## INDEX



EXHIBITS

# New Jersey
# Court of Errors and Appeals

---

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs, | |
| vs. | |
| NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law |

## NOTICE OF APPEAL.

*To New York and Long Branch Railroad Company, a body corporate, and Applegate Stevens, Foster & Reussille, attorneys of the defendant, New York and Long Branch Railroad Company, and Pennsylvania Railroad Company, a body corporate, and Wall Haight, Carey & Hartpence, attorneys of the defendant, Pennsylvania Railroad Company:*

SIRS:

TAKE NOTICE that the plaintiffs appeal to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause.

Respectfully,

QUINN, PARSONS & DOREMUS,
Attorneys for Plaintiffs.

## GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs-Appellants, vs. NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants-Appellees. | On Appeal. |

The plainitff-appellant writes down the following grounds of appeal.

1. The trial court erred in directing a verdict in favor of the defendant.

2. The trial court erred in refusing to allow the case to go to the jury which should have determined it.

PARSONS, LABRECQUE & BORDEN,
Attorneys for Plaintiffs-Appellants.

**SUMMONS.**

The State of New Jersey—

To New York and Long Branch Railroad Company, a body corporate, and Pennsylvania Railroad Company, a body corporate:
You Are Hereby Summoned to answer the complaint of Fannie Rothstein and Milton Rothstein, Executors of the Last Will and Testament of Samuel Rothstein, deceased, in an action at law in the Supreme Court.

(L. S.)

And Take Notice, that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, Thomas J. Brogan, Esquire, Chief Justice of the said Supreme Court, at Trenton, this 16th day of May, A. D. Nineteen Hundred and Thirty-five.

Fred L. Bloodgood,
Clerk.

Quinn, Parsons & Doremus,
Attorneys.

**COMPLAINT.**

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

| | |
|---|---|
| FANNIE ROTHSTEIN aid MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs, | |
| vs. | Action at Law |
| NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | |

Plaintiffs, Fannie Rothstein and Milton Rothstein, Executors of the Last Will and Testament of Samuel Rothstein, deceased, residing in the City of Long Branch, in the County of Monmouth and State of New Jersey, by way of complaint against the defendants, say that:

FIRST COUNT

1. They are the executors of the Last Will and Testament of Samuel Rothstein, deceased, and have qualified as such executors by virtue of the probate of the Last Will and Testament of said Samuel Rothstein, deceased, in the Surrogate's Office at Freehold, New Jersey.

2. On April 22nd, 1935, and at all times thereafter, the defendant, New York and Long Branch Railroad Company, was a railroad corporation of the State of New Jersey and owned and operated railroad tracks in the City of Long Branch, and in connection therewith operated a railroad station and terminal facilities all of which were for the convenience and safety of passengers then and there lawfully being transported by said company to and from the City of Long Branch.

3. On the day and year aforesaid, the deceased, Samuel Rothstein, was a passenger for hire of the defendant, New York and Long Branch Railroad Company, and was then and there at the station of the defendant company, New York and Long Branch Railroad Company, preparing to board a train and take passage thereon from the City of Long Branch for hire and compensation paid by him to the defendant, New York and Long Branch Railroad Company.

4. It was then and there the duty of the defendant, New York and Long Branch Railroad Company, to have the platform, steps and embarking points in a good and proper condition and properly and safely constructed so that the persons using the same would be safe from injury by reason of the condition thereof, and it was further the duty of the defendant to provide proper guards, attendants and employees to assist persons then and there desiring to board trains operating from said station and platform.

and to protect such persons from falling by reason of the condition of the station platform and its appurtenances, and it was further the duty of the defendant, New York and Long Branch Railroad Company, to so carefully, prudently and cautiously operate its trains out of said station Railroad Company, and was then and there at and in connection therewith to provide proper trainmen and employees to control the movement of its said trains that persons lawfully upon said platform should not, through the carelessness and negligence of the defendant in the operation of said trains, be injured.

5. Notwithstanding the premises, the defendant, New York and Long Branch Railroad Company, neglected its duties in that behalf and the decedent, Samuel Rothstein, while lawfully upon said platform and enroute to boarding a train leaving said station and the platform, was precipitated to the ground and met injuries resulting in his death.

6. The defendant, New York and Long Branch railroad Company, was negligent in the following respects:

(a) It failed to properly maintain its platform and permitted the same to become in disrepair.

(b) It failed to guard, block off or protect the portions of said platform in disrepair.

(c) It neglected to place warning signs or attendants who would warn the decedent of the defective condition of the platform.

(d) It neglected by its employees to properly control the movement of said train at the platform while the decedent was in a place of danger.

(e) It was in divers other respects careless and negligent.

7. Said decedent left him surviving, Fannie Rothstein, his widow, and the following children: Milton Rothstein, Herbert Rothstein, Thelma Rothstein and Elliott Rothstein, who are his only next of kin and who have suffered pecuniary injury by reason of his death.

8. This action is commenced within two years after the death of the plaintiffs' testator.

SECOND COUNT

1. Plaintiffs repeat the allegations of paragraph one of the first count.

2. On April 22nd, 1935, and at all times hereinafter, the defendant, Pennsylvania Railroad Company, was a railroad corporation of the State of New Jersey and owned and operated railroad tracks in the City of Long Branch, and in connection therewith operated a railroad station and terminal facilities all of which were for the convenience and safety of passengers then and there lawfully being transported by said company to and from the City of Long Branch.

3. On the day and year aforesaid, the decedent, Samuel Rothstein, was a passenger for hire

of the defendant, Pennsylvania Railroad Company, and was then and there at the station of the defendant company, Pennsylvania Railroad Company, preparing to board a train and take passage thereon from the City of Long Branch for hire and compensation paid by him to the defendant, Pennsylvania Railroad Company.

4. It was then and there the duty of the defendant, Pennsylvania Railroad Company, to have the platform, steps and embarking points in a good and proper condition and properly and safely constructed so that the persons using the same would be safe from injury by reason of the condition thereof, and it was further the duty of the defendant, Pennsylvania Railroad Company, to provide proper guards, attendants and employees to assist persons then and there desiring to board trains operating from said station and platform, and to protect such persons from falling by reason of the condition of the station platform and its appurtenances, and it was further the duty of the defendant, Pennsylvania Railroad Company, to so carefully, prudently and cautiously operate its trains out of said station and in connection herewith to provide proper trainmen and employees to control the movement of its said trains that persons lawfully upon said platform should not, through the carelessness and negligence of the defendant in the operation of said trains, be injured.

5. Notwithstanding the premises, the defendant, Pennsylvania Railroad Company, neglected

its duties in that behalf and the decedent, Samuel Rothstein, while lawfully upon said platform and enroute to boarding a train leaving said station and the platform, was precipitated to the ground and met injuries resulting in his death.

6. The defendant, Pennsylvania Railroad Company, was negligent in the following respects:

(a) It failed to properly maintain its platform and permitted the same to become in disrepair.

(b) It failed to guard, block off or protect the portions of said platform in disrepair.

c) It neglected to place warning signs or attendants who would warn the decedent of the defective condition of the platform.

(d) It neglected by its employees to properly control the movement of said train at the platform while the decedent was in a place of danger.

(e) It neglected to place warning signs or atnegligent.

7. Said decedent left him surviving, Fannie Rothstein, his widow, and the following children: Milton Rothstein, Herbert Rothstein, Thelma Rothstein and Elliott Rothstein, who are his only next of kin and who have suffered pecuniary injury by reason of his death.

Plaintiffs demand as damages on the first count the sum of One Hundred and Fifty Thousand Dollars ($150,000) together with costs of this suit.

Plaintiffs demand as damages on the second count the sum of One Hundred and Fifty Thousand Dollars ($150,000) together with costs of this suit.

QUINN, PARSONS & DOREMUS,
Attorneys for Plaintiffs.

## ANSWER OF DEFENDANT, NEW YORK AND LONG BRANCH RAILROAD COMPANY.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs, vs. NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law |

Defendant, New York and Long Branch Railroad Company, a corporation of the State of New Jersey, answering the complaint filed in the above entitled suit, says:

ANSWER TO FIRST COUNT.

1. It has no knowledge or information as to the allegations contained in paragraph 1 of the first count, and, therefore, leaves the plaintiff to full and formal proof thereof.

2. It admits the allegations contained in paragraph 2 of the first count.

*Answer of Defendant, New York and Long Branch Railroad Company*

3. It denies the allegations contained in paragraph 3 of the first count.

4. It denies the allegations contained in paragraph 4 of the first count.

5. It denies the allegations contained in paragraph 5 of the first count.

6. It denies the allegations contained in paragraph 6 of the first count.

7. It has no knowledge or information as to the allegations contained in paragraph 7 of the first count, and, therefore, leaves the plaintiffs to full and formal proof thereof.

8. It admits the allegations contained in paragraph 8 of the first count.

First Defense to First Count.

There was no negligence on the part of this defendant contributing to the accident in question.

Second Defense to First Count.

The accident in question, resulting in death of plaintiffs' decedent was caused by decedent's contributory negligence, namely, his failure to exercise and use ordinary care while in and upon the platform of this defendant. Said lack of ordinary care consisted of running at full speed and attempting to board the train in question

while it was in motion, and also failure of said decedent to observe the alleged defect, if any, in the platform of this defendant.

THIRD DEFENSE TO FIRST COUNT.

Plaintiffs' decedent, at the time of the alleged injury, was guilty of contributory negligence and not entitled to recover in this action by reason of Section 55 of the Railroad Act of the State of New Jersey.

APPLEGATE, STEVENS, FOSTER & REUSSILLE,

Attorneys of Defendant, New York and Long Branch Railroad Company.

## ANSWER OF PENNSYLVANIA RAILROAD COMPANY.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs. | |
| vs. | |
| NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law |

The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, answering the complaint of the plaintiffs, says that:

FIRST COUNT.

1 As all the paragraphs therein relate entirely to the New York and Long Branch Railroad Company, co-defendant, this defendant, the Pennsylvania Railroad Company, makes no answers thereto, leaving the same for the New York and Long Branch Railroad Company to answer.

SECOND COUNT.

1. It has no knowledge of the matters stated in paragraph 1, First Count, and leaves the plain-

tiffs to make such proof thereof as they may deem necessary.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. While admitting that there were certain duties which the defendant, Pennsylvania Railroad Company, had to perform, it alleges that it did fully perform the duties which it owed to any passenger who, as such, was ready to embark upon any of its passenger trains, but denies the allegations as stated in the said paragraph, and further says that it owed no duty to the said decedent because he was not a passenger upon the said defendant's train, had no ticket, nor had he paid any fare, and hence, was a trespasser upon the said station platform at the time when it is alleged the accident occurred as described in the complaint.

5. Denies paragraph 5, as stated, excepting as regarding the death of the said Samuel Rothstein, which, from information received, the defendant has understood to be the fact.

6. Denies paragraph 6 and all sub-divisions thereof, and especially does it deny that the said platform referred to therein was in disrepair.

7. Has no knowledge of the facts stated in paragraph 7, and leaves the plaintiffs to make such proof thereof as they may deem necessary.

Denies that it owes the plaintiffs anything on said Second Count, as alleged.

*Answer of Pennsylvania Railroad Company*

SPECIAL DEFENSES.

1. The defendant, Pennsylvania Railroad Company, was not guilty, in any wise, of any negligence whatsoever in regard to the alleged accident, which resulted in the death of the said Samuel Rothstein.

2. The said Samuel Rothstein was guilty of contributory negligence, in that he attempted to jump on a car of the said defendant's train while said car was in motion, and which act, on his part, by the Statutes of the State of New Jersey, is deemed contributory negligence, and if injured while so doing, prevents recovery for any damages that might have been received because thereof.

3. The said Samuel Rothstein assumed all risk of injury to himself, because he attempted to jump on a car of a train while said car was in motion, and by so doing, caused the alleged accident which it is said resulted in his death.

4. The said Samuel Rothstein, when he attempted to jump on a car of a moving train, was a trespasser in that he had no ticket to ride on said train, and any injury received by him, which it is alleged resulted in his death, was not caused by any wilful or wanton negligence on the part of the said defendant, Pennsylvania Railroad Company.

W. HOLT APGAR,
Attorney of Defendant,
Pennsylvania Railroad Company.

**REPLY.**

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs, vs. NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law |

Plaintiffs, Fannie Rothstein and Milton Rothstein, Executors of the Last Will and Testament of Samuel Rothstein, deceased, by way of reply to the answer filed herein by the defendant, New York and Long Branch Railroad Company, a corporation of the State of New Jersey, say that:

They deny the new matter raised therein and join issue upon the same.

QUINN, PARSONS & DOREMUS,
Attorneys for Plaintiffs.

**REPLY.**

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs, vs. NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law |

Plaintiffs, Fannie Rothstein and Milton Rothstein, Executors of the Last Will and Testament of Samuel Rothstein, deceased, by way of reply to the answer of the defendant, Pennsylvania Railroad Company, say that:

They deny the new matter raised therein and join issue upon the same.

QUINN, PARSONS & DOREMUS,
Attorneys for Plaintiffs.

**STATE OF CASE FOR APPEAL SETTLED BETWEEN THE PARTIES.**

NEW JERSEY SUPREME COURT

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs, vs. NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law |

This case was tried at the Monmouth Circuit Court, Freehold, New Jersey, before Honorable Rulif F. Lawrence, Circuit Court Judge. At the close of the entire case, the trial court directed a verdict against the plaintiffs and in favor of the defendants.

By reason of the death of the court stenographer, and the disappearance of his minutes, a stenographic transcript of the proceedings cannot be furnished. The parties, by their respective attorneys, have agreed upon the facts and have stipulated that this State of Case be offered in lieu of the stenographic transcript.

