

As the plaintiff, on this motion for a non-suit, was entitled to the best that her case contained, the statement of the Supreme Court "attempted to cross the track in front of it when it was some 25 feet or more away from him" may, if this Court so decides, be taken as referring to a distance of sixty feet, because witness Cisto said (p. 23, l. 8): "Q And at the time he raised his hand for this car to stop, how far was this trolley car away from him? A About twenty-five to thirty feet, I would not say exact. * * * (p. 23, l. 20). Q Suppose you were the man how far away was the trolley car when he put his hand up? A Into that room, the window inside the door, that is about how far the man was." The distance pointed out was (p. 24, l. 16) agreed to by counsel as sixty feet. The question whether this Court accepts sixty feet as the distance in question depends, as hereinafter pointed out, on whether the Court looks upon Cisto's later testimony, in which he greatly reduces the distance, as a correction of his earlier testimony. Whether the Supreme Court called it "some 25 feet or more" through mistake, or advisedly after reading the whole case, as a conclusion

arrived at on the weight of the evidence, it is, of course, impossible to conclude from the printed case before this Court, in which only the case of the plaintiff appears. However, the Supreme Court could readily arrive at that distance of "25 feet or more" from the plaintiff's case alone, for the Justices were free, on the argument of the rule to show cause, to decide on the *weight of the evidence*, and were not obliged to accept the best testimony offered by the plaintiff when *all the testimony offered by the plaintiff* convinced to the contrary. Only one witness for the plaintiff testified as to distances. That was Louis Cisto. We have pointed out how his testimony of "about twenty-five to thirty feet" proved to be sixty feet. But *after Cisto had doubtless heard* this correction of his estimate (p. 24), he on cross examination unmistakably reduced the distance in question, testifying repeatedly to much lower figures, and it is reasonable to assume that his latter testimony was a correction of his earlier testimony, after he had had more time to think about it.

As this is not an appeal from the Supreme Court, and as the question now before us (the propriety of a non-suit) was not before the Supreme Court, and was not passed on by the Supreme Court, when the case was before that court on rule to show cause, we see no reason why the Justices who sat in the Supreme Court on the argument of the rule to show cause should not sit on the present argument.

There were, in the street, four rails, constituting two tracks (p. 22, l. 20). Cisto said (p. 21, l. 35): "A Whereabouts was Mr. Bergmann when I first saw him? Why, he was just crossing the street and as he was crossing the street, why, when he *gets past the third rail going over*, why, he put his hand up about twenty-five feet before the car come and as he put his hand up, why, the conductor on the one-man car, and the motorman, it is all the same, see, it is only one man on the car, why, he kept right on going and furthermore he didn't have any head-light on his car, * * *. (P. 22, l. 14): Q You say

that this trolley car was how far from Mr. Bergmann as he approached what you say was the third rail? What do you mean by the third rail? Look at this picture, please. * * *

Q It is the first rail of the car track which runs to Elizabeth? A Yes, that is the idea. Mr.

Bergmann was coming this way. He was going across the

rail. Q Was he going across straight or diagonally? A

Well, just going across about straight, see, and just as he got over on the last rail on that side for car to stop, the

car never stopped, the car kept right on going and simply

hit him and drove him into the middle of the street on

his back and fractured his skull. Q Where was he when

he gave this signal? A Why, he was there on the oppo-

site side there at the first rail for the car to stop. Q Did

he give this signal before he started to cross the tracks

running to Elizabeth? A No. After he was in the mid-

dle of the street there he raised his hand for the car to

stop. Q That was before he started to cross the track?

A Yes; before he started to cross the track."

The above testimony makes it reasonably clear, that plaintiff's decedent raised his hand at the moment that he reached *the first rail* of the track on which the car was running, and that he was struck by the trolley car as he reached *the second rail* of the same track. The Court will probably take judicial notice that a trolley track approximates five feet from rail to rail. This witness Cisto, who was in a jitney bus, of which he was the driver, saw (p. 22, l. 3) that the trolley car had no headlight, and (p. 23, l. 5): "Q Could you see, from where you were, the motorman that was operating this car? A Yes, I could see him. Q And could you from your observation of him tell whether he was looking to the right, front, or left or what he was doing? A He was looking down, he wasn't looking out of the car at all (p. 24). Q At the time Mr. Bergmann gave this signal what was the motorman doing? A Motorman doing? Why, he was looking down and he had this here hand on the controller, and he had this here hand down here and he was looking down like that (indicating)."

Then came (p. 24) the agreement by counsel that the distance testified to was sixty feet.

