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**Notice of Appeal**

(Filed July 16, 1929)

**New Jersey Supreme Court** 10

No. 420, MAY T., 1929

ELBERT PALING, by next friend, <i>et al.</i> , <i>Plaintiff-Appellee</i> ,	}	Action at Law	20
v.			
NEW YORK CENTRAL RAILROAD COMPANY, <i>Defendant-Appellant</i> .	}	Notice of Appeal.	20

To Carl Weitz, Esq., Attorney for Plaintiff-Appellee:

PLEASE TAKE NOTICE, That the Defendant-Appellant appeals to the Court of Errors and Appeals of the State of New Jersey from the judgment entered in this cause in the above-entitled Court. 30

WALL, HAIGHT, CAREY & HARTPENCE,  
*Attorneys for Defendant-Appellant.*

Service of a copy of the within Notice is hereby acknowledged this 12th day of July, 1929.

CARL WEITZ,  
*Attorney for Plaintiff-Appellee.* 40

## Grounds of Appeal

(Filed July 16, 1929)

### NEW JERSEY COURT OF ERRORS AND APPEALS

10

ELBERT PALING, by next friend,  
*et al.*,  
*Plaintiff-Appellee,*

v.

NEW YORK CENTRAL RAILROAD  
COMPANY,  
*Defendant-Appellant.*

}

On Appeal  
Grounds of  
Appeal.

20

The defendant-appellant states the following grounds of appeal in this cause:

1. That the Supreme Court erred in affirming the judgment of the First Judicial District Court of the County of Hudson.

WALL, HAIGHT, CAREY & HARTPENCE,  
*Attorneys for Defendant-Appellant.*

30

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 12th day of July, 1929.

CARL WEITZ,  
*Attorney for Plaintiff-Appellee.*

40

**Rule of Affirmance**

NEW JERSEY SUPREME COURT

No. 420, MAY T., 1929

<p>ELBERT PALING, by next friend, <i>et al.</i>, <span style="float: right;"><i>Appellee</i>,</span></p> <p style="text-align: center;">vs.</p> <p>NEW YORK CENTRAL RAILROAD COMPANY, <span style="float: right;"><i>Appellant</i>.</span></p>	}	<p>Action at Law, 10</p> <p style="text-align: center;">Rule of Affirmance and Remittitur.</p>
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This cause having been submitted on briefs to the Supreme Court, at Trenton, at the May Term, 1929, by Carl Weitz, Attorney for the Plaintiff Appellee, and Wall, Haight, Carey & Hartpence, Attorneys for the Defendant-Appellant, and the Court having considered the same and being of the opinion that the judgment for the Plaintiff entered in the District Court of the First Judicial District of the County of Hudson, New Jersey, should be affirmed; 20

It is thereupon ordered and adjudged that the judgment of the District Court of the First Judicial District of the County of Hudson, New Jersey, from which the appeal was taken in this cause, be and the same is hereby affirmed, with costs to the Plaintiff-Appellee, and said record is hereby remitted to the Court below to be proceeded with, according to law and the practice of said Court. 30

Entered July 3, 1929,

On motion of

CARL WEITZ,

*Attorney for Appellee.*

40

A true copy.

FRED L. BLOODGOOD,  
*Clerk.*

**Notice of Appeal**

(Filed March 7, 1926)

10 DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE COUNTY OF  
HUDSON, NEW JERSEY

20	<p>ELBERT PALING, an infant, by ERNEST PALING, next friend, and ERNEST PALING, individu- ally,</p> <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;">vs.</p> <p>NEW YORK CENTRAL RAILROAD COMPANY, a corporation, <i>Defendant.</i></p>	} In Tort
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30 *To Elbert Paling, an infant, by Ernest Paling,  
next friend, and Ernest Paling, individually,  
or Carl Weitz, their Attorney:*

SIRS:

40 TAKE NOTICE That the Defendant in the above  
cause, New York Central Railroad Company, a  
corporation of the State of New York, hereby ap-  
peals to the New Jersey Supreme Court from the  
judgment of the District Court of the First Judi-  
cial District of the County of Hudson, rendered

*Notice of Appeal*

in above stated action on the 20th day of February, Nineteen Hundred and Twenty Nine.