*State of Case for Appeal Settled Between the Parties*

## WITNESSES FOR PLAINTIFFS.

ANTHONY GRANDA—Worked in Rothstein's clothing factory. Took care of machinery and engine. Was in plant early in the morning. Samuel Rothstein came to the factory at seven o'clock, gave instructions for work for day. Rothstein said that he was going to New York on the seven-twenty train. Rothstein left factory, which is five hundred feet from station, ten minutes before train time.

ROSA FODERADO—On Monday, April 22nd, was at the railroad station waiting for a later train. Samuel Rothstein came to the station, went to the newsstand and bought a newspaper. The train was at the station and he walked towards the train. When he was within a short distance of the train, which was standing still at that time, he stumbled and fell forward headlong under the train which started at the same time. The bricks were loose at the place where he stumbled and fell. On cross-examination, she stated she had made the statement to Mr. Curtis except she denied that she had told him that she did not see the accident.

MOE SOKER—A commuter of many years standing from Long Branch. Traveled back and forth on the trains. He knew the condition of the station platform and that the bricks had been loose on the platform along the track. He was at the station on the day that Samuel Rothstein was

killed, saw the blood spots and the bricks loose at these points. Marked Exhibit P-5 with "B" to identify where body was.

MICHAEL WEINSTEIN—Took photographs of the station platform four days after the death of Mr. Rothstein. These photographs were enlarged. At the time that the photographs were taken, men were repairing the bricks on the station platform in the vicinity of the tracks. The photographs taken by the witness are marked Exhibits P-2, 3, 4, 5, respectively.

HERBERT ROTHSTEIN—A son of the deceased who resided with his father. He testified that his father was going to New York by train that day. His father was making $15,000.00 a year running his clothing factory.

PHIL HUBERMAN—A taxi driver. His taxi was parked facing the train at the north end of the station. He saw Samuel Rothstein approaching the train. When Rothstein was four or five feet from the train, which was still at a standstill, Rothstein suddenly pitched forward between the cars. Instantly the train started up and decapitated Rothstein.

ANTONIO DE SANTIS—A police officer of Long Branch at the station. Described the position of the body, the decapitation, the blood on the platform and identified the sand shown on the pictures which had been used to cover the blood.

*State of Case for Appeal Settled Between the Parties*

JULIA DISPANDO—Was standing on the platform near the south door of the ladies' room. She saw the conductor jump on the train and wave the train to go ahead. It started and suddenly the conductor reached for the emergency cord. She heard the brakes and the train stopped within the distance of a car length. She saw the body laying on the platform. The train barely started before it stopped. She did not see the accident.

FANNIE ROTHSTEIN—Testified as to her husband's earnings and that he was going to New York on business the day he was killed. Her husband was making $15,000.00 a year running the clothing factory.

CONRAD CALOFF—An actuary who testified as to the mortality tables.

WITNESSES FOR DEFENDANTS.

FRANK CURTIS—Railroad investigator. Testified he interviewed Rose Foderaro, asked her questions and she answered them, which answers he wrote down. He stated that she said that the answers were correct but she refused to sign the statement. She was standing inside the waiting room at the time of the accident.

GEORGE MORRIS—A railroad photographer, identified pictures which he had taken which were marked Exhibits D-2, 3, 4, 5, 6, 7 and 8.

*State of Case for Appeal Settled Between the Parties*

JOSHUA HALL—Janitor of the railroad station. Cleaned up the station each morning and swept the platform alongside of the tracks. On the morning of the accident, the bricks were in good condition with no bricks sticking up. At the time of the accident, he was behind the railroad station, heard a scream and saw the body with the feet towards the station and the head on the other side of the rail. Hall examined the plaintiffs' pictures and said they truly represented the station platform but showed no loose bricks.

ARTHUR ROBINSON—Baggage master at the station. Was in the baggage room when the train pulled in. He did not see the accident. He saw the body with the feet towards the station and the head on the other side of the rail. There were no loose bricks nor any depressions in the bricks. The train moved a car's length before it stopped the second time. He was present when the commutation book and wallet were found on the body. No ticket was found in the wallet.

WILLIAM REID—A railroad carpenter. Was at the south end of the baggage room waiting for another train and did not see the accident. He saw Rothstein with a newspaper in his hands running fast towards the train when it was in motion, saw him reach for the handle and then fall. He did not stumble. The train only went one-half a car length before it stopped.

*State of Case for Appeal Settled Between the Parties*

CALVIN LANGENBACK—Track supervisor of the New York and Long Branch. Inspected the platform one hour after the accident. He found the bricks in good order, no low bricks nor high bricks nor any holes in the platform. The bricks between the rails were out in April, 1935, because the frost had raised them and were replaced in May, 1935.

S. D. MILNOR—Draftsman for Pennsylvania Railroad Company. Photo June 5 with train 704 there. Lagenback, Mr. Woodward, Mr. Curtis—Mr. Morris. Map produced 25 feet waiting room door to point of accident at track. Rear of 4th car of 704 stopped 69 feet south of door, plus 25 feet. Train moved 94 feet. White broad line 5′ 6″ from gauge of E rail, center of line. Line 4″ wide x 2′ 6¾″ to chalk line. Bottom of car to platform 3′ 6¾″ approximately. Cars moved about 14′ 2″ June 5. Station building 150′ north to south. 118 feet south side of station to 25 feet north of waiting room door along track. 125 feet straight line south side of station to 25 feet north of waiting room door. (41.2″ to track) 48.2″ diagonal of accident.

JOHN W. SCHAIBLE—Engineer. Pensioned. Stopped running engine June 26, 1935. Has been on Pennsylvania Railroad for thirty years. Ran on Long Branch Railroad twenty years. April on train 704. Ran two and one-half car lengths after the first start until train stopped. He knows

where he stopped April 22, 1935. June 5, 1935, stopped at the same spot. Cannot say how long train was there. Had same number of cars.

ANTHONY DE SANTIS—Took commutation ticket and wallet. Ticket on railroad, wallet, fountain pen, few cards in wallet. First looked at card was Louis Debine. No money in wallet. Did not search body all way through. Did not go through his pockets. Milton Rothstein on ticket. I showed ticket to agent Herbert. Turned ticket over to the police.

CLIFFORD H. HERBERT—Ticket agent of New York and Long Branch. He did not see Mr. Rothstein purchase ticket. After the accident he saw the body. The train crew, some witnesses and police officer were there. Mr. DeSantis showed him commutation ticket, Milton Rothstein, 178-4-1-35. Stub is from original book. Sold to Milton Rothstein. Milton Rothstein paid for the ticket. No family can use a ticket of that type. Contract and not transferrable. Signed by stub. Stub signed by him. (Marked Exhibit D-10.) Train 704 leaves 7:21 A. M. 726 next train to New York. Regular 1 day excursion fare to New York $1.90 down town. Monthly commutation ticket fifty-four trips, 14/ per mile.

S. L. MILNOR—Recalled. Oil line 18 inches approximate distance from rail. Works for Pennsylvania Railroad Company (made plaintiffs' witness.) Ties eight and one-fourth feet long. Frost got under bricks and heaved bricks up

between the tracks. There was a chance for bricks being raised. Might raise bricks up if rain got under the bricks and froze. Platform runs down from station to track.

EDWARD SCHOENTHALEN—Contractor. Called by the New York and Long Branch Railroad. I went over to the platform and examined the platform. Ten A. M. I went over and examined the platform. I found the platform in excellent shape. Loose bricks next to the east rail. No loose bricks on the main part of the platform. One or two uneven bricks. Shown photograph marked D-4. He did not notice the blood spots. No loose bricks in the main platform. Sand between the bricks. Went over the platform and four or five feet from the east rail perfect condition. Did not see blood spot. Saw where sand was. Did not examine where the sand was. Concrete base. Sand. Would not swear it was concrete on cinder base. Presumed it was concrete base. Mr. Curtis was with him when he made the examination. Water contracts when frozen. Get expansion when thaw comes. Contraction due to cold. Expansion due to heat. He was on the platform from ten to twelve. It had been two months ago when he was on the platform. He was not on the platform for two or three months after accident. Did not look at the platform at that time. There were some broken bricks there inside the white line.

MICHAEL CONWAY—Oceanport. Carpenter New York and Long Branch Railroad. He was at

Long Branch station waiting for a train to go to a job. He was there when train came in involved in the accident. He did not see the accident. I was at the south end of the platform. After the train struck him I saw him on the platform. Went up where the body was lying. Body a little north of the door. Head on top of the rail. Body outside from the rail. Lying on his back, face up. I did not examine platform at that time. He goes from Bay Head to South Amboy. Knows the platform at Long Branch. Brick and cement. Twenty-seven feet of brick, thirteen feet of cement. Elberon platform is brick. Asbury Park and Spring Lake is brick. Laid in cinders. Sand between the bricks. I have been with the railroad thirty years. These bricks have been there twenty years. Two of us there, Read and myself. Did not know where the wheels of the car were when he saw the body. He does not work on the brick platform. Bricks laid on cinders.

JOSEPH SORRENTO—338 Poole Ave., Long Branch. Presser, clothing presser. He saw the accident in which Mr. Rothstein was killed. I was sitting on a bench ouside. Outside in front of the station on the bench. He came out of the station. He went toward the train. Got hold of the hand hold. He slipped with his hand. Did not have chance to grab with the other hand. Ready to put his foot on the first step. He was hanging Then he got loose and went down. He fell in between the two cars. He was walking

fast. The train was just beginning to move. The train moved about half a car length. Did not see the train man stop the train. There was a conductor on the last car of the train and he saw the man fall down and stopped the train. He was on the first step of the last car. I saw this man and he went up when the train started to move, trainman. I was sitting on the right-hand side of the door, toward New York. I did not know the man. He was dressed clean. Suit like Mr. Parsons. Cannot say as to hat. Had a soft hat on. Does not recall whether he had a coat on or not. I saw him come out of the station door and the train had started to move. This man passed in front of him. He was watching him as he was going toward the train. Missed his right hand and got the left hand. Had left hand hold a second. Got loose. Did not get foot on the steps. He was hanging. Attempted to put right foot on the steps.

ROBERT L. WILCOX—Lives at 172 River Avenue. Railway express. He recalls the accident. He was sitting on bench at north end of station at the entrance to the man's waiting room. I saw Mr. Rothstein come out of the door and run toward the track. I saw him raise his right hand. Raised his right hand toward the hand rail of car. He lost it. Cannot say whether he raised his left hand or not. Right hand slipped down and he fell down on his face. The train was moving when Mr. Rothstein came out of the station.

Before Mr. Rothstein reached the train he did not slip or fall on the station platform. Saw no defect about the station platform. He might have had a newspaper. The train moved from time it started until it stopped about the length of a car. The train was not moving fast, going eight or ten miles an hour, not sure of the speed. He was there until the next train came in.

DANIEL A. MULHEIN—Wheel Report, cars 1296-3441-3290-3522-3474-8130-3471-3482. He was between the first and second coach. The train stood there about one minute. He stood on the bottom step, looking south. I gave the signal to start the train. I got signal from the train crew. The train crew were on the platform. Brill, head brakeman, Van Wert and Keefer. No brakeman between the fourth and fifth cars. Vestibule doors open with the exception of the rear platform of the rear car of the train. I ran up the steps. Gave two bells to go. Came back to bottom step. The train had started to move. None to get on and off train when the train started to move. I saw that man come out of the station. I saw him start toward the train. I called to him. I called hey, he kept right on coming. Lost my voice for three months. He was going pretty fast. When he reached for the handle I knew he could not make it. I pulled the cord, the train stopped within six or eight feet when I pulled the emergency. The train had moved one and one-half car lengths when he tried to get on. The train was

moving between five and eight miles an hour. Saw him attempt to reach the hand rail. Saw the man after the accident. He was lying between the tracks of the coach. Three trucks had gone over him. Saw nothing on the platform. Did not look. He did not stumble or fall going toward the train. The train had moved about one car length when I saw him. Three car lengths from the time the train started until the train stopped.

ARTHUR D. BRILL—Passenger brakeman. Eighteen years on the Pennsylvania Railroad. Conductor has gold buttons. The brakeman has silver buttons. Same kind of hat. He was between the third and fourth coach. Van Wert was between the fifth and sixth. Keefer was between the seventh and eighth. He got off the train on the platform. No one on the platform to board the train when the train started. I stood on the bottom step. The other two brakemen were on the bottom steps. He saw the man come out of the station. He had a newspaper in his hand. He came out of the station in a hurry. Had a paper in the right hand. Reached with his left hand. Swung around and fell between the cars. He (Brill) saw the platform, saw nothing the matter with the platform. The train stopped after the accident. The train had moved about one car length before he reached the car. The train stopped in one and one-half car lengths. Total about two and one-half car lengths. I called

to him "Go way." Waved my hand. He was looking toward me. Paid no attention to me. I heard Mulherin call to him. He went to pull emergency cord. I pulled him out from under the car. He was under car 8130, center of car. Three trucks went over him. He was under the sixth car of the train. The train had moved about one-half car length when I first saw him. It went another one-half car length when I saw him grab.

LESTER E VAN WERT—Brakeman. He was between the fifth and sixth car. The train stopped there forty-five seconds to a minute. No passengers got off at his platform. General passengers got on. Keefer gave him the signal and he passed it. Platform was clear when the train was started. He (Van Wert) was looking backwards. I saw this man walking very fast out of the station. I had an idea and called to him don't get on. He had a paper in his right hand. He ran through the car but someone else pulled the emergency cord. Got off between fifth and sixth car. The train was going four to six miles an hour when he tried to get on. Saw nothing on the platform. Saw no disrepair of the platform. This man did not stumble before he reached for the hand rail. This man was one-half way down the platform when I saw he was going to board train. His car at that time was just about half way between where it stopped and baggage room door. He was south of the man.