The witness Cisto expected calamity. He stopped his jitney in the street (p. 27, l. 8): "Q What did you stop there for? A Why, no more than I seen the old man come across, *I was going to holler.* Q What were you going to holler for? A *So the man wouldn't get killed.* Q By what? A By a street car. * * * And before I had a chance to holler, why the car had already hit him * * * (p. 29, l. 1). Q Did you get out of the jitney? A *Yes, I seen the old man walking across, I wanted to holler at him, see?* Q Well, did you holler? A And I didn't get a chance to holler at him, before I had a chance to holler at him, why, the street car had already hit him * * * (p. 31, l. 9). Q And when you were going to holler, how far away was the trolley car? A How far away? Why, he was almost on top of him. *Only about three foot away from him, four foot away.* I expected the trolley car to stop and instead he kept right on going. Q *Where was the man then?* A *Where was the man? Why, he just got over the rail as to raise his hand and the car never stopped, kept right on going.* Q Well, you say the first you saw the man he had gotten on the first rail? A Yes, sir. Q And then you immediately saw the trolley car? A When I seen the old man on the first rail I knew he was going after the car. Q When you first saw the man he was on the first rail? A Yes. Q Where was the trolley car then? A Where was the trolley car then? Q Yes. A *Why he was about ten feet away from him.* Q Ten feet away from him? A *Yes; ten or fifteen feet away.* Q *And he was going fast?* A *He sure was.* Q And the man ran right in front of the trolley car? A He didn't run, exactly, in front of the car. The old man was already across, understand, he was ready to cross and he wanted the car to stop. (*The Court.*) Just a moment. Q *When you say the man was on the first rail the trolley car was ten or fifteen feet away?* A *Yes, sir.*

* * *"

(P. 32, l. 4):

“Q I am calling your attention to the fact, and I want you to tell me—I want you to answer my question? A I will. Q When you say that the man was on the first rail or just passed the first rail the trolley car was then ten or fifteen feet away? A I didn't say that. Q Isn't that right? A No, sir. Q Well, where was the trolley car? A *When the man crossed the first rail the car was about twenty feet away from him.* Q *The man was twenty feet away?* A Yes. Q And after he got across—just a moment now. *When the man passed the first rail the trolley car was about twenty feet away?* A Yes, sir. Q *And it was going then about what speed?* A *He was going about twenty miles an hour.* Q And the motorman was looking down? A He was looking down, positively. Q *And the man had his hand up and was looking towards the trolley car, wasn't he?* A *He sure was.* Q And the car had lights inside? A Yes, sir. Q You could see the trolley car very distinctly, couldn't you? A Sir? Q You could see the car, couldn't you? A I could see the car; yes, sir. Q And there was an arc light in the street? A There sure was. * * *”

(P. 33):

“Q He did run, did he? A No, he did not run. Q What did he do? A He walked across the street. Q And he didn't run in front of the trolley car? A No, sir; he did not run. Q *When he got to the third rail?* A Yes. Q *How far was the trolley car away?* A *Why, the car was almost on top of him, about five foot away from him.* Q The man kept right on straight ahead, he didn't stop, didn't hesitate at all? A No, sir. Q When did you first notice the trolley car? A *When did I first notice it? When the car was about twenty-five feet away or more I seen the car coming.* Q *Did you notice the car before you noticed the man?* A *I sure did.* Q Did the man go in front of your automobile, your jitney? A He passed me, why certainly. Q In front of it? A Yes. But I didn't

know whereabouts this here man was going or what the man was going to do. Q Then you didn't see him pass in front of you, did you? A In front of where? Q In front of your jitney? A Why, certainly, I seen him pass. I seen a man pass but I don't know who he was. Q You saw the man that was killed pass in front of your jitney? A Why, yes."

Cisto on page 34 repeats both that he saw the decedent pass in front of him, and that the decedent, when he saw him, was on the first rail going across. What is meant by the "first" rail is veiled in some uncertainty, for there were four rails (p. 22, l. 20), forming two tracks. It appears (p. 21, ll. 30 to 40) that "why when he got past the third rail going over, why, he put his hand up about twenty-five feet before the car come." It further appears (p. 22, ll. 30 to 40) that "just as he got over on the last rail on that side for car to stop, the car never stopped, the car kept right on going and simply hit him," and that when he gave the signal, "Why, he was there on the opposite side there at the first rail for the car to stop." It is perhaps fair to assume that "first rail" thereafter in the testimony means "first rail for the car to stop," which in fact is the third rail, or (p. 22, l. 26): "Q It is the first rail of the car track which runs to Elizabeth? A Yes, that is the idea." This is the meaning that doubtless should be impressed upon the testimony on page 29, line 20: "Q Well, now, where was this man when you saw him have his hand up? A I am telling you he was at the first rail."

