

for the application of the maxim *res ipsa loquitur*, and that, the defendant not having shewn that the car left the track without negligence on its part, the plaintiff is entitled to judgment.

I cannot agree with this contention. Had the plaintiff chosen to rest his case upon shewing the derailing of the car and consequent injury to the automobile, I think the case would have been brought within the rule; but the plaintiff went further and chose to assign a specific cause for the derailing. This, I think, relieves the defendant from the general obligation; and the defendant satisfied the onus resting upon it when it shewed that the accident did not happen by reason of the cause alleged; for the refusal of the jury to find the negligence set up by the plaintiff is equivalent to a finding that it did not exist.

Neither counsel has referred me to any case throwing light on this precise problem; but I find in *White on Personal Injuries on Railroads* the statement that proof of a derailment of a train, together with the resulting injury from such cause, is generally held to establish a *prima facie* case of negligence; but this statement is qualified at para. 615, by the statement: "If the evidence of the plaintiff goes further and shews the cause of the derailment, and this develops to be due to a condition which would not render the railroad company liable, then the *prima facie* case of the plaintiff is overcome, and the same result follows as to a right of recovery based on a specific ground of negligence which the evidence fails to establish." *A fortiori* must this be so where it is shewn that the cause of derailment alleged did not in fact exist.

I think the action fails, and should be dismissed.

A cross-action was brought by the street railway company to recover for the damage done to the street car. This action likewise fails, and I see no reason why costs should not follow the event in each case.

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MIDDLETON, J.

OCTOBER 19TH, 1914.

RE HICKEY.

*Will — Construction — Bequest for Benefit of Son and Son's Widow — Death of Son in Lifetime of Testator — Right of Widow — Provision for Abatement.*

Motion by the executor and the widow of James Hickey, deceased, upon originating notice, for an order determining a question arising upon the construction of the will of the deceased.