*State of Case for Appeal Settled Between the Parties*

JAMES KEEFER—Brakeman. Passenger brakeman on the Pennsylvania Railroad. He was on 704, rear brakeman. He was between the seventh and eighth car. He was at that point when the train stopped. Stopped about one minute at Long Branch. He was on the platform and watched the passengers. I passed signal to Van Wert. No passengers to get on the train at that time. Passed signal to brakeman Van Wert. The train then started. I got up on the bottom step of the eighth car. Right hand on one guard and one on the other. He was facing toward New York. I did not see this man come out from the station. I saw him half way between the station and the train. He was moving rapidly. Did not see anything in his hand. As he came toward the train I saw him make a grab for the grab iron. Cannot say what car it was. Up ahead of where I was. I called. I called "hey." Van Wert called. Cannot say as to the other men. I saw him make a grab and fall. Could not say if he fell on the steps or between the cars. I ran up the steps and pulled the emergency cord. Stopped in a car and a half. The train had moved from the time it started until he grabbed, the train moved about one car length. He went to the rear of the train after the train stopped.

MICHAEL STROLLO—Thirty six years with the New York and Long Branch Railway. Assistant Train Master. New York and Long Branch Railroad own the station and make repairs to the sta-

tion platform. Used by Pennsylvania and Jersey Central. Asked to produce agreement. Acts as assistant superintendent. Has charge of all train crews on New York and Long Branch Railroad. Did not know men shown working on the stations, shown in the photograph.

CARL L. ILIFF—Was going to take the 7:25 train for Perth Amboy. I was there standing at the station. I was standing in the door. Got a newspaper from the news stand. The train had started and I looked out the door. I saw this man try to board the train. He was eight or ten inches from the train when he put his left hand up to grab the hand rail. Missed that. Next coach knocked him down on his back and train passed over him. All that car and trucks of next car. The train was in motion at that time. Cannot say which car of the train that was. The train was stopped within not over a car length. I would say the train was going about eight or ten miles an hour when he tried to get on. At the time the only person I saw was on the lower steps of the car following. Did not see any other member of the crew. I did not hear anyone call out. Did not notice anything out of the ordinary. He did not stumble before he put up his hand. Did not notice any disrepair of the platform. He was inside of the station until after the accident. Used the station for three or four years before the accident. Station door was closed. Was standing by the north door. Cannot say whether any-

one was at the news stand. Two or three people around there. About thirty feet from where he was to the track. Man was eight or ten inches from train when he first saw him.

At the close of the case, counsel for the defendants moved for a direction of a verdict upon the ground that Rothstein had purchased no ticket, no ticket was found in his wallet and he was, therefore, not a passenger to whom the railroad owed no duty and upon the ground that Rothstein had purchased no ticket and had no ticket excepting the commutation book in the name of Milton Rothstein, who was the son of decedent, which was found on his person, and, therefore, there was no contractual relation between decedent and the defendants, and he was, therefore, not a passenger and the defendants owed no duty to decedent other than to refrain from willful injury.

The defendants further moved for a direction of a verdict upon the ground that upon the facts, the decedent was a trespasser to whom the defendants owed no duty other than to refrain from willful injury. The trial court granted the motion for the direction of a verdict in favor of the defendants upon the grounds that the decedent was a trespasser and that no contractual relation existed between the decedent and the defendants and allowed exceptions to such action to the plaintiff.

*State of Case for Appeal Settled Between the Parties*

We hereby stipulate that the foregoing state of case, together with the exhibits mentioned therein shall constitute an agreed state of case for appeal, by reason of the inability of the parties to produce a stenographic transcript, due to the death of the court stenographer.

PARSONS, LABRECQUE & BORDEN,
Attorneys for Plaintiffs.

JOHN A. HARTPENCE and THORN LORD,
Attorneys for Defendant,
Pennsylvania Railroad Co.

APPLEGATE, STEVENS, FOSTER & REUSSILLE,
Attorneys for Defendant,
New York & Long Branch Railroad Co.

**EXHIBIT P-2.**

[For the convenience of the Court this exhibit is inserted on the opposite page.]

**EXHIBIT P-3.**

[For the convenience of the Court this exhibit is inserted on the opposite page.]

EXHIBIT P-4.

[For the convenience of the Court this exhibit is inserted on the opposite page.]

EXHIBIT P-5.

[For the convenience of the Court this exhibit is inserted on the opposite page.]

**EXHIBIT D-2.**

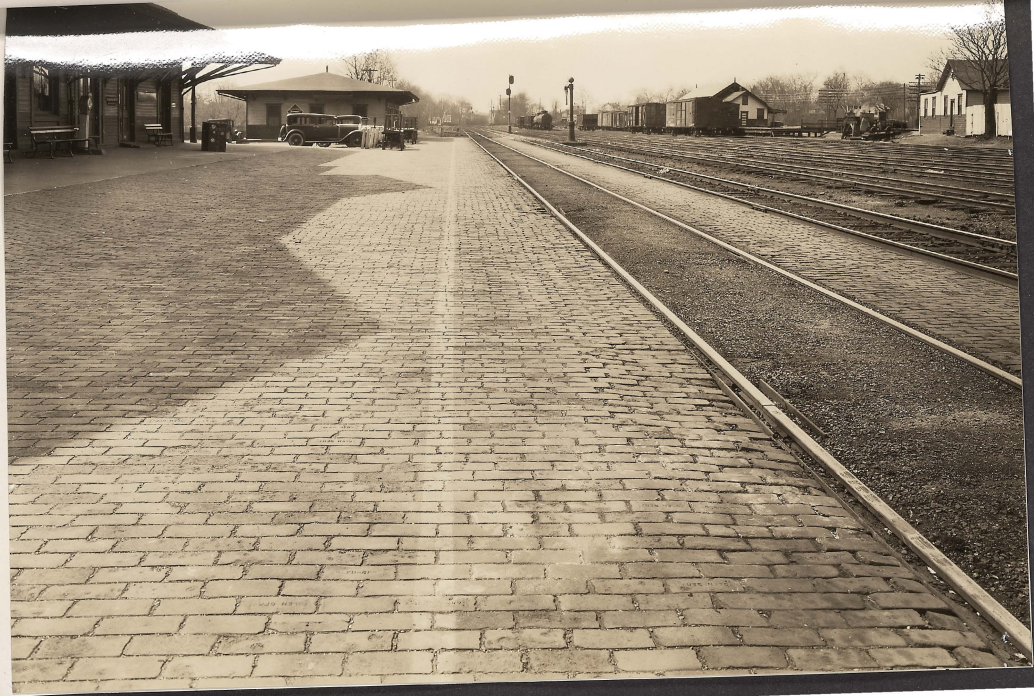
[For the convenience of the Court this exhibit is inserted on the opposite page.]

**EXHIBIT D-3.**

[For the convenience of the Court this exhibit is inserted on the opposite page.]

**EXHIBIT D-4.**

[For the convenience of the Court this exhibit is inserted on the opposite page.]



D4

EXHIBIT D-5.

[For the convenience of the Court this exhibit is inserted on the opposite page.]

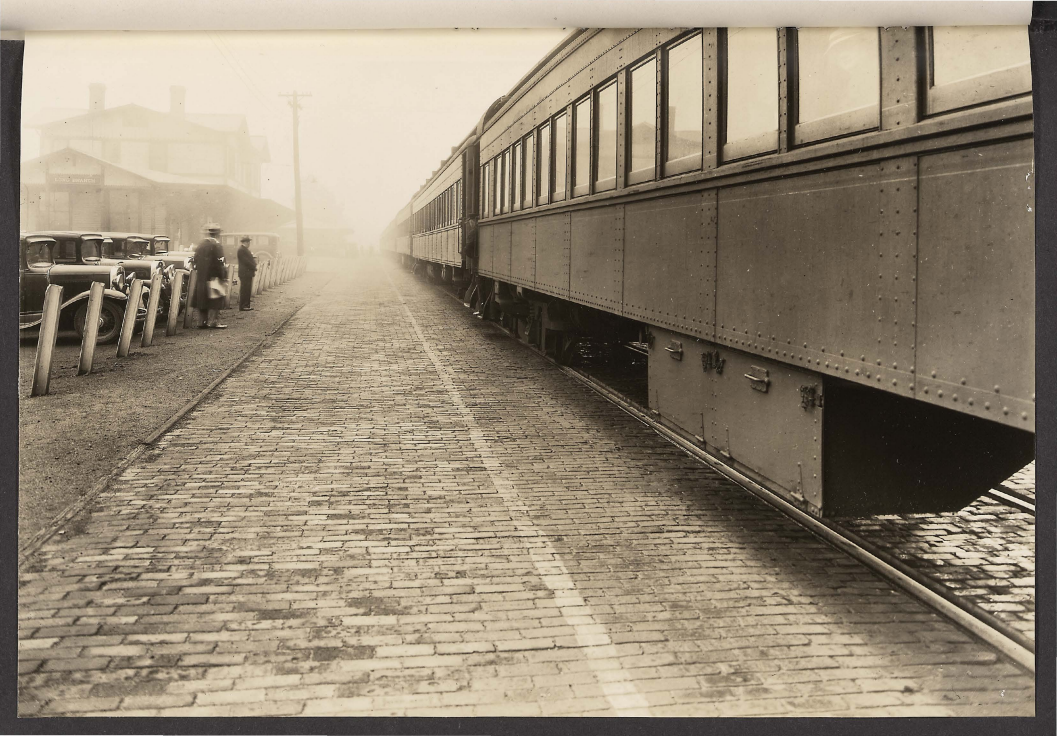
**EXHIBIT D-6.**

[For the convenience of the Court this exhibit is inserted on the opposite page.]

D6

**EXHIBIT D-7.**

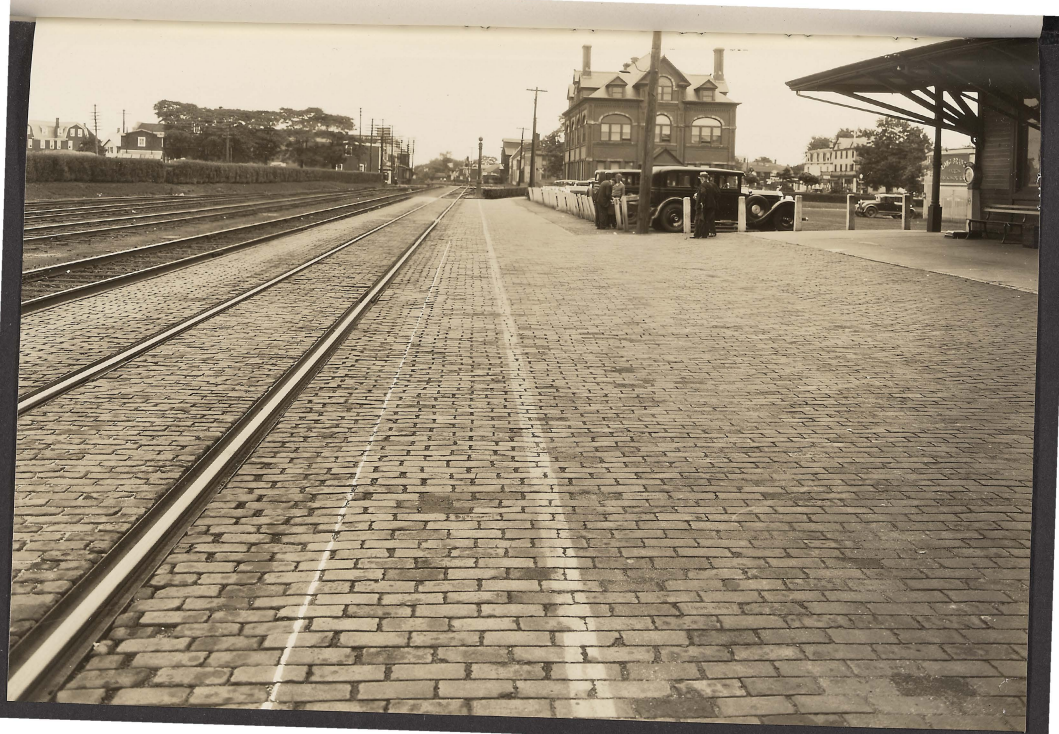
[For the convenience of the Court this exhibit is inserted on the opposite page.]



D7

**EXHIBIT D-8.**

[For the convenience of the Court this exhibit is inserted on the opposite page.]



D 8

**EXHIBIT D-10.**

The New York and Long Branch Railroad Co.

AGENT'S STUB

Not good for passage

West End and Hollywood, N. J.

Long Branch, N. J. or Branchport, N. J.

AND

NEW YORK, N. Y.

4 M. Milton Rothstein,

178 Signature of Purchaser.

Form 54 N-22 Address West End, N. J.

| 1 | 2 | 3 | 4 | 5 | 6 | X |
|---|---|---|---|---|---|---|
| 33.00 | 22.44 | 17.16 | 14.52 | 13.20 | 11.88 | |
| 7 | 8 | 9 | 10 | 11 | 12 | X |
| 10.56 | 9.90 | 9.24 | 8.58 | 7.92 | 7. | |

In the upper left hand portion of this stub is small ruled corner with the legend—Agent Stamp Here. Within this area appears a stamp, not all of which is legible. However, this much is legible, New York Long Branch, 1 April 11, 1935

In the square where the figure "12" appears there has been an L-shaped punch made, which completely obliterates the figure under 12, excepting the figure 7.

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, Deceased, Plaintiffs, *vs.* NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law. Postea. |

This case was tried before his Honor, Rulif V. Lawrence, Circuit Court Judge, and a jury, at the Monmouth Circuit, beginning April 30th and concluding May 4th, 1936, at Freehold, New Jersey.

The said Judge directed the jury to return a verdict against the plaintiffs, Fannie Rothstein and Milton Rothstein, Executors of the Last Will and Testament of Samuel Rothstein, deceased, and in favor of the defendant, New York and Long Branch Railroad Company, of no cause of action, and the jury did accordingly return a verdict against the said plaintiffs and in favor of the defendant, New York and Long Branch Railroad Company, of no cause of action.

Dated May 8, 1936.

RULIF V. LAWRENCE,
Circuit Court Judge.

61

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

| | |
|---|---|
| NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, Defendant, *ads* FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, Deceased, Plaintiff. | Action at Law. On Postea. |

It is ORDERED that judgment be and hereby is entered in favor of the defendant and against the plaintiffs without costs.

Entered, May 11, 1936.

On motion of

APPLEGATE, STEVENS, FOSTER & REUSSILLE,
Attorneys.

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, Deceased, Plaintiffs, *vs.* NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants. | Action at Law. Postea. |

This case was tried before Judge Rulif V. Lawrence, with a jury at the Monmouth County Circuit Court on April 30, May 1st and May 4th, 1936. By instruction of the court, the jury rendered a verdict in favor of the defendant, Pennsylvania Railroad Company and against the plaintiffs, Fannie Rothstein and Milton Rothstein, Executors of the Last Will and Testament of Samuel Rothstein, deceased, of "No Cause for Action".

Dated: May 8, 1936.

RULIF V. LAWRENCE,
Judge.

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

| | |
|---|---|
| PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendant, *ads* FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, Deceased, Plaintiffs. | Action at Law. On Postea. |

It is ORDERED that judgment be and hereby is entered in favor of the defendant and against the plaintiffs without costs.

Entered May 11, 1936.

On Motion of W. HOLT APGAR,
Attorney.

# New Jersey
# Court of Errors and Appeals

---

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased,<br>Plaintiffs-Appellants,<br>vs.<br>NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and PENNSYLVANIA RAILROAD COMPANY, a body corporate,<br>Defendants-Appellees. | Action at Law.<br>On Appeal from Supreme Court Monmouth Circuit. |

**BRIEF OF PLAINTIFFS-APPELLANTS**

**INTRODUCTION**

This appeal is prosecuted by the Executors of the Last Will and Testament of Samuel Rothstein, deceased, in behalf of his widow and children. Samuel Rothstein, a resident and substantial citizen of Long Branch, New Jersey, was the principal owner and president of a clothing fac-

tory bearing his name. This factory was located in close proximity to the Railroad Station in that city. Rothstein, prior to his death, had received a salary from this company of $15,000.00 a year. At seven o'clock on the morning of April 22, 1935, Rothstein went to the factory to arrange for the details of the day's work. After talking with his foreman and the caretaker, he left the factory and started for the Railroad Station. He had left word with his foreman at the factory and his family upon leaving home that he intended to take the 7:20 train to New York where he frequently went on business. Rothstein arrived at the station, purchased a newspaper, and then started toward the train which was in the station receiving passengers. As Rothstein neared the train, he was seen to pitch headlong, forward, under the train and on to the tracks. The train at the same instant moved forward and Rothstein was decapitated. At the spot where Rothstein fell, there were loose bricks which caused depressions in the platform. Two witnesses saw Rothstein stumble, as they described it, before he pitched forward on to the track and under the wheels of the train.

Suit was thereafter instituted by the Executors of the Last Will and Testament of Samuel Rothstein to recover damages for the decedent's wrongful death. At the trial of the cause in the Monmouth Circuit, evidence was produced by the defendants, that a card case of the deceased was examined by a police officer and in this card case was found a commutation ticket belonging to his

son. No evidence was produced at the trial that the remaining clothes of the decedent were searched and no proof was offered of the absence of money or tickets in his other pockets. Samuel Rothstein met a violent death and there was no description offered as to what happened to his clothes or the contents, except the one card case which was found by the police officer who was searching for means of identification of the deceased. The railroad further offered evidence to show that Rothstein, that morning, did not purchase a railroad ticket at the station.

At the close of the trial, the two railroad defendants contended that, since the card case contained the commutation ticket of the son, which was a personal contract with the son, this was conclusive evidence that Samuel Rothstein was a trespasser to whom the railroads owed no duty except that of abstaining from acts of wilful injury. In the motion for a directed verdict, this was urged by counsel for both railroads. The Trial Court adopted this view and directed a verdict in favor of the defendants and against the plaintiffs upon the ground that the decedent was a trespasser, having purchased no ticket and having in his possession the commutation ticket of his son, which admittedly he had no right to use. From this ruling of the Trial Court the plaintiffs appeal.

The decision of the Trial Court in effect, held that Samuel Rothstein, an honorable and reputable citizen of the City of Long Branch, at the

time he met his death, was attempting to cheat the railroad out of $1.40. The decedent, who at the very time was earning $15,000.00 a year, was presumed by the Trial Court to be a trespasser and entitled to no protection. From this judgment of the Trial Court, the plaintiffs prosecute this appeal.

## REVIEW OF THE EVIDENCE

The state of case is extremely brief, due to the death of the court stenographer shortly after the trial. As a result no transcript of the testimony could be procured. The skeleton of the evidence was settled between the parties. In brief, the evidence is as follows:

Anthony Granda, an employee at Rothstein's factory, was there early in the morning when the decedent came to the factory at seven o'clock, left instructions for the day's work and then said he was going to New York on the 7:20 train. Rothstein left the factory ten minutes before train time (p. 20).

Rosa Foderado was at the station waiting for a later train; saw Rothstein buy a newspaper and then walk toward the train; when he was a short distance from the train, he stumbled and fell forward headlong under the train which started at the same time; the bricks were loose at the place where he stumbled (p. 20).

Moe Soker, described the condition of the loose bricks along the platform near the track; saw the

blood spots and the bricks loose at the place of the blood spots (p. 21).

Michael Weinstein, took photographs of the station platform four days after Mr. Rothstein's death. The photographs are marked Exhibits P-2, page 37; P-3, page 39; P-4, page 40; and P-5, page 42 (p. 21).

Phil Huberman, a taxi driver, had parked his taxi facing the train at the north end of the station. He saw Rothstein approaching the train and when four or five feet away from the train, Rothstein suddenly pitched forward between the cars; the train started up and decapitated Rothstein (p. 21).

The train crew appeared and testified.

Daniel A. Mulhein, a trainman (p. 29), Arthur D. Brill, brakeman (p. 30), Lester E. VanWert, brakeman (p. 31), James Keefer (p. 32), testified with numerous variances that the train was beginning to move when Rothstein, running, grabbed a handle of the train and then fell between two cars. Hall, the janitor, testified the bricks were not loose (p. 23); Robinson, baggage master, said there were no loose bricks (p. 23); Reid, the railroad carpenter, saw Rothstein running fast for the train, reach for the handle and then fall (p. 23); Langenback, track supervisor, saw no loose bricks (p. 24); DeSantis, a policeman, found the commutation ticket in his wallet with a few cards. *He did not search the body all the way through and did not go through his pockets* (p. 25). Herbert, ticket agent, said that Rothstein purchased

no ticket (p. 25); Schoenthalen, a contractor, found no loose bricks (p. 26); Sorrento, a clothes presser, saw Rothstein reach for the handle and fall between the cars (p. 25).

It is submitted briefly from this review of evidence that Rothstein unquestionably was boarding a train at a place where he had a right to board it. Unquestionably, he also was a passenger at the time he was attempting to board the train. No evidence was offered to show that Rothstein had not a ticket purchased at some other point and was without funds to pay his fare on the train. It is submitted from the evidence that Rothstein was legally a passenger and was entitled to all the rights and protection due a passenger boarding a train at a station where he had a right to be. There was nothing whatsoever in the evidence which justified the presumption, as a proven fact, that the decedent was a trespasser.

---

## ARGUMENT.

### I.

**Decedent was a passenger at the time he met his death and to him the defendants owed those duties owed by common carriers to passengers.**

Samuel Rothstein on the morning of April 22, 1935, had gone to the railroad station to take passage on a train to New York City. He had gone as a customer. He was the proprietor of a

substantial and remunerative business. The Trial Court, when it directed the verdict against the plaintiffs, rested its action upon the ground that he was a trespasser, because he had not purchased any ticket that morning and because there was found in a wallet upon his body a commutation ticket belonging to his son. No scintilla of evidence appeared that Samuel Rothstein intended to use this ticket. There was no proof that he did not have upon his clothes ample funds to pay his way. The proposition is fantastic and unbelievable that a man in his position was embarking upon a trip to New York with no funds in his pocket. When he went to the railroad station to take this train, he occupied a similar position to that of any other passenger. He had a right to be at the station; he had a right to board the train. Nowhere in the evidence does any proof occur that he intended to obtain free passage or trespass upon the defendant's property. No direct declarations in this jurisdiction have discussed the inception of the relationship of carrier and passenger. However, with general unanimity those jurisdictions where the question has arisen, have held that the relation of carrier and passenger arises, when one lawfully appears at the station and offers himself to the carrier to be carried to a destination.

So, in the instant case, when Samuel Rothstein proceeded to the railroad station in Long Branch to board a train for New York City, he then and there became a passenger to whom the carrier was bound to exercise that degree of care requisite for the proper carriage of passengers. The posses-

sion *vel non* of a ticket was not dispositive of his status. The decisive fact in the determination of the status of Rothstein was the presentation of himself as a passenger for carriage. Until some proof had been elicited that Rothstein had no intention of paying his fare, he remained a passenger.

In the case of *McFeat* v. *Philadelphia, W. & B. R. Co.* (Del.), 69 Atl. 744, the Supreme Court of Delaware speaking through Justice Spruance, said at page 746:

> "It is not necessary, to constitute him a passenger, that he should have had a ticket, or that he should have been actually upon the train of the defendant. If you believe that it was the *bona fide* intention of Walter McFeat, at the time of the accident, to board the defendant's train, and that the defendant had knowledge of that fact, or that the acts and conduct of the deceased and the other facts and circumstances were such as to reasonably inform or notify the defendant that he intended to board the train, he was entitled to such care and protection on the part of the defendant as is required by the law where the relation of passenger and carrier exists."

It is submitted that this is sound law. So in the instant case if Samuel Rothstein was attempting to board the defendant's train at the time of the accident, he became a passenger and was entitled to have the care and protection which a carrier owed a passenger.

In the case of *Berkebile* v. *Johnstown Traction Co.*, 99 Atl. 871, the plaintiff had been injured on

a car of the defendant. The defendant obtained a nonsuit upon the ground that the plaintiff had boarded a moving car and therefore was not entitled under the Pennsylvania Law to the care owed a passenger. The Supreme Court of Pennsylvania in a unanimous decision reversed the nonsuit and said at page 873:

> "When the individual gets on the car, he is presumed to be there lawfully as a passenger, having paid or being liable when called on to pay his fare; and the onus is upon the carrier to prove affirmatively that he was a trespasser. The company can only eject him for sufficient cause, and, until he is advised that the company refuses to accept and carry him as a passenger, the relation of carrier and passenger is presumed to exist. The purchase of a ticket or the payment of fare is not essential to the creation of such relation. * * *
>
> "We are not favorably impressed with the contention of the defendant company that, under the circumstances disclosed by the evidence, the plaintiff was not a passenger because he was not seen or recognized by the motorman or conductor prior to the accident."

The statement of the Court that the purchase of a ticket or payment of fare is not essential to the creation of the relation of passenger and carrier is practically dispositive of the present appeal. In the present case, Rothstein was lawfully at the station. He was lawfully going to board the train when he met his death. Whether he had a ticket or not is immaterial. He had pre-

sented himself as a passenger and as a passenger was going to board the train.

In the case of *Kidwell* v. *Chespeake & Ohio Railway Company* (W. Va.), 77 So. Eas. 285, the same rule was enunciated. In that case the plaintiff went to the station platform for the purpose of purchasing from incoming excursionists, return coupons which he intended to use for passes. While attempting to purchase such coupons, he was assaulted, arrested and injured. He instituted suit for injuries and the Court held:

> "One may become a passenger without a ticket if by some act on his part he places himself in the care or control of the carrier, intending in good faith to become a passenger, and is accepted by the carrier as such, although, of necessity, the existence of the relation is commonly to be implied from attending circumstances."

In the case of *Fremont E. & M. V. R. Co.* v. *Hanblad* (Neb.) 106 N. W. 1041, the Court likewise said:

> "If within a reasonable time before the departure of the train he intends to take, he goes to the place provided for the reception of intending passengers, and there places himself actually or impliedly within the carrier's care, then, and not until then, the law places around him the protection vouchsafed to passengers, and charges the carrier with the highest degree of care for his safety."

In the case of *Phillips* v. *So. Railway Company*, 124 N. C. 123, the Court held:

> "A party coming to a railroad station with the intention of taking the defendant's

> next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for the departure of said train. To constitute him such passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his Honor."

The defendant contended in the case of *Messenger* v. *Valley City Street & Interurban R. Co.* (N. D.) 128 N. W. 1023, that the relation of carrier and passenger was not created as a matter of law until the passenger entered some conveyance by virtue of a contract express or implied and has been expressly or impliedly received as a passenger by the servants of the carrier. In this case the plaintiff had not purchased a ticket for his trip but had boarded the car. The Court, denying this contention, said:

> "The contention that the plaintiff was not a passenger for the reason that she had not paid fare or bought a ticket when injured cannot be upheld. The car was at the station to receive passengers, and that fact may be deemed an invitation for passengers to enter, under the circumstances of this case."

So in the instant case, as is the frequent custom, the decedent may have bought, when he was in New York, a ticket to Long Branch and have intended to pay a fare on his second trip to New York. He may, on the other hand, have had in his clothes a return trip to New York. As the Court said in the Messenger case, the train was at the station to receive passengers. This was

an invitation to passengers to enter. Rothstein accepted this invitation and proceeded to enter the train when he met his death.

Again the Court of Appeals of the State of Maryland in the case of *Baltimore & O. R. Co.* v. *State,* 32 Atl. 201, said:

> "It is conceded to be the well-settled rule that a person is a passenger who enters upon depot grounds by the approaches furnished by the carrier. The fare does not have to be paid, nor the train entered, but the person must merely enter within the control of the carrier at the depot, through the usual channels of business with the intention of becoming a passenger by either paying fare before or after entering the train."

Similarly in the case of *Buffet* v. *Troy & B. R. Co.,* 40 N. Y. 168, a person was also held to be a passenger of a railroad company who was injured while going to the depot in a stage to take a train, although he had not yet paid his fare or purchased a ticket nor formally announced his purpose to do so.

The Supreme Court of Georgia in the case of *Western & Atlantic R. R. Co.* v. *Voils,* 35 L. R. A. 655, held that a person was a passenger who went to a place where it was customary for trains to stop, when signalled, in order to take on passengers and that such person was entitled to all the rights of a passenger although he had not purchased a ticket.

The decisions are uniform upon the point that an individual who has arrived on the premises of

a railroad company intending to board a train has entered into the relation of passenger and carrier with the railroad company. In *Cooley on Torts* at page 770, the authority says:

> "The responsibility of the carrier begins when the passenger presents himself for transportation and this he may state to do when he approaches the place of reception for the purpose."

The Supreme Judicial Court of Massachusetts in the case of *Inness* v. *Boston R. B. & L. R. Co.,* 47 N. E. 193, said:

> "It is not necessary that a man should have bought a ticket in order to be a passenger either at common law or within the meaning of the statute under which this action is brought."

The rule is stated in 4 *R. C. L.* 1004, paragraph 473, where it is said:

> "While the payment and receipt of fare is unequivocal evidence of the existence of the relation of carrier and passenger, it is well settled that the purchase or possession of a ticket or the payment of fare is not essential to the creation of such relation."

This rule is again stated in 4 *R. C. L.* at page 1030, where it is said:

> "The purchase of a ticket is not essential to the existence of the relation of carrier and passenger."

The Supreme Court of Illinois in the case of *Chicago & E. I. R. Co.* v. *Jennings,* 190 Ill. 378 said:

> "It is not always easy to determine when the relation of passenger begins, but it would seem from the cases that it is not necessary that a contract for passage should have been actually made, or the fare actually paid in order to create the relation, but it is necessary that a person should be under the control of the carrier in order to be entitled to its care as such. Therefore, a person cannot be regarded as a passenger who is not upon the premises of the carrier."

In Volume 10 of American Jurisprudence, page 28, paragraph 956, it is said that:

> "The purchase of a railroad ticket or the holding of a free pass will not alone operate to constitute the relationship of passenger and carrier, nor is such purchase essential to its existence, although it may be considered as one among other elements entering into the inception of such a relationship."

Again at page 43 in the same volume, paragraph 986, it is said:

> "While the payment of fare or possession of a ticket by one on the train, or in readiness to take it, is unequivocal evidence of the existence of the relationship of carrier and passenger, it is well settled that the purchase or possession of a ticket or the payment of fare is not essential to the creation of such relation and that a person may assume the status of a passenger, and become entitled to all the rights and privileges accruing from such relationship, without the payment of fare. if he is on the vehicle of the carrier with the intention of

becoming a passenger and with the consent of the carrier or its agents, express or implied."

In 10 *C. J.*, page 619, paragraph 1042, it is said that:

> "Nor, in the absence of a rule or known usage of the company to the contrary, is the actual purchase of a ticket before entering the train essential to constitute the relation, particularly where he has been given no opportunity to purchase a ticket."

Other authorities for the same rule are the following:

Lent v. N. Y. C. & H. R. R. Co., 120 N. Y. 467, 24 N. E. 653;

Allender v. Chicago R. I. and P. R. Co., 37 Iowa 264;

Norfolk & W. R. Co. v. Galliher, 80 Va. 639, 16 S. E. 935;

Thomp. Carr. of Pass. 43;

Dwyer v. Boston and M. R. Co., 143 Mass. 343, 19 N. E. 523;

Penna Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713;

Grimes v. Penna Co., 36 Fed. Rep. 72;

Indianapolis Traction & Terminal Co. v. Lawson, 143 Fed. 834;

Philadelphia & Reading R. Co. v. Derby, 141 How. 468;

The New World v. King, 16 How. 469;

Brennan v. Fair Haven & W. R. Co., 45 Conn. 284;

Florida South Ry. Co. v. Hirst, 30 Fla. 1;

Gardner v. Wayeross Air-Line Co., 97 Ga. 482;
Riley v. Wrightsville & T. R. Co., 133 Ga. 413;
Ohio & M. R. Co. v. Muhling, 30 Ill. 9;
Gillenwater v. Madison & I. R. Co., 5 Ind. 339;
Indianapolis Traction & Terminal Co. v. Klentschy, 167 Ind. 598;
Union Pac. Ry. Co. v. Nichols, 8 Kan. 505;
Illinois Cent. R. Co. v. Laloge, 113 Ky. 896; and others.

No attempt has been made to include every case passing upon the inception of the relation of passenger and carrier. However, the review of cases which has been made is clearly indicative of a well-settled rule of law that a carrier owes a duty to a person offering himself as a passenger, when that person presents himself at a regular station of the carrier with intent to take passage upon the transportation facilities afforded by the carrier. In the instant case, the decedent, Samuel Rothstein, unquestionably went to the station to take a train to New York. He went there as a passenger who was proceeding to board the train. Legally, it is submitted he became a passenger when he entered the station grounds to board the train. The defendants, as he was on his way to board the train, owed him the duty that a carrier owes its passengers. He was in no sense of the word a trespasser. The fact that a card case was found on his body which contained a commutation

ticket of his son, cannot alter that relation, nor can the fact that the ticket agent testified that that morning he bought no ticket, alter the relation. A passenger may pay his fare on the train. He may have a return ticket. He may have bought tickets at other times. A third person may have bought the ticket for him. All these alternatives present themselves. The crucial question was the purpose of Rothstein's presence on the platform as he was going to board the train and there is only one answer to this question. It was a regular passenger train of the defendants, which was running specifically for the purpose of the carriage of passengers. Rothstein was within that category. He intended to go to New York. He was boarding the train. He was in no sense of the word a trespasser.

It is respectfully submitted that the direction of a verdict was erroneous.

## II.

**The decedent, until the contrary is shown, is presumed to have been on has way to board the train with a lawful purpose.**

In the state of case as settled between the parties, "The Trial Court granted the motion for the direction of a verdict in favor of the defendants upon the grounds that the decedent was a trespasser and that no contractual relation existed between the decedent and the defendants and allowed exceptions to such action to the plaintiff" (p. 34).

The only fact upon which the Trial Court could have based such a decision was the evidence of the police officer that in the wallet of the decedent was a commutation ticket of his son and of the station agent that he had sold no ticket to Samuel Rothstein that morning. No other evidence appears in the case. The police officer definitely testified that he did not examine the other pockets in the clothes of the decedent and he did not know whether the decedent had sufficient monies to pay his fare. The station agent could not testify that he had not sold the ticket to some person for Mr. Rothstein. The decision of the Trial Court, in effect, is a determination that the decedent had a criminal intent to cheat and defraud the Railroad Company and to ride to New York without paying his fare. The mere statement of this proposition is sufficient to show its falsity. Rothstein, the decedent, was a man of substantial means. He was the president and principal owner of a large clothing company. He was bound for New York for the day. Ordinary common sense dictates that a man in his position would not leave for such a trip without money in his pocket. While boarding the train he died. He can no longer speak for himself and defend his good name. Nothing in the evidence appears to indicate that this man was other than a reputable and decent citizen. No decedent should be branded as an intending criminal because on boarding a train he has a commutation ticket of a third party. The effect, however, of the decision of the Trial Court is to brand the decedent as an intending criminal. The contrary, however, is the

well-settled law of this and other jurisdictions. Until the opposite is proved, litigants are presumed to have acted with a lawful intent. Wrongdoing is contrary to the presumption of the Court. People are presumed to have acted legally. No case has been found in this jurisdiction upon this precise point. However, other jurisdictions have had cause to pass upon the identical question.

The Supreme Court of Indiana in the case of *Louisville N. A. & C. Ry. Co.* v. *Thompson*, 8 N. E. 18, passed upon the identical question. In the pocket of the decedent in the latter case was found a pass issued to another person, which pass was not transferable. No explanation was given as to the manner in which the deceased came into possession of the pass nor as to the circumstances under which it was issued. The Court there said at page 20:

> "There is, as we have intimated, no evidence that he procured the pass fraudulently, or was attempting to travel on it, except such as is supplied by the fact that after his death the pass was found in his pocket. For anything that appears, he may have been the mere custodian of it for Whalin. The presumption always is in favor of honesty and fair dealing, and he who asserts the contrary must prove it. A presumption, like a *prima facie* case, remains available to the party in whose favor it arises until overcome by countervailing evidence. * * * We cannot consent to characterize an act as fraudulent from the single fact that on a dead man's body is found a pass issued to another per-

> son. If there were attendent circumstances making it probable that the pass had been wrongfully used, the case would be different; but here there are no such facts, for the conductor says that he did not know the man who presented the pass. * * * The inference—for it cannot, with justice or accuracy, be called a 'presumption'—arising from the fact of finding the pass in Eichler's pocket after his death, is a special one, while the presumption of good faith is a general one. The Court may instruct the jury that the presumption is in favor of good faith and honesty; but it could not rightfully instruct, as matter of law, that the fact that the pass was found in Eichler's pocket created a presumption that it was fraudulently used, and this proves that the inference must give way before the general legal presumption. But if we grant that the fact that the pass was found in Eichler's pocket creates a presumption and that there is a conflict of presumptions, still the one in favor of good faith is the stronger and will break down the other."

On petition for re-hearing of the above case, the Court said in its opinion in 9 N. E. 357:

> "The authorities cited in our former opinion abundantly prove that one who is on a train used for carrying passengers is, in the absence of countervailing evidence, presumed to be rightfully there as a passenger."

So in the instant case, is is respectfully submitted to this Court that there was no evidence that Rothstein had either procured the ticket of

his son fraudulently or that he was attempting to travel upon it. For anything that appears, Rothstein may have been the mere custodian of his son's ticket.

The same doctrine is expounded in the case of *Inness* v. *Boston R. B. & L. R. Co.*, 47 N. E. 193, wherein the Court said:

> "He knew that he could not go for nothing, and it may be presumed that he knew whether he could pay or not. It may also be presumed that he took the train with lawful intent, when nothing in his manner or boarding the train or the other facts raises a doubt. It is not necessary that a man should have bought a ticket in order to be a passenger, either at common law or within the meaning of the statute under which this action is brought. Exception sustained."

In 10 *C. J.* 1040, paragraph 1436, it is said:

> "this burden, however, is aided by the presumption that a person traveling in a railroad car, or other public conveyance used for passenger carriage, and who is not connected with the carrier as employee, is presumed to be there lawfully as a passenger."

The case of *Berkebile* v. *Johnstown Traction Company*, 99 Atl. 871, is authority for the statement that:

> "When the individual gets on the car, he is presumed to be there lawfully as a passenger, having paid or being liable when called on to pay his fare; and the onus is upon the carrier to prove affirmatively that he was a trespasser."

The Georgia Supreme Court followed the same rule in the case of *Georgia & Florida Railway Co.* v. *W. A. Tapley*, 87 S. E. 473. It was held:

> "Indeed as a general rule, every person not an employee, being carried by the expressed or implied consent of the carrier upon a conveyance usually employed in the carriage of passengers, is presumed to be lawfully upon it as a passenger."

While the specific rule of law has not been laid down in this jurisdiction, the general principle has been followed. In this jurisdiction, freedom from negligence is presumed. If there is no presumption of negligence or contributory negligence upon the part of a party litigant then this Court would logically follow the rules laid down in the decisions already cited, that a party litigant is presumed to have acted legally. To suggest that the party may presume on the one hand to have intended to commit a crime and defraud the railroad by obtaining a ticket to which he had no right and yet on the other hand that such a person is presumed to have acted without negligence would be a paradox of the first water. That is what the decision of the Trial Court in the instant case presents. Rothstein is dead and cannot speak for himself. The Trial Court could not without violating the settled rules of this jurisdiction find a presumption that Rothstein was guilty of contributory negligence. Under the decisions of this state Rothstein was presumed to have acted with due care. Yet the Trial Court, when Rothstein's good name was involved, when his reputation carefully built up for a lifetime came into issue,

presumed, because he had in his wallet a commutation ticket belonging to his son, that the decedent intended to use the same unlawfully and was a trespasser.

This Court in the case of *McConachy* v. *Sklarew*, 113 N. J. L. 17, held at page 19:

> "Contributory negligence is a matter of defense and the plaintiff is not required to prove its absence as a part of her case. No presumption of negligence upon the part of the decedent arises in such an action from the mere occurrence of the accident."

Justice Trenchard, speaking for this Court in the case of *Danskin* v. *Pennsylvania R. R. Co.*, 79 N. J. L. 526, also said at page 528:

> "No presumption of negligence upon the part of the decedent arises in such an action as the present one from the mere occurrence of the accident."

In the case of *Gilson* v. *Gilson*, 116 N. J. Eq. 556, at page 563, said:

> "If the circumstances taken singularly and together reasonably admit of two interpretations, that interpretation which favors innocence should be adopted."

This jurisdiction has repeatedly held that the presumption is in favor of legal acts and against illegal acts, is in favor of care and caution and against negligence. Is is submitted that the Trial Court overlooked this rule. The gravamen and foundation for the decision of the Trial Court is an inference that a man who had died, was intending at a future time to do a criminal act.

Opposed to this inference are an equal number of inferences and probabilities which justify the decedent. Rothstein may have had in another pocket a ticket to New York. He may have arranged for a friend to have purchased a ticket for him which he would have procured on the train. He certainly had sufficient cash on this business trip to New York to pay for his ticket, his lunch, his subway fares and other necessary incidentals on such a business trip. This jurisdiction will not presume a criminal intent on the part of a decedent until it is proven. It is respectfully submitted that Samuel Rothstein on the day that he met his death, had not departed from the conduct which he had pursued during his lifetime of dealing honorably with his fellow-man.

## III.

## CONCLUSION

Samuel Rothstein, on April 22, 1935, entered a passenger station of the defendants, enroute to board a train to New York. At that time he was a passenger. He was entitled to be protected with the care and caution on the part of the defendants which they owed to passengers whose status was not changed by the purchase or non-purchase of a railroad ticket, by the presence or absence in his clothes, after he was killed, of tickets of other persons. He did not and could not become a trespasser until he was proven to have been upon the premises or in the trains of the defendants without legal right. The deceased is presumed to have acted legally and rightfully. No presumption exists that he intended to act wrongfully. It is respectfully submitted that the direction of the verdict against the plaintiffs was erroneous in finding that the plaintiff was a trespasser and that because he had not purchased a ticket, no contributory relationship had existed.

It is respectfully submitted that the judgment in favor of the defendants should be reversed to the end that a new trial should be had.

Respectfully submitted,

PARSONS, LABRECQUE & BORDEN,
Attorneys for and of Counsel
with Plaintiffs-Appellants.

THEODORE D. PARSONS,
Of Counsel.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of Samuel Rothstein, deceased, Plaintiffs-Appellants, vs. NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate and PENNSYLVANIA RAILROAD COMPANY, a body corporate, Defendants-Appellees. | Action at Law. On Appeal from Supreme Court, Monmouth Circuit. |

## Brief of Defendant-Appellee, New York and Long Branch Railroad Company.

### Facts.

The morning of April 22, 1935, appellants' decedent, Samuel Rothstein, entered the premises of the New York and Long Branch Railroad Company, at its station in the City of Long Branch.

A Pennsylvania railroad train arrived at said station in the course of its usual run and stopped in order to discharge and take on passengers. As it started up and was slowly getting under way, Samuel Rothstein approached and attempted to board it.

There is some evidence in the case that he was walking toward the train and that at the precise moment it started he stumbled on some loose bricks in the station platform, fell under the now

moving vehicle and was decapitated. The great weight of the evidence given by disinterested witnesses shows that he was in fact running toward an already moving train, that he attempted to grab the hand rail, lost his grip, fell, rolled underneath the train and was decapitated. The great weight of the evidence shows that loose bricks, if any, were not on the platform proper but only a few inches from the east rail of the northbound track on which the Pennsylvania train was traveling.

No ticket was purchased by the decedent at the ticket office. (State of Case, page 25, line 21). After the accident, and while the body was lying on the platform, a wallet was found by Antonio DeSantis, a police officer of Long Branch, (State of Case, page 25, lines 10-18), in the pocket of decedent's clothing, containing no money and a commutation ticket issued in the name of one Milton Rothstein, who proved to be the son of the deceased. The stub of the commutation ticket was offered in evidence and marked Exhibit D-10 (State of Case, page 58).

No evidence was offered by appellants to show any financial ability on the part of the deceased to pay his fare if he had boarded the train, and it was proved at the trial that the contract under which the commutation ticket was purchased was non-transferable, allowing no one but the person to whom it was issued to use the same. (State of Case, page 25, line 29).

At the close of the case a directed verdict was granted upon motion of the defendants upon the following grounds: That no contractual relation existed between the decedent and the defendants and that the decedent was a trespasser. (State of Case, page 34, lines 32-38). Appeal has been taken by appellants from the directed verdict granted the defendants.

## Review of Evidence.

In order that a true picture be presented to the court it is necessary to supplement appellants' review of the evidence with the following information:

Rosa Foderado's testimony (State of Case, page 20, lines 20-30) on page 4 of appellants' brief states that she saw the accident. On cross-examination (State of Case, page 20, line 30) she denied a previous statement that she had not seen the accident.

Photographs were taken for appellants by Michael Weinstein four days after the accident. (Page 5, par. 1 of appellants' brief.) Those of the railroad were taken shortly after the accident.

The testimony of defendants' witnesses was as follows:

Joshua Hall, the janitor who cleaned and swept the station and platform alongside the track every morning swore that on the morning of the accident the bricks were in good condition. (State of Case, page 23).

Arthur Robinson, baggage master, swore there were no loose bricks nor any depressions in the bricks, (State of Case, page 23).

William Reid, a railroad carpenter, swore that he saw Rothstein with a newspaper in his hands running fast towards the train when it was in motion, saw him reach for the handle and then fall. He did not stumble. (State of Case, page 23).

Calvin Langenback, track supervisor, swore that he inspected the platform one hour after the accident, that he found the bricks in good order, no low bricks nor high bricks nor any holes in the platform, (State of Case, page 24).

Anthony DeSantis, police officer of the City of Long Branch, swore that he took a commutation ticket and a wallet from the body of the dead man and that there was no money in the wallet. (State of Case, page 25).

Clifford H. Herbert, ticket agent, swore that he did not see Rothstein purchase a ticket, that DeSantis showed him the commutation ticket found on the body and that it was issued to the son of Mr. Rothstein, and that said ticket was of a non-transferable type. (State of Case, page 25).

Edward Schoenthalen, contractor, examined the platform and found it in excellent shape with no loose bricks on the main part of the platform, (State of Case, page 26).

Joseph Sorrento, a Long Branch clothing presser, swore that he had seen the accident, that he had seen Rothstein come out of the station when the train started to move, that he grabbed the hand hold and slipped, (State of Case, pages 27 and 28).

Robert L. Wilcox swore that he saw Mr. Rothstein come out of the door and run towards the track when the train was moving and that he did not slip or fall on the station platform but after grabbing for the hand rail, (State of Case, pages 28 and 29).

Daniel A. Mulhein, one of the train crew, saw the man run for the train after it was under way and grab for the hand rail. He did not stumble or fall on the platform, (State of Case, pages 29 and 30).

Arthur D. Brill, passenger brakeman, swore that no one was on the platform when the train started, that after it was under way Rothstein ran out,

tried to get on the moving train and fell, (State of Case, page 30).

Lester Van Wert, brakeman, swore that platform was clear when the train started, that thereafter Rothstein ran after the train, that he did not slip or fall on the platform, (State of Case, page 31).

James Keefer, brakeman, swore that after the train had started Rothstein ran toward it, grabbed at the hand rail and fell, (State of Case, page 32).

Carl Iliff, a commuter, saw Rothstein try to board the train after it had started, grab the hand rail and then fall, (State of Case, page 33).

Referring to paragraph one, page 6, of appellants' Brief wherein the review of the evidence is summarized it is submitted that the conclusion drawn is fallacious inasmuch as it is founded upon false premises and for the reason that appellants' assume that decedent was a passenger and further assert that no evidence was offered to show that Rothstein had not purchased a ticket. Careful consideration of defendants' proofs will show that he had not bought a ticket, that the only contract of passage in his possession was a non-transferable ticket issued to the dead man's son, and that he had no money to buy one capable of being used by himself; thereafter the burden of proof was upon appellants to prove the contrary which they have not done.

## ARGUMENT.

### I.

**Appellants' decedent was not a passenger at the time he met his death inasmuch as there was no contract of passage, express or implied.**

We have no quarrel with the proposition of law set forth in appellants' Brief under Point I, (pages 6 to 17), namely, that the relation of carrier and passenger arises when one lawfully appears at a railroad station and offers himself to the carrier as a passenger, but appellants lose sight of the fact that they offered no proof that decedent was a passenger nor any proof of any contractual relation as such between him and defendants. As a matter of fact, under the circumstances, he was a trespasser. Further, we find appellants attempting to inject conjectures (page 17 of Brief) to be considered as proof in this case, (last paragraph, page 11 of Brief, and top of page 17 in Brief)—that decedent may have bought a ticket in New York, may have had a return ticket in his clothes, or a third person may have bought a ticket for him. Such conjectures should not be considered by this Court. The facts adduced by the evidence should be the exclusive guide; that on an appeal in this Court it is an elementary proposition and needs no citations; that this Court in deciding the issues involved in this appeal must be limited to the proofs appearing in the State of Case, (but see *Morton* v. *Beach*, 56 N. J. Eq. 791, at top of page 794:

> "The record of the court below is always conclusive evidence of all matters that are properly included in it, and will prevail over

> incompatible statements appearing *aliunde.*"

and see *Phillips* v. *Longport,* 90 N. J. L. 212, bottom of page 215:

> "In short, to work a reversal, some injurious error must be shown, as every intendment is in favor of the record."

See also *Loweree* v. *Newark,* 38 N. J. L., 151, at page 156) and only as to the proofs as relate to the sole issue involved, namely, was decedent a passenger? We are not concerned in this appeal with either contributory negligence on decedent's part or whether he was a trespasser in attempting to board a moving train.

It is elementary that the relation of carrier and passenger is dependent upon the existence of a contract of passage, express or implied, between the carrier and the passenger, *10 C. J. 611,* par. 1038:

> "A plaintiff seeking recovery for a breach of the carrier's duty to carry him safely has the burden of proof to show that he was a passenger at the time of receiving his injuries." *Elliot on Railroads,* Vol. V, 3rd edition, sec. 2810 (1776), p. 819. See to like effect *10 C. J. 1040,* par. 1463 (3).

The existence of such relationship arises when the person to be carried produces a ticket entitling him to ride, or if he is already upon the property or train of the carrier to prove possession of moneys sufficient to pay his fare upon demand. In the absence of a proper ticket the plaintiff may be commanded to pay his fare or suffer eviction without liability accruing to the railroad.

In *Colton* v. *D. L. & W. R. R.,* 80 N. J. L. 592, suit for damages was brought for conversion of a monthly commutation ticket which was paid for

by the plaintiff but bought by plaintiff's son and the agent issued it in the son's name rather than the mother's. Plaintiff used it one day without challenge; the next day it was taken up by the conductor.

> "It has been held that as between a passenger and the conductor, conclusive force is to be given to the intrinsic effect of the ticket to pay his fare, as expressed on its face. If, therefore, the ticket in question entitled only Mr. J. L. Colton to ride, and Mrs. J. L. Colton, attempting unsuccessfully to ride on it, and refusing to pay fare, had been put off the train, she would have no right of action for the ejection."

Judgment accordingly for the defendant.

To like effect see *Shelton* v. *Erie R. R. Co.*, 73 N. J. L. 558 (Ct. of Errors and Appeals) wherein plaintiff tendered a limited ticket that on its face had expired, refused to pay his fare and was expelled from the train. He brought suit for the expulsion. Judgment was entered for the plaintiff and on appeal the court reversed in favor of the defendant.

> "For present purposes we need go no further than to say that in the determination of a right to travel under a railroad ticket tendered as fare, conclusive force is to be given to the intrinsic effect of such ticket as expressed on its face." (Page 566.)

In *Delaney* v. *Erie R. R. Co.*, 97 N. J. L. 434 at 437, affirmed 98 N. J. L., 558, which case involved expulsion of a passenger for use of a commutation ticket issued in another name, the trial judge at the request of the defendant charged the jury:

> "The face of the ticket is conclusive as to the right to take the ticket from a pas-

> senger. The terms on the ticket are a part of the contract between the passenger and the carrier, and as such are binding upon the passenger. This is in harmony with the settled law of this state * * *."

There are cases which hold that "the ticket is a mere token that the fare has been paid" but there is added to the statement the further fact that "the passenger has the right to be carried to the destination it indicates, according to the reasonable regulations of the railway company. Such regulations, at least so far as they are known to the passenger enter into the *contract* of passage." *Wood* v. *D. L. & W. R. R. Co.*, 73 N. J. L. 357, *Pennsylvania R. R. Co.* v. *Parry*, 55 N. J. L. 551 (italics ours.)

See *10 C. J.*, page 619:

> "Ordinarily a person attempting to board a moving train or car does not become a passenger until he reaches a place of safety on the car, although he may have a ticket for such train or car. So also running to get on board a moving train or car is not of itself sufficient to constitute one a passenger." See also *10 C. J.*, page 610.

The important factor to be gleaned from a recitation of the above cases as it applies to the instant case is the absence of a contract of passage. In the instant case there is no evidence establishing the existence of the relation of carrier and passenger, either by production of proper ticket, or money for payment of fare, if requested, and the proof shows that the stub of the commutation ticket (Exhibit D-10, State of Case, page 58) was issued in the name of decedent's son; also that the contract is not transferable. The proof also shows that no ticket was purchased from the ticket agent in charge of the Long

Branch station. (State of Case, page 25, line 20). See the case of *Delaney* v. *Erie R. R. Co.,* 97 N. J. L. 434, at 437, (supra).

In view of the evidence in the case that appellants' decedent had a commutation ticket purchased by his son and in the latter's name, which gave decedent no right to transportation, and that he had no other ticket, this evidence was adduced by the defendants on the part of the defendants and was uncontradicted. It was appellants' duty in that juncture to go forward with the evidence, either in contradiction of said proofs of affirmative evidence showing that decedent had a ticket or some authorized form of passenger transportation or sufficient means to pay his fare to his determined destination. On the contrary, there was no proof offered by appellants nor the slightest evidence from which even a presumption can be raised that decedent was a passenger. There was no proof to go to the jury and the direction of the verdict made by the trial judge was legally justified.

Referring to the argument in appellants' Brief, (page 7), "No scintilla of evidence appeared that Samuel Rothstein intended to use this ticket." * * * * (Referring to the commutation ticket.) "There was no proof that he did not have upon his clothes ample funds to pay his way. The proposition is fantastic and unbelievable that a man in his position was embarking upon a trip to New York with no funds in his pocket," in view of the proof on the part of defendants, above referred to, it became the duty of appellants to go forward with the proof to the contrary, none having been offered on their part at any time during the trial. To paraphrase the language used and above quoted, in view of the absence of any proof of the assertion that decedent was a passenger

is it not more fantastic and inconceivable that decedent's intention was to ride on defendant's train using his son's commutation ticket as the token of his right to travel.

The burden of proof in the sense of the duty of the party having the affirmative of the issue to establish the proposition at the end of the trial never shifts, but in the sense of the duty on going forward in presenting evidence may shift as one side or the other satisfies the judge that the evidence suffices to make a case in his favor.

*Hughes* v. *Atlantic City and Shore R. R. Co.*, 85 N. J. L., p. 212; (Ct. E. & A.);
*Schomer* v. *Hoffman*, 102 N. J. L., pp. 347, 348; (Ct. E. & A.);
*Fell* v. *Fell Poultry Co.*, 69 N. J. L., pp. 429, 432; (Ct. E. & A.);
*Biebel* v. *Winslow*, 88 N. J. L., pp. 191, 192, (Ct. E. & A.)

## II.

**Decedent was a trespasser to whom the defendant owed no duty other than to refrain from willful negligence.**

The previous discussion herein leaves uncontradicted the facts that no money was found on the person of the deceased and that he did not have a proper or lawful ticket enabling him to ride upon defendant's train under a contract of carriage. No evidence was submitted to rebut this testimony or show that he was in fact lawfully at the station.

> "The relation of carrier and passenger commences when one puts himself in the care of the carrier, or directly within its control, with the bona fide intention of becoming a passenger, and is accepted as such by the carrier, as where he makes a contract for transportation and presents himself at the proper place and in a proper manner to be transported, but not where he does not present himself in a proper way to become a passenger." *10 C. J., 611,* par. 1039.

In the case here under discussion appellants allege their decedent slipped on loose bricks, page 2 of appellant's Brief. Photographs, numbered Exhibits P-3, D-2 and D-7 speak for themselves. They show the allegedly loose bricks in a place where decedent could not have possibly stood and been in a place of safety even if he were a passenger.

> "When in an action, brought for damages against a railway company, it appears from the evidence that the plaintiff has been guilty of great imprudence, which was, at least, one of the proximate causes of the evil

> which befell him, the law does not afford any compensation for damages which have resulted, and the question upon the point of the existence of negligence in the conduct of the defendant, becomes wholly unimportant." *Harper* v. *Erie Railway Co.*, 32 N. J. L. 88.

Such being true in the case of a passenger the proposition attains more force and greater truth when directed to a trespasser and

> "While, as against a trespasser, a malicious or intentional injury is actionable, a merely negligent act will not form the basis of recovery, because the duty to observe reasonable care is not owing to a trespasser." *Lerner* v. *Public Service Railway Co.*, 83 N. J. L., 64, *Powell* v. *Erie R. R. Co.*, 70 N. J. L., 290.

Appellant under Point II states that the decedent, until the contrary is shown, is presumed to have been on his way to board the train with a lawful purpose, (page 17 of Brief.)

The trouble with appellants' argument is as hereinbefore shown in this brief. There is no proof to warrant the raising of any presumption and certainly not that decedent when he entered defendant's station or attempted to board the train had any lawful purpose.

## Conclusion.

The only question to be argued before this Court is that decedent was not a passenger and he was a trespasser and the facts which have been argued in this Brief on behalf of the defendants have not been contradicted. There is no evidence to be weighed, and we can see that the question of contributory negligence is not and cannot be in-

volved in this appeal. It was not considered by the trial judge in his direction to the jury to return a verdict in favor of defendants. In short there is no evidence that can probably be relied upon by the appellants other than such proof as relates to whether decedent was a passenger and whether he was a trespasser.

It is respectfully submitted that the cases and the law referred to in this Brief lead to the conclusion that the relation of carrier and passenger is dependent upon the existence of a valid contract, express or implied, between the two.

Respectfully submitted,

APPLEGATE, STEVENS, FOSTER & REUSSILLE,
Attorneys for the Defendant-Appellee,
New York and Long Branch
Railroad Company.

JOHN S. APPLEGATE,
Of Counsel.

E. W. Stillman, Pompton Plains, N. J., Tel. Pompton Lakes 500

# New Jersey Court of Errors and Appeals

**No. 3, October Term, 1938.**

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of SAMUEL ROTHSTEIN, deceased, *Plaintiffs-Appellants,* *vs.* NEW YORK AND LONG BRANCH RAILROAD COMPANY, a body corporate, and THE PENNSYLVANIA RAILROAD COMPANY, a body corporate, *Defendants-Respondents.* | ACTION AT LAW. On Appeal from New Jersey Supreme Court. |

## BRIEF OF DEFENDANT-RESPONDENT THE PENNSYLVANIA RAILROAD COMPANY.

### I.

### Statement of the Case.

The action is brought by the Executors of Samuel Rothstein, under the New Jersey "Death Act" (2 Comp. Stat. N. J., p. 1907; 1 1911-1924 Supp., p. 927; 1937 Rev., 2:47-1, *et seq.*), alleging that decedent, whose death occurred on April 22nd, 1935, was killed through the negligence of defendants as he was about to board a train at the Long Branch, New Jersey, station, due to a defective condition of the station platform and the im-

proper operation of the train (State of Case, pp. 4-10).

Defendants respectively denied the alleged negligence, and averred that decedent was not a passenger but a trespasser; that he was guilty of contributory negligence in attempting to board a moving train; that he assumed the risk of injury by such action, and that by so doing, the statute (Section 55 of the Railroad Act of New Jersey) barred a recovery by plaintiffs for decedent's death (Case, pp. 11-16). Section 55, as in force at the time of the accident, provided as follows (P. L. 1903, p. 673; 3 Comp. Stat. N. J., p. 4245; Rev. 1937, 48:12-152):

> "* * * If any person shall be injured * * * by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad. * * *"

Upon the trial of the case, before Hon. Rulif V. Lawrence, Circuit Court Judge, at the Monmouth Circuit, a verdict was directed in favor of the defendants, "upon the grounds that the decedent was a trespasser and that no contractual relation existed between the decedent and the defendants" (Case, p. 19, lines 25-30; p. 34, lines 32-37).

From the judgments entered in favor of the defendants in the cause, the present appeal was taken by plaintiffs (Case, pp. 1-2). The formal judgments do not appear in the printed State of the Case. To supply the omission we beg leave to refer to the record, as follows:

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

| | |
|---|---|
| FANNIE ROTHSTEIN and MILTON ROTHSTEIN, Executors of the Last Will and Testament of SAMUEL ROTHSTEIN, deceased, *Plaintiffs,* | ACTION AT LAW. JUDGMENT. |
| *vs.* | |
| PENNSYLVANIA RAILROAD COMPANY, a body corporate, *Defendant.* | |

This case was tried before Judge RULIF V. LAWRENCE, with a jury, at the Monmouth County Circuit Court, on April 30th, May 1st and May 4th, 1936. By instruction of the Court, the jury rendered a verdict in favor of the defendant, Pennsylvania Railroad Company, and against the plaintiffs, Fannie Rothstein and Milton Rothstein, Executors of the Last Will and Testament of Samuel Rothstein, deceased, of "no cause for action".

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed without costs.

No Costs.

Judgment entered and signed May 11, 1936.

THOMAS J. BROGAN,
Chief Justice.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true copy of the Judgment in

the above stated cause as the same remains on file in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, [SEAL] this twentieth day of October A. D. nineteen hundred and thirty-eight.

FRED L. BLOODGOOD
Clerk.

A like judgment was entered on the same date in favor of the defendant New York and Long Branch Railroad Company.

Owing to the death of the official stenographer who reported the trial, and the resulting inability to procure a transcript of his minutes, counsel for the respective parties agreed upon a State of the Case for the purposes of the appeal (Case, p. 19, lines 32-40; p. 35, lines 1-25). His Honor Judge LAWRENCE has also since died.

The agreed State of the Case on appeal is of necessity fragmentary, but it is sufficient, we think, to lead to an affirmance of the judgment below.

## II.

## Grounds of Appeal.

It will be noted that the only grounds of appeal (Case, p. 2) are that—

1. The Trial Court erred in directing a verdict in favor of the defendant.

2. The Trial Court erred in refusing to allow the case to go to the jury which should have determined it.

## III.

### Statement of Facts.

The main facts are stated in the brief of the co-defendant-respondent, New York and Long Branch Railroad Company, at pages 1 and 2 thereof. They appear more in detail in the agreed State of the Case (Case, pp. 19-35), where the testimony of the several witnesses is epitomized. It seems impracticable to further condense or epitomize them satisfactorily for the convenience of the Court.

## IV.

### Argument.

#### (a)

The station at Long Branch was owned and the platform maintained by the New York and Long Branch Railroad Company. The Pennsylvania Railroad Company and the New Jersey Central Railroad Company operate their trains over the New York and Long Branch tracks and use the station (Case, p. 32, lines 38-39; p. 33, lines 5-7). This is a matter so much of common knowledge that, it is respectfully submitted, the Court may take judicial knowledge of the fact.

There is no material dispute with respect to the moving train. Two of plaintiffs' witnesses only made reference to that feature,—Rose Foderado, who said that decedent, when a short distance from the train, stumbled and fell headlong under the train, which started at the same time (Case, p. 20, lines 24-29); and Phil Huberman, who said that Rothstein, when four or five feet from the train,

suddenly pitched forward between the cars, and that instantly the train started up and decapitated him (Case, p. 21, lines 28-33).

The witnesses Reid (Case, p. 23), Wilcox (Case, p. 28), Mulherin (Case, p. 29), Brill (Case, p. 30), VanWert (Case, p. 31), Keefer (Case, p. 32), and Iliff (Case, p. 33), all testified that the train was moving when decedent attempted to board it.

If what the two witnesses Foderado and Huberman say is true, whether the train was moving or not has no significance, so far as this defendant is concerned, for the accident is then attributable to the condition of the platform or the fall of decedent from other causes, and the movement of the train is not in issue. This leaves the testimony of the seven witnesses who say the train was moving when decedent attempted to board it and fell in the attempt, the only testimony upon the issue of the applicability of Section 55 of the Railroad Act. It seems, therefore, indisputable that decedent was injured either, (1) because of his stumbling before he reached the train and falling under it just as it began to move; or (2) while jumping on a moving car. If the latter was the cause of decedent's fatal injuries, plaintiffs are barred of a recovery by virtue of Section 55 of the Railroad Act.

If the proximate cause of decedent's fall was a defect in the station platform, then the fault is not attributable to The Pennsylvania Railroad Company, which did not own or maintain the station (Case, pp. 32-33, *supra*).

In either event, therefore, whether the death of decedent was caused, (1) by a defect in the platform, or (2) by his attempting to board a moving train, no recovery can be had in this action against The Pennsylvania Railroad Company, and the direction of the verdict in its favor by the Trial Court was correct and should be sustained.

**(b)**

It seems clear also that decedent was not a passenger of The Pennsylvania Railroad Company at the time he met with his fatal injuries, and that no duty was owing to him by that company except to refrain from wilfully or wantonly injuring him; and there is no proof or imputation of wilful or wanton injury. This being so, again the action of the Trial Court in directing the verdict in favor of that defendant was correct and should be sustained.

As pointed out in the brief of the co-defendant, at page 7, the burden of proof is upon the plaintiffs to establish that the relation of passenger and carrier existed.

> *Elliott on Railroads*, Vol. V, 3rd Ed., Sec. 2810 (1776), p. 819;
> *10 C. J.*, p. 1040, par. 1463 (3).

> "The plaintiff", states Elliott, at the page above indicated, "seeking a recovery for a breach of the carrier's duty to carry him safely, has the burden of proof to show that he was a passenger at the time of receiving his injuries. The rule is the same in the case of an alleged wrongful ejection from the train, and the plaintiff, to recover as a passenger, must prove that he was received or accepted by the defendant as a passenger either expressly or impliedly."

This is also supported by the case of *Shelton* v. *Erie Railroad Company*, 73 N. J. Law, 558, cited at page 8 of the co-defendant's brief, where it clearly appears that the person complaining of an act of the railroad company *must show* that he has the right to claim the status of a passenger if he bases his claim upon that status. Mr. Justice

GARRISON, speaking for the Court of Errors and Appeals, at page 560 of the Report, said:

> "While this question is one of first impression in this court, the underlying proposition that a passenger may lawfully be ejected for non-payment of fare must be taken to be entirely established in this state. That 'railroad companies are not bound to carry a passenger unless upon payment or tender of his fare; that they may in such case either refuse to permit him to enter the cars, or having entered them they may require him to leave them before the termination of the journey, and that if he refuses to leave they may remove him at a suitable time and place, using no unnecessary force,' were, more than half a century ago, treated by Chief Justice Green, in *State* v. *Overton*, 4 Zab. 435, as unquestioned propositions from which to reason with respect to a questionable regulation."

And further, at page 565:

> "The fare thus to be collected by the conductor may be a cash sum or it may be a ticket; that is for the passenger to determine. If the passenger proposes to pay in cash, he must be provided with and tender to the conductor a sum that under the established rules of the company is sufficient to pay his fare; if he proposes to pay by ticket, he must be provided with and tender a ticket that under the established rules of the company has the intrinsic effect of paying such fare. This intrinsic attribute of the ticket is the essential quality to which it owes its efficiency. It is the possession of this attribute that distinguishes a ticket from a contract, on the one hand, and from a mere instrument of evidence, on the other."