NEW YORK CENTRAL RAILROAD  
COMPANY,

By WALL, HAIGHT, CAREY & HARTPENCE, 10  
*Its Attorneys.*

Dated, February 21st, 1929.

Service of a copy of this notice is hereby acknowledged this 7th day of March, 1929.

CARL WEITZ,  
*Attorney of Plaintiff.*

20

30

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## Specification of Errors

## NEW JERSEY SUPREME COURT

- |    |   |   |
|----|---|---|
| 10 | <p>ELBERT PALING, an infant, by<br/>ERNEST PALING, next friend,<br/>and ERNEST PALING, individu-<br/>ally,<br/><i>Plaintiffs-Respondents,</i></p> <p style="text-align: center;">vs.</p> <p>NEW YORK CENTRAL RAILROAD<br/>COMPANY, a corporation,<br/><i>Defendant-Appellant.</i></p> | <p>Action at Law<br/>On Appeal</p> <p>Brief specifica-<br/>tion of determina-<br/>tions of the First<br/>Judicial District<br/>Court of the<br/>County of Hud-<br/>son, with which<br/>defendant - appel-<br/>lant is dissatisfied<br/>in point of law.</p> |
|----|---|---|

20 The following is a specification of the deter-  
minations of the First Judicial District Court of  
the County of Hudson with which the defendant-  
appellant is dissatisfied in point of law:

1. At the close of the plaintiff's case the at-  
torneys for the defendant-appellant moved the  
Court for judgment of non-suit on the ground  
that:

30 (a) There had been no showing of the relation-  
ship of passenger and carrier between plaintiff  
and defendant, inasmuch as there was no testi-  
mony as to the purchase or intention to purchase  
a ticket or pay a fare on the train which the plain-  
tiff testified that he had boarded.

(b) That there had been no showing of any neg-  
ligence on the part of the defendant and

40 (c) That the evidence showed that the plaintiff  
had been guilty of contributory negligence.

*Specification of Errors*

The Court refused so to find, and defendant-appellant prayed for and was granted an exception to the Court's said ruling. The Court erred in denying said motion on each of the aforesaid grounds and defendant-appellant is dissatisfied with the same in point of law.

10

2. At the close of the defendant's case, the attorneys for the defendant-appellant moved the Court for a directed verdict in favor of the defendant. The Court denied this motion and defendant-appellant prayed for and was granted an exception to the Court's said ruling. The Court erred in its said determination and defendant-appellant is dissatisfied with the same in point of law.

20

3. The Court erred in failing to grant defendant's motion for a directed verdict, for the reason that there had been no showing of the relationship of passenger and carrier between plaintiff and defendant, inasmuch as there was no testimony as to the purchase or intention to purchase a ticket, or pay a fare on the train which the plaintiff testified that he had boarded.

4. The Court erred in failing to grant defendant's motion for a directed verdict, for the reason that there was no evidence of negligence on the part of the defendant.

30

5. The Court erred in failing to grant defendant's motion for a directed verdict for the reason that from all the evidence adduced, plaintiff was guilty of contributory negligence such as to bar it from recovering any judgment in its favor.

40

Dated, April 24, 1929.

WALL, HAIGHT, CAREY & HARTPENCE,  
*Attorneys for Defendant-Appellant.*

## Grounds of Appeal

(Filed March 7, 1929)

### NEW JERSEY SUPREME COURT

10	ELBERT PALING, an infant, by ERNEST PALING, next friend, and ERNEST PALING, individu- ally, <div style="text-align: center;"><i>Plaintiffs-Respondents,</i></div>	}	Action at Law
	vs.		
20	NEW YORK CENTRAL RAILROAD COMPANY, a corporation, <div style="text-align: center;"><i>Defendant-Appellant.</i></div>		

1. The Court erred in overruling defendant's motion for judgment of non-suit.

2. The Court erred as a matter of law in giving judgment for the plaintiff.

30 3. The Court erred as a matter of law in finding that the plaintiff, Albert Paling, was a passenger on the defendant's train at the time of the accident.

WALL, HAIGHT, CAREY & HARTPENCE,  
*Attorneys for Defendant-Appellant.*

Service of a copy of this within notice is hereby acknowledged this