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has arisen. In any event I am not prepared to appoint an arbitrator on this claim alone out of the five claims which have been made. If the applicant wishes to go to arbitration on this single point, and will formulate his charges, the Court can consider the application. The respondent has not had a fair opportunity of considering the matter, seeing the claim hitherto made was for arbitration on the first four claims. It is not clear that the applicant wishes to go to arbitration on this claim alone.

I only wish to add a word with regard to the case of *Willersford* vs. *Watson* (8 Ch. 473), and the interpretation given to the words "or touching the rights, duties or liabilities of either party in connecton with the premises." It must be borne in mind that that interpretation was given to the words taken in connection with the other very wide words contained in the arbitration clause and the extent and nature of the premises.

The application must be dismissed with costs.

[Applicant's Attorney, E. G. RUSSELL.
Respondent's Attorneys, VAN HULSTEYN, FELTHAM & FRY.]
[Reported by G. WILLE, Esq., Advocate.]

WARD, J.
September 26th, 27th, October 19th, 1912.

BURKHARDT *vs.* ELIAS.

Negligence.—Driving.—Running down Passenger alighting from Tramcar.

It is the duty of a passenger, when alighting from a tram-car to look back and notice the state of the traffic in the road, but it is also the duty of the driver of a vehicle to pass tram-cars with caution; and if he fail to keep his vehicle in reasonable control in so passing, and a passenger alighting from the tram-car is injured in consequence, the driver of the vehicle is responsible, even though the said passenger have neglected to look back.

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Action for £1,000 for damages for injuries sustained by the plaintiff owing to the negligence of the defendant in running him down in a public street with his motor

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car. The defence was a denial of negligence, and an allegation of contributory negligence on the part of the plaintiff. The facts appear from the judgment.

F. E. T. Krause, for the plaintiff.

J. Stratford, for the defendant.

Cur. adv. vult.

Postea (October 19th).

WARD, J.: In this case the plaintiff claims £1,000 damages for injuries sustained by the engligence of the defendant in driving a motor car against him on the 9th day of June, 1911. The negligence alleged is that the defendant did not have his car under proper control, and did not keep a proper look out. The defence is a denial of negligence and an allegation of contributory negligence on the part of the plaintiff.

It appears that shortly before 8.30 on the evening in question, the plaintiff was travelling on a tramcar going south in Twist Street, and wished to alight at a stopping-place which is just south of Noord Street, and is marked by the word " post " in the plan. He got on to the platform at the rear of the car ready to alight. The tramcar did not stop at the post, but pulled up about twenty yards to the south of it. The plaintiff got off without looking to see if any traffic was approaching and had he looked he could have avoided the accident which occurred. It is difficult to say whether the tramcar came to an actual standstill or not to enable him to leave it. I am satisfied that it slowed down to such an extent that persons on the car who were watching came to the conclusion that it had stopped; on the other hand, it moved off so soon after the plaintiff had alighted that those looking on might easily have assumed that it did not actually stop. An examination of the evidence reveals the fact that all the witnesses who were on the tramcar, or looking from the street, thought that the car had stopped. Those approaching in the motor car were

under the impression that it did not. This discrepancy appears to me to be not unnatural, but is in my mind more consistent with the fact that the car did stop, but, as I have stated before, the period of its cessation from movement is so slight that nothing really turns upon the point. The tramcar stopped again a short distance further on, exactly how far it is impossible to say, but I am satisfied that the motor car did not pass the tramcar. Whether it overlapped it or not I do not think it is necessary to decide. The main feature about this part of the evidence is that I have come to the conclusion that the motor car did pull up before or immediately after the accident, and that at the exact moment of the accident it was turned to the east. I am satisfied that the driver of the motor car was keeping a good look-out, and that he sounded his hooter when he perceived the tramcar was about to stop at the usual and proper stopping-place just south of Noord Street. I am also satisfied that he sounded his hooter again as he approached the same spot —he would then be less than the distance between the scene of the accident from that spot from the car, that is to say, less than 20 yards away. But I think that that was the last hoot he gave; he was going then, no doubt, at a brisk pace, probably nearly 20 miles an hour, and I do not think he slowed down until some yards further on. A little further on he no doubt pulled up his car very rapidly, he put on the brakes and shouted and put up his hand; there is no doubt in my mind that he put up his hand, and there is no reason why Colonel Beves should have imagined this. The defendant was rather scornful on the point because the suggestion was that he had lost his head, but a careful consideration of the facts leads me to the conclusion that it was not an extraordinary circumstance. The defendant came down at a rapid pace. He did not think he would have to pull up; he suddenly found the plaintiff getting off the car at a point beyond the usual stopping-place; he pulled up rapidly, and put up his hand instinctively to warn people behind that he was so doing; he shouted, and found himself on the plaintiff before he was able to stop the car or make such a detour to the left as would have avoided the accident. I

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am sure that the plaintiff did turn back in front of the car, but I am far from satisfied that the defendant saw him standing on the car ready to alight. This is sworn to by the defendant and his companion, but it is a fact easily imagined after the event, or rather I would put it a fact seen physically before but only mentally appreciated after the event. I am convinced that if the defendant had seen the plaintiff ready to jump off the tramcar he would have diverged to the left with small slackening of speed, and avoided the catastrophe. The plaintiff was undoubtedly negligent. I hold that the defendant was also negligent because he approached the tramcar at such a speed that he had not sufficient control of his motor car to stop it or diverge to the left when a passenger alighted immediately in front of him. By immediately in front of him I mean with reference to the pace at which he was travelling. If a car going 20 miles an hour had a foot passenger 20 feet in front of it, it has him, so far as I can gauge the evidence, relatively, immediately in front of it; if it is going four miles an hour that passenger is relatively a long distance off.

The question I have to decide in these circumstances is, who is to blame? I am of opinion that the defendant is; the want of caution or care on the part of the plaintiff no doubt was a *causa sine qua non*, but the last and proximate cause was the excessive speed at which the defendant was travelling just prior to the accident. It is the duty of passengers stepping from tramcars to look back and notice the state of the road, but it is also the duty of all vehicles to pass tramcars with caution, and having the vehicle under proper control. In spite of the fact that the plaintiff was not looking back, the accident in this case might have been avoided if the defendant had held his car under control when approaching the tramcar which he has to pass, it must be remembered, according to the rule of the road, apparently on the wrong side.

The learned judge then dealt with the question of damages suffered, and awarded £155 and costs.

[Plaintiff's Attorney, R. KURANDA
Defendant's Attorneys, ZWARENSTEIN & HEIMANN.]

[Reported by G. WILLE, Esq., Advocate.]