In *Petrie* v. *P. R. R. Co.*, 42 N. J. Law, 449, it is pointed out by Mr. Chief Justice Beasley, speaking for this Court, that *it is incumbent upon the one claiming to be a passenger to show that he had the right to ride upon the train.* As was also stated by Mr. Justice Garrison in the *Shelton* case, *supra,* referring to this case, at page 565 of the Report:

> "That this essential attribute of a railroad ticket did not escape the acute observation of Chief Justice Beasley is evident from his careful description of such a document in the opinion delivered by him in *Petrie* v. *Pennsylvania Railroad Co.*, 13 Vroom 449. 'The plaintiff,' he said, 'had a passenger ticket, issued by the defendant, which *on its face and according to its intrinsic effect* did not authorize him, after having stopped at a place intermediate the designated termini, to use it for the purpose of continuing his journey.'"

And in *Breese* v. *Trenton Horse R. R. Co.*, 52 N. J. Law, 250, Mr. Chief Justice Beasley, speaking for the Supreme Court, made it clear that one does not become a passenger merely by being on a car. He has the burden of showing that he has a legal right to be there. He said, at page 252 of the Report:

> *"Here the question is presented, Whether from the mere presence of a person in the car in question, a duty to carry safely was, ipso facto, imposed on the car company.*
>
> We think that here, again, the duty averred is not shown to exist. *Presence in the car will not, per se, raise such duty, and the consequence is, that when mere presence is stated, and negligence is stated, a cause of action to even a common certainty is not shown.* The

allegations, according to the familiar rule, are to be taken most strongly against the pleader, and the court cannot help a defective statement by a conjectural addition. The ground of the plaintiff's case must be his *legal* presence in the car; that is, he must have been there, either as a fare-paying passenger, or, at the least, as a licensee; and if this be so, one or the other of such legal characteristics is an indispensable fact in the constitution of his right to sue. This is not a matter of defence. Presence, plus the legality of such presence, is the ground work of the plaintiff's case, and one of these essential factors is here omitted. If the plaintiff was unlawfully in the car, the company did not owe to him any duty springing from the fact that he was in the car. In such a condition of things, the defendant could not be held liable for mere non-feasances; it would have been responsible only for its malfeasances. 'A person,' says Judge Cooley, 'who steals a ride, cannot insist that there is a duty to him to run its trains with care.' *Cooley Torts 792.* That negligence which does not constitute a breach of duty is not actionable, has been exemplified in many cases. *Price* v. *New Jersey Railroad and Transportation Co.*, 2 Vroom 229; *2 Add. Torts*, § 1378; *Cooley Torts 792.*"

In *Jardine* v. *Cornell, et al.*, 50 N. J. L. 485, Mr. Justice GARRISON, delivering the opinion of the Supreme Court, said at page 487—

> "The agents of a railroad company have a right to forcibly eject from the train a passenger who, being unprovided with a proper ticket, refuses to pay a fare or to leave the train. *State* v. *Overton*, 4 Zab. 435; *Carpenter* v. *W. & G. R. R. Co.*, 121 U. S. 474."

And the mere fact that one believes that he has the right to ride upon a ticket which, in fact, does not entitle him to ride, makes no difference. He *must show his right,* irrespective of his belief. This was pointed out by Mr. Justice VAN SYCKEL, speaking for the Supreme Court, in *Spiess* v. *Erie R. R. Co.,* 71 N. J. Law, 90, and also referred to by Mr. Justice Garrison in the *Shelton* case, *supra,* at page 566 of the Report, where he said:

> "For the present purposes, we need to go no further than to say that in the determination of a right to travel under a railroad ticket tendered as fare, conclusive force is to be given to the intrinsic effect of such ticket as expressed on its face. Such was the force given to it by Chief Justice Beasley in the case just cited, and by Mr. Justice Van Syckel in *Spiess* v. *Erie Railroad Co.,* 42 Vroom 90, where the judgment was reversed because the lower court had left it to the jury to say 'whether the plaintiff believed he had a right to use the ticket.' Such was the force accorded to the ticket in *Rogers* v. *Atlantic City Railway Co.,* 28 Id. 703, where Mr. Justice Lippincott, speaking for this court, said: 'The ticket is the conclusive evidence of the contract of carriage upon which the conductor had the right to rely.' "

See also,

> *Moore on Carriers,* Vol. II, (2nd Ed.), p. 1028, Sec. 25, quoted *infra.*

It should also be noted that this burden, which is on the plaintiff as above indicated, never shifts.

> *Cella* v. *Roth,* 113 N. J. Law, 458, at 462, 463;

*Hughes* v. *At. C. &c. R. R. Co.*, 85 N. J. Law, 212;
*Niebel* v. *Winslow*, 88 N. J. Law, 191, 192.

In *Cella* v. *Roth*, 113 N. J. L. 458, Judge WELLS, speaking for this Court, said, at *page 462:*

> "We held in *Kresse* v. *Metropolitan Life Insurance Co.*, 111 N. J. L. 474, which was an action brought by the beneficiary on a life insurance policy in which the defendant insurance company set up death by suicide by way of separate defense, that it was error for the trial court to charge the jury that the burden of proving that the insured came to his death by suicide rested upon the defendant insurance company.
>
> "To the same effect is *Hughes* v. *Atlantic City, &c., Railway*, 85 N. J. L. 212; 89 Atl. Rep. 769, in which this court held that defendant's right to have plaintiff bear the burden of proof upon the whole case is a substantial right of which defendant should not be deprived.
>
> "The burden of proof never shifts from the one asserting a cause of action. If the plaintiff makes out a *prima facie* case and the defendant offers an explanation which leaves the jury in a state of equipoise on the question of negligence, the defendant is entitled to a verdict. He is never under a duty of showing by the weight of the evidence that he is innocent of negligent conduct."

When, therefore, it was shown upon the trial of this case that a search of decedent's clothing after the accident disclosed a wallet containing no money; a commutation ticket issued to his son Milton which was non-transferable; that no ticket usable by decedent was found on his person; and that it was not shown that he had purchased one

(Case, p. 25, lines 10-35),—it seems clear that plaintiffs had failed to sustain their burden of proving that decedent was a passenger at the time he sustained his fatal injuries.

(c)

The basis of a common carrier's liability as such, whether as a carrier of goods or of passengers, depends entirely upon its holding out,—upon what it holds itself out to do. This is elementary.

> *Elliott on Railroads*, Vol. IV (2nd Ed.), Secs. 1465, 1466, 1474, 1392, 1574, 1576, 1577, &c.

What is the holding out as to passengers? It is aptly expressed by the Supreme Judicial Court of Massachusetts, in the case of *Webster* v. *Fitchburg R. R. Co.*, 161 Mass. 297, 24 L. R. A. 521, where Mr. Justice KNOWLTON, delivering the opinion of the Court, at page 524 of the L. R. A. Report, said:

> "A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this the question is whether the person has presented himself, in readiness to be carried, under such circumstances, in reference to time, place, manner, and condition, that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? In Dodge v. Boston & B. S. S. Co., 148 Mass. 209, 2 L. R. A. 83, it was said that 'When one has made a contract for passage upon the

vehicles of a common carrier, and has presented himself at a proper place, to be transported, his right to care and protection begins.' In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If his condition should render him unfit to be in the presence of passengers on the train, *or if he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of the railroad company, and it would not be expected to accept him as a passenger.* In the present case, after the arrival of the plaintiff's intestate on the defendant's premises, there was no time when he presented himself in a proper manner to be carried. He was all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train. He did not put himself in readiness to be taken as a passenger, and present himself in a proper way. If we treat his approach as a request for passage, and if we conceive of the railroad company as being present, and speaking by a representative who saw him, there was no instant when the answer to his request would not have been: 'We will not accept you as a passenger while you are exposing yourself to such peril. We do not invite persons to become passengers while they are rushing into danger in such a way.' The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as appear in this case."

See also,

*Chicago &c. R. R. Co.* v. *Jennings,* 190 Ill. 478;

*Baltimore Trac. Co.* v. *State,* 28 Atl. Rep. (Md.) 397;
*Jones* v. *Boston & Maine R. R. Co.,* 163 Mass. 245.

And so, in *Furey* v. *N. Y. C. & H. R. R. Co.,* 67 N. J. L. 270, Mr. Justice GARRISON, delivering the opinion for the Court, said, at page 274—

> " * * * For, as was aptly said by Mr. Justice Depue in *Phillips* v. *Library Co.,* 26 Vroom 307, 315, 'the owner's liability for the condition of the premises is only co-extensive with his invitation.' The case of *Diebold* v. *Pennsylvania Railroad Co.,* 21 Id. 478, is an illustration of this phase of the rule, which is neither an exception to nor a limitation of the general doctrine of invitation, but only a specific application of it. The same may be said of the so-called 'turn-table cases,' in so far as they are in line with the opinion delivered in this court by Mr. Justice Gummere. *Delaware, Lackawanna and Western Railroad Co.* v. *Reich,* 32 Id. 635. * * *

In *Turess* v. *N. Y. Susq. & West. R. R. Co.,* 61 N. J. L. 314, Mr. Chief Justice MAGIE, delivering the opinion for the Supreme Court, said, at page 319—

> "In my judgment, it follows that the liability of a railroad company to a child injured by playing on its turntable cannot arise out of a duty imposed on the company by reason of a supposed implied invitation.
>
> "If a child is not to be deemed invited to enter a railroad company's land to play upon a turntable, it also follows that a child in doing so is either a trespasser or is there by mere permission. In neither case is any duty cast upon the landowner, except to abstain from willful injury, and from maintaining hidden or concealed dangers."

In *Devoe* v. *N. Y., O. & W. Ry. Co.*, 63 N. J. L. 276, Mr. Justice DEPUE, delivering the opinion of this Court, said, at *page 281*—

> "It is also settled by the decisions of this court in the case last cited and in *Delaware, Lackawanna and Western Railroad Co.* v. *Reich, supra,* that no distinction exists between adults and infants when entering uninvited upon lands of another with relation to the duty which the owner or occupier of such lands owes to them.
>
> "Construing the evidence as favorably as possible for the plaintiff's suit, there are no facts and circumstances which could be construed as an invitation to the deceased to use the company's grounds for the purpose for which she was using them. There should have been a nonsuit. The defendant at least was entitled under the uncontradicted evidence to a direction in its favor."

And this principle is equally applicable to personal property, including vehicles. In *Hoberg* v. *Collins, Lavery & Co.*, 80 N. J. Law, 425, Mr. Justice VOORHEES, speaking for this Court, said, at page 427:

> "The general doctrine so often enunciated, that to a trespasser no duty is owed, save to refrain from a willful and intentional injury, usually arises in cases having to do with acts of trespass upon land, yet there is no reason why the same principles should not obtain with reference to such personal property as may be the subject of a trespass committed upon it. Indeed, it has been indirectly applied to that class of property in *Friedman* v. *Snare & Triest Co.*, 42 Vroom 605; the personal property there consisting of iron beams which had been piled in the public highway.

> "In recent times it has been applied, where persons have wrongfully entered upon railway trains, and in these cases, the consideration of the *status* of a trespasser has frequently arisen, and they furnish examples of many recoveries by trespassers that have been sustained."

And in *Sohn* v. *Katz,* 112 N. J. Law 106, Mr. Justice Case, speaking for this Court, said, at page 109:

> "The duty of an owner, as thus stated, towards a trespasser or licensee, applies also to personal property, as for instance, to horse-drawn trucks (*Hoberg* v. *Collins,* 80 Id. 425), and to automobiles (*Faggioni* v. *Weiss,* 99 Id. 157)."

**(d)**

The position of decedent, under the circumstances present at the time of the accident, is aptly stated in *Moore on Carriers,* Vol. II (2nd Ed.), p.1028, Sec. 25, *supra,* as follows:

> " * * * A common carrier has a right to issue and sell special tickets at a reduced rate of fare in consideration of the purchaser's agreement to certain conditions and limitations contained therein, among which it may be stipulated that the ticket shall not be transferred and shall be valid only in the hands of the original purchaser, and the purchaser of a ticket, marked 'not transferable,' and bought by him subject to that restriction, cannot sell the ticket to another, or take part of the journey and then sell the ticket to another, with effect to entitle the latter to passage on that ticket, or to the rights of a passenger; and the use of such a ticket by another to whom it has been transferred in violation of the contract is

> a fraud and an actionable wrong. Persons using free non-transferable tickets issued to others are making a fraudulent use of the same, and are not passengers but trespassers, having no contractual relations with the carrier. Where plaintiff, with her mother, enters a train, and on demand for fare the mother gives a pass, issued for others, which the conductor takes, a fraud is practiced on the carrier, and the plaintiff is a trespasser on the train, even though she did not know about the pass, and hence she could not recover for injuries resulting from simple negligence."

As stated by Mr. Justice LIPPINCOTT, in *Rogers v. At. City R. R. Co.*, 57 N. J. L. 703, at p. 705, *supra*, speaking for this Court:

> " * * * His right to ride depended upon the performance of this contract, that is, to surrender his ticket or pay his fare when called upon to do so. This was an exaction which he was called upon to submit to in order to entitle him to a passage. * * * *As a condition precedent* to entitle him to the passage, he must produce his ticket and surrender it or pay his fare,"

Here, decedent could do neither, according to the proofs in the case. He, therefore, was not a passenger, nor were the defendants liable except as to a trespasser or licensee.

## V.

***It is respectfully submitted, therefore, that the action of the Trial Court in directing the verdict in favor of the defendants was proper, and that the judgments in favor of defendants under review should be affirmed.***

Respectfully submitted,

JOHN A. HARTPENCE,
*Of Counsel with Defendant-Respondent*
*The Pennsylvania Railroad Company.*

[9569]

LAWYERS PRESS, INC., 165 WILLIAM STREET, NEW YORK CITY, N. Y.

# INDEX