Such construction is a little more difficult as to testimony (p. 27, l. 23) concerning where the man was when Cisto stopped his jitney: "Q Did he get to the first rail before you stopped? A He was at the *first rail*; yes, sir; going across the *second rail*." We judge that the last mentioned testimony actually refers to the first rail and not to the third rail, and relates, we presume, to a time before the decedent put his hand up.

And so, in the testimony of Cisto, and taking the third rail, or the first rail on which the car was running, as the location of the decedent when he raised his hand, the question to be solved is how far the trolley car was away at that moment. When at that rail, he had already taken a step within the danger zone. He need not have taken that step, or he could have stepped back to safety, but he chose to take his chance and proceed, and (p. 22, l. 31) "just as he got over on the last rail on that side for car to stop, the car * * * hit him." The question before us, then, is whether or not, reaching the third rail, and putting up his hand, going ahead instead of stepping back, was negligence as a matter of law. When the distance of the trolley car away is considerable, the question is obviously for the jury. When such distance is small, the question is obviously for the Court. In the present case, after having had his twenty-five or thirty feet designated as 60 feet (p. 24, ll. 10 to 20), this witness Cisto said (p. 31, l. 10) that when witness was going to "holler," the trolley car was only *about three or four feet* from the man, and that at that time the man "*just got over the rail as to raise his hand—*" Cisto further said (p. 31, ll. 20 to 30) that when he first saw the man *he was on the first rail and the trolley car was about ten feet away from him.* He then (p. 31, l. 30) changes this to "*ten or fifteen feet away.*" Again (p. 31, l. 40): "Q When you say the man was on the first rail the trolley car was *ten or fifteen feet away?* A Yes, sir." Again (p. 32, ll. 10 to 20,) denying that he gave the last quoted testimony, he said, "A *When the man crossed the first rail the car was about twenty feet away from him.*" This the witness then proceeds to repeat, and to repeat a second time. On page 33, line 13, we have the following: "Q He did run, did he? A No, he did not run. Q What did he do? A He walked across the street. Q And he didn't run in front of the trolley car? A No, sir; he did not run. Q *When he got to the third rail?* A Yes. Q *How far was the trolley car away?* A *Why, the car was almost on top of him, about five foot away from him.*"

So, according to the last quoted testimony, when the plaintiff's decedent reached the third rail, that is, the first rail of the track on which the car was running, "the car was almost on top of him, about five foot away from him."

And this was said after much examination on the subject of distance, and after the witness' former distance of 25 or 30 feet had been demonstrated to be 60 feet. Are we to take this as a correction of his former testimony? It is followed by a statement that fits in with it, to wit (p. 23, ll. 20 to 30): that witness first noticed the trolley car when it was about 25 feet or more away, and that he noticed the car before he noticed the man.

It therefore would seem that, if *weight of evidence* was the question before us, it might be said that, on the testimony of plaintiff's witness Cisto alone, taking *all of such testimony*, the plaintiff's decedent was guilty of negligence which was the sole cause or at least a contributing cause of the accident. If we can take Cisto's latter testimony *as a correction of his earlier testimony*, there can be no question that a non-suit in this case was proper. On the assumption, however, that the plaintiff was entitled to the best that Cisto's testimony contained, to wit, that the decedent reached the third rail (the first rail of the fatal track) and held up his hand, when the trolley car was a distance away which counsel (p. 24, ll. 10 to 20) agree on as sixty feet, we beg to call attention to the following:

(1) It was night. The plaintiff's decedent (p. 7) lived at Roselle Park, and left the house to go to Newark, on February 3, 1921, at night, at twenty minutes to seven. It was, therefore, dark; but (p. 23, l. 30) there was an arc light at that intersection.

(2) *The speed of the trolley car was rapid.* Cisto said (p. 24, ll. 20 to 30) it had a speed of twenty or twenty-five miles an hour. Cisto further said (p. 31, l. 31), speaking of when he saw the man on the first rail with the trolley car *ten or fifteen feet way*,—"Q And he was going

fast? A *He sure was.*" On page 32, after three times in succession stating that when the man passed the first rail the trolley car was about twenty feet away, Cisto says: "Q And it was going then about what speed? A He was going about twenty miles an hour." Joseph Geores, a carpenter (p. 12), was on the trolley car, on his way from Roselle Park to Elizabeth (p. 13). It was a one-man trolley car (p. 13, l. 16). Witness was sitting "A Second seat, in front, on the right, facing the motorman." Witness could not see the motorman, as he had the curtain down (p. 13, l. 24): "Q After the car started from Walnut street will you tell us whether it went fast or slow? A Well, he was going fast. Q Will you tell us how fast? A Well, I don't know what speed they make, but *I think he was going as fast as he could go.* (It is then brought out (top of p. 14) that the witness means that the speed is the maximum speed of the car (p. 14).)

"Q What happened as the car reached Dalton street? A Why, the motorman shut off his control, I believe that is what they call it and we hit something. *I thought we hit a wagon or an automobile.* Q Was the control shut off before the accident happened or after the accident happened? A Just before he hit him. Q How long before? A Well, I should say as he shut off he hit this man. Q Just as he shut off you felt the impact, is that it? A Yes, sir. Q Could you tell from where you were what he hit, whether it was a wagon or a man? A Well, I didn't see until I looked out the window and *seen this man's body even with the bottom of the window where I was sitting.* Q As he approached Dalton street did this motorman sound the gong or give a signal of warning of any kind? A Not to my knowledge. I don't remember hearing it. Q Will you tell us whether or not the speed of the car, as it approached Dalton street and immediately before he shut off his control or shut off his power, whether the speed of the car was increased or decreased prior to that? A Well, I couldn't say whether it was

increasing or not, *but it was going at a great rate of speed. It wasn't decreasing.* Q Was there any gradual decreasing of that speed as he reached Dalton street? A No, sir."

(P. 15):

"Q Where was the body of this man when you first saw it? A *Just opposite my seat, his back was even with the window, he was in the air.* Q Where did the body land? A It landed right alongside the trolley track, then rolled over to the curb. * * * Q After the car came in contact with this man will you tell us how far it proceeded before it was brought to a halt? A *I should say about two lengths of the car.* * * *"

(P. 18):

"* * * Q Do you mean to say that you saw this man up in the air? A Yes, sir Q How far from the ground? A His back was even with the bottom of the window, face downward. Q Had his face down and his body was even with the bottom of the window? A Yes. Q Not the floor of the car but the bottom of the window? A Bottom of the window. Q And the car was going then, you think, as fast as it could go? A Well, he had shut off then when I saw him. Q The car wasn't going so fast then? A Well, he had shut off before he hit him, that is exactly as he hit him—as he shut off he hit this man and of course, he was applying the brakes then when I saw him in the air."

(P. 19):

"Q But you say that he hit him just about the time that he shut off his power? A Yes. Q And put on his brakes? Notwithstanding the fact that he struck him just about the same time that he put on his brakes the car was going slow enough from the time that he came past your window that you could see that he was flying in the air and he had his face down? A *He was going fast enough because we had almost passed him before he hit the*

ground. I had to look back to see him. Q What? A He was going fast enough that we had almost passed him when he hit the ground. Q And you could see, notwithstanding the speed of this car, that he was going in the air face downward past your window and up as high as the bottom of your window? A Well, as soon as I saw him I followed him back as far as I could see him. Q And during all that time he was in the air? A Until we had almost passed him and then he hit the ground and rolled over to the curb."

So the trolley car was going so fast that when it hit the man it threw his body so that "his back was even with the window, he was in the air." And the car "almost passed him before he hit the ground; and went about two car lengths before stopping, or probably further, for (p. 16, l. 30) Geores says that when the car stopped the rear of the car was about two lengths ahead of the body. The impact must have been considerable when witness (p. 14, l. 13) "thought we hit a wagon or an automobile."

(3) The plaintiff's decedent apparently was not crossing directly at the white-painted pole which represents the trolley stop. On the photograph, Exhibit P. 2, fastened in the back of the Printed Case, will be found a cross, X. Witness Geores said (p. 15, l. 15): "Q Will you by using this picture please indicate on it where this accident occurred and where the trolley was at the time it struck Mr. Bergmann? Indicate with your finger? A He hit him here (indicating). Q About there (indicating)? A Yes. (Mr. Wachenfeld.) The spot indicated by the witness is marked with an X in lead pencil." On page 20, however, this witness says he intended the X to be opposite the east side of Dalton street. "A I think that X is on the far side, isn't it? It is past the middle." The witness Cisto said (p. 30, l. 23): "Q Was he walking anywhere near the cross walks, or in the street, that is what Mr. Fryling wants to know. A That is something I couldn't swear to. *The Court.* What is the name of the side street, Mr. Fryling? *Mr. Fryling.* Dalton

street. Q He wants to know whether as he crossed Westfield avenue, he crossed in what would be a continuation of the middle of Dalton street, whether it would be a continuation of the cross walks of Dalton street? A He was over towards the curb walking across. *By Mr. Fryling.* Q Over toward the curb furthest away from Elizabeth? A You see whereabouts the curb to the sidewalk is? (p. 31.) Q Yes. A Well, he was walking across that way, understand? Q And the curb sidewalk you are referring to was the curb sidewalk further away from Elizabeth? A Further away; yes, sir; that is going to Roselle."

So on Cisto's testimony the man was crossing a considerable distance from the white pole, and on Geores' X on the photograph the distance from the white pole was considerable; but Geores' explanation indicates an intention to have the X designate a spot somewhat nearer the white pole.

(4) The question whether or not the motorman rang his gong is not important in view of the obvious fact that the plaintiff's decedent saw the car. *Courtney, Admx., v. Public Service Railway Company* (N. J. Supreme Court), 115 Atlantic Reporter, 740.

(5) The witness Cisto (bottom of p. 23) said: "Q Could you see, from where you were, the motorman that was operating this car? A Yes; I could see him. Q And could you from your observation of him tell whether he was looking to the right, front, or left or what he was doing? A He was looking down, he wasn't looking out of the car at all. Q At the time that Mr. Bergmann gave his signal what was the motorman doing? A Motorman doing? Why he was looking down and he had this here hand on the controller, and he had this here hand down here and he was looking down like that (indicating)."

We do not suppose that the plaintiff's decedent was absolutely chargeable with noticing this alleged fact, which

Cisto claims he saw from his position in the roadway, but the plaintiff's decedent might have seen it.

The case of *Courtney, Admx., v. Public Service Railway Company*, 115 Atlantic Reporter, 740 (N. J. Supreme Court), has been affirmed by this Court for the reasons given in the Supreme Court, so that said opinion has thereby become the opinion of this Court. The alleged error in the Courtney case was the refusal to direct a verdict for the defendant, on the ground that the evidence failed to disclose negligence of the motorman, and on the further ground that it conclusively appeared as a matter of law that the decedent's own negligence contributed to the injury which resulted in his death. In discussing the Courtney case in connection with the case at bar, we are only concerned with the second of these grounds. In the Courtney case the judgment below, for the plaintiff, was affirmed. There are elements of similarity between the two cases, but other elements which differentiate them. Courtney, with a companion, was crossing from the west side to the east side of Ocean avenue, across a double-track trolley system, to take a car on the far track, it thereby becoming necessary for them to cross over both tracks, the situation in this respect being similar to that of the case at bar. In the effort to get across, as was the case of plaintiff's decedent in the case at bar, Courtney was killed by the approaching trolley car. But, in the Courtney case, "they stood at the curb on the west side for some minutes, and then observed the car which they desired to take approaching from the south *and about a block away*. Within a second they started to cross the street toward a white pole, at which cars stop when occasion demands. Courtney's companion made no further observation for the trolley car, and the Court assumes that Courtney himself did not do so either, the case being decided on that hypothesis. The result is that the Courtney case was simply one of a decedent who *left the curb to cross trolley tracks just after he had seen an approaching trolley car a block away, and who, without looking*

again, reached the track and was struck. Under decisions in this State the decedent's contributory negligence was for the jury, quite apart from the added impulse in his favor that arose from the fact that he was approaching a white pole, at which cars stop to let off passengers, if any want to get off, and at which cars stop to take on passengers, if any passengers are waiting there. In the Courtney case the Supreme Court (affirmed by this Court) said:

“When the decedent observed the approach of the car it is a fair inference that he assumed that it would slow down as it approached the corner of these two streets and stop at that point to take on or let off passengers. It may properly be inferred that he assumed that the passage of himself and his friend across the street would be observed by the motorman, and that the latter would use the appliances of the car to keep it under reasonable control, and to check or stop it, if need be, in order to avoid running them down. *Vrooman v. North Jersey Street Railway Co.*, 70 N. J. L. 818; *Bauer v. Id.*, 74 N. J. L. 624. The question whether, with these inferences in his favor, he exercised reasonable care for his safety—that is, whether he acted as a reasonably prudent man would have acted under like circumstances—was, as we think, one for the jury and not for the Court, under the decisions of the Court of Errors in *Bauer v. North Jersey Street Railway Co.*, *supra*, and *Glasco v. Jersey City, &c., Street Railway Co.*, 81 N. J. L. 469.”

The case at bar is an entirely different proposition. In it we have no man starting to cross a street with a trolley car about a block away. While it is true that the witness Cisto rather foggily sets out that Bergmann passed in front of his jitney, the only coherent picture we have is of the decedent *at the first rail*, which, under much of the testimony was *the third rail*, or the *first rail on which the car was approaching*, holding up his hand, with the trolley car, coming at high speed, a distance from him which Cisto said was 25 or 30 feet, pointing to a distance which

the attorneys agree on as 60 feet, but which thereafter Cisto states as 10 feet, or 15 feet, or 20 feet, or, finally (p. 33), when decedent reached the third rail: "A *Why, the car was almost on top of him, about five foot away from him.*" The Courtney case has no bearing on such a situation.

In the Courtney case an important element is, "It may properly be inferred that he assumed that the passage of himself and his friend across the street would be observed by the motorman—" But in the case at bar, it does not with any clearness appear that the decedent had crossed the street, for while Cisto says that decedent passed his jitney he also insists that he first saw decedent at the *first rail*. In the Courtney case, when Courtney reached the tracks, under the hypothesis adopted in the decision, he did not again look, but depended on the observation which he had made while at the curb, and the duties of the motorman toward himself which may have arisen when he left the curb. But in the case at bar the question of the respective duties and privileges of Mr. Bergmann and of the motorman arose only when the decedent, with the trolley car rapidly approaching, looked toward the trolley car and held up his hand (p. 32, l. 25). "Q And the man had his hand up and was looking towards the trolley car, wasn't he? A He sure was." We should not concern ourselves with anything prior to that moment. In solving the proposition thus presented, the Courtney case is no guide whatever.

When this case was before the Supreme Court on rule to show cause, that Court, in its opinion, referred to *Brown v. Elizabeth, &c., R. Co.*, 68 N. J. L. 618, as containing an underlying principle which governed the situation. The Brown case is one in which the pedestrian apparently did not make the observation which duty required of him. He saw lights up the hill, but did not pause to discover what they were. In the Brown case the Court said:

“As the plaintiff did not pause to discover what the light which he saw up the hill was, or whether it was the light of an approaching vehicle, he did not place himself in the position of one who, having occasion to cross a track of this sort, and having observed an approaching car, exercises his judgment as to his being able to cross safely without risk of a collision—”

In the Brown case the plaintiff took a chance *without making proper observation*. In the case at bar the plaintiff's decedent took a chance *after* making proper observation. It is the fact that such action was so highly reckless that justifies the present non-suit. The plaintiff's decedent was not one who “exercises his judgment as to his being able to cross safely without risk of a collision—” On the contrary, he was one who made a hazardous and reckless venture. If he held up his hand at the *third* rail, and was struck at the fourth rail, he had not taken more than three steps before being struck with such force by this rapidly advancing car that *his body was thrown in the air*. If he held up his hand at the first rail, that is, the first of the four rails comprising the two tracks, then the testified distance of the car away when he held up his hand must have been reduced to almost nothing when the decedent entered upon the fatal track. In neither case was the car so far away that, traveling at that rapid speed, the plaintiff's decedent could reasonably have assumed that it would stop before reaching him. So far as concerned the white pole, he had at best no reason to suppose that it would stop until it reached such pole, *and he was between the trolley car and the pole*.

The case of *Earle v. Consolidated Traction Co.*, in this court, 35 Vroom 573, affirmed by a divided court, a non-suit below. But the principle of the decision is not concerned in the dissenting opinion which presumably was the basis of the Court's division. The main opinion said: “But if, when the plaintiff reached the crossing, it was apparent that his rights were not being observed by the motorman, he could not proceed without imprudence, and

was bound to stop or to turn aside if he could by the exercise of due care do so, and protect himself from injury.”

We believe that the dissenting opinion in the Earle case does not conflict with the foregoing pronouncement of the law. The Court's division was on the application of the principle to the facts.

The main opinion said:

“The question, therefore, is whether, from his own statements, it is manifest that he took an apparent risk of injury, and attempted to cross over in advance of the car in the presence of a danger which he could not have failed to see in the exercise of that care and prudence which it was his duty to use.”

This “question” in the main opinion is decided against the plaintiff, it being held that he was “clearly guilty of contributory negligence.” In the dissenting opinion, certain additional facts were brought out, to wit, (1) that a prior halting of the trolley car could well have justified the plaintiff in believing that the car was stopping to let him pass, and (2) “that when the motorman *increased his speed* the plaintiff's horse was so near the track that it was impossible either to pull him up or turn him aside so as to let the car pass in front;—” and, continuing, shows that the plaintiff apparently did his best to accomplish the latter purpose.

We therefore say, that in the Earle case, the fact that the decision is by a divided court in no way reflects upon the propriety of the legal principle upon which the main opinion is founded, for the dissenting opinion merely points out facts which take the plaintiff outside of the legal principle in question, to wit, that the motorman's conduct misled him into believing it safe to proceed, such misleading by the motorman continuing until the plaintiff had proceeded to a point from which it was impossible successfully to withdraw.

The opinion of this Court in *Connolly v. Public Service Railway Co.*, 94 N. J. Law 157, takes this view, for in

commenting on the principle of the Earle case (which is there followed and approved), this Court said: "In that case the plaintiff was non-suited, and the judgment was affirmed by a divided court. The Judges voting for reversal do not seem to have questioned the correctness of the rule, but maintained that there was a jury question as to whether the facts existed which made it applicable."

The Earle case was followed in *Schwanewede v. North Hudson Ry. Co.*, 38 Vroom 449, in which the Supreme Court held: "If it appears that the trolley car motor-man is not going to respect your rights to cross the street first, you must wait, or you are guilty of contributory negligence if hurt.

"A person cannot take chances and hold himself free from contributory negligence. There is a difference between an unforeseen peril and being overtaken by one recklessly incurred."

The case of *Gilliland v. Middlesex and Somerset Traction Co.*, 38 Vroom 542, decided by this Court, holds:

"A person who, while attempting to cross over the tracks of a trolley road, in front of a car which is only *one and a half times its own length away*, falls and is run over by it, contributes, by his own negligence and recklessness, to the injury which he receives, and must bear the consequences of his temerity."

In the last-quoted case it certainly was not the fact that the person fell, that made her negligent. The falling was a mere accident, although "her fall was due to the fact that the tracks, at the point where she attempted to cross, were elevated some six inches above the surface of the highway." This construction added somewhat to the risk of crossing, but it is not made an element of the syllabus of the case. The Court cites *Fitzhenry v. Consolidated Traction Co.*, 35 Vroom 674-679, where it was said that "when the plaintiff attempted to cross defendant's tracks as she did, either in front of a car which she saw, or by rushing heedlessly into danger without looking, she acted in such entire disre-

gard of her duty that there is room but for one opinion, and that is that she was guilty of contributory negligence."

In the case of *Glasco v. Jersey City, &c., Street Ry. Co.*, 52 Vroom 469, decided by this Court, it appeared that when the same case was in the Supreme Court, on rule to show cause (47 Vroom 185) that Court held, according to the syllabus, that "a plaintiff is guilty of contributory negligence in attempting to cross a street railway in front of an approaching car running at a high rate of speed and only one hundred and fifty feet away when the plaintiff attempted to cross, she testifying that she knew the car would be very close when she crossed, but thought she would risk it." In view of the foregoing opinion a non-suit was granted at the second trial, and the result was the writ of error that brought the case to this court for review. As the case appeared in this court, the plaintiff was accompanied by a boy, a relative. In order to enter the car, which usually stopped at that crossing, it was necessary for her to cross to the other side of the avenue. From the curb she saw the car a block away, seemingly coming fast. The headlight of the car was brightly shining. There was nothing in the street to obstruct the motorman's view. *The boy ran ahead of her across the track, signaling with his hand for the car to stop.* The plaintiff followed, and as she stepped on the track for the purpose of crossing she looked and the car was then about one hundred and fifty feet away. She was struck by the car, which was running rapidly, just as she was stepping over the last rail. This Court held that a non-suit for contributory negligence could not be supported.

The Glasco case as it appeared in this court after its second trial contained elements which do not appear in the syllabus of the case in the Supreme Court. As it appeared in this court, a legal relation between the plaintiff and the trolley company may have arisen when she left the curb with the trolley car a block away. When

she reached the track the boy that accompanied her ran across the tracks, *signaling with his hand for the car to stop*. The boy's signal obviously was given when the car was farther away than the 150 feet distance which existed when the plaintiff herself stepped on the track. So the plaintiff may have been entitled to rely on the motorman seeing her leave the curb while his car was far enough away to control, and certainly was entitled to rely on the motorman paying attention to the signal to stop given by the boy companion who had preceded her across the tracks. Furthermore, assuming that an entirely new and independent situation arose when the plaintiff stepped on the track for the purpose of crossing and saw the car about 150 feet away. We submit that 150 feet gives a chance for a car to stop. But in the case at bar, with distances that vary, by the same witness, from sixty feet to a final statement of five feet, when Bergmann stepped on the first rail of the fatal track, even the outside limit of sixty feet, with the car coming at that speed, did not justify any reasonable man in assuming that it was safe to depend on the motorman stopping it.

The case of *Peterpolo v. Public Service Railway Co.*, decided by this court, 52 Vroom, p. 390, refers to *Earle v. Consolidated Traction Co.*, above cited, and *Schwane-wede v. North Hudson Railway Co.*, above cited, and states that the Earle case was decided by an equally divided court, "and so is not to be taken as an authority." But this latter statement was not necessary to the Peterpolo decision, for, after referring to it, the Peterpolo case says: "We are not concerned with the question whether this is a correct statement of the driver's duty under the circumstances noted. For in the present case there was, as already shown, a question for the jury whether the plaintiff on reaching the crossing was charged with notice that the motorman had failed to observe him or was operating the car in defiance of his rights."

But such jury question in the Peterpolo case arose because the trolley car was a substantial distance away, a distance that would permit of stopping it. The Peterpolo opinion says: "The evidence in behalf of plaintiff tended to show that when he reached the junction of these two streets he looked up McWhorter street and saw the car, *then about fifty to seventy-five yards away*, coming towards him at a very high rate of speed. He was then fifteen or twenty feet from the car track, and his horses were walking."

Fifty or seventy-five *yards* is 150 feet, or 225 feet, which distance, so far as justifying an expectation of effective action from the motorman, was so far superior to the greatest of the various distances testified to in the case at bar by the witness Cisto that there is no comparison between them. In the Peterpolo case the distance was such as to raise a reasonable expectation that the car, despite its fast speed, could have been stopped. In the case at bar, with the distance as it was and the speed as it was, none but a very rash man would have acted on that expectation.

The case of *Connolly, Admx., v. Public Service Railway Co.*, 94 N. J. L. 157, hereinbefore referred to, decided by this court March 1, 1920, in an opinion by Justice Parker, follows and approves of the rule enunciated in *Earle v. Consolidated Traction Co.*, and does so by a vote of thirteen Judges for affirmance and none for reversal, so that the principle of the Earle case is now adopted by this Court, and we are no longer facing the proposition, so far as concerns said principle, that the Earle case was decided by an equally divided court. In the Connolly, Admx., case several New Jersey cases are referred to in which the principle of the Earle case has been applied.

We submit that, under the facts in the case at bar, when the plaintiff's decedent proceeded to cross in front of the approaching trolley car, which car he obviously saw (for he looked toward it and held up his hand), the situation

was such that any reasonable man must have realized that the motorman either would not or could not respect the decedent's right of priority, and that, with the car so near and advancing so fast, the decedent could not, in the exercise of reasonable prudence, exercise his right; and that, as he failed to wait or turn aside and protect himself from injury, he was guilty of contributory negligence. The desire of the witness Cisto to "holler" a warning is evidence of the way the decedent's undertaking appeared to a bystander. As for the bearing on the matter of the white pole, the plaintiff's decedent was between the trolley car and the white pole, and could not have expected the trolley car to stop until it reached the pole. Furthermore, cars only stop at poles when occasion requires, and there is no evidence that anybody was waiting at the white pole. Until plaintiff's decedent put up his hand, no one had any reason to suppose that he intended to board the car; and it was just about the time that he put up his hand that the situation arose which made applicable to him the doctrine of *Earle v. Consolidated Traction Co.*

It seems unnecessary to concern ourselves deeply with the varying distances testified to by the plaintiff's witness Cisto for on *any distance to which he testified* the result is the same, to wit, the description of a man taking a desperate chance, a chance which no reasonable man would be justified in taking. In the brief of the plaintiff-appellant, at the top of page 6, it is averred that the decedent was standing "upon the outside rail of the track running in the opposite direction from that upon which the trolley was being operated." In this brief, believing that the evidence so indicated, we have tried to place the decedent, when he looked at the car and raised his hand, at the first rail of the track upon which the car was running; but if the evidence will bear the other construction, then all the more was the plaintiff's decedent taking a desperate chance, for he had that much farther to go.

We ask that on the ground of the contributory negligence of the plaintiff's decedent the judgment of nonsuit be affirmed.

Respectfully submitted,

LEONARD J. TYNAN,
*Attorney of and of Counsel
with the Defendant-Respondent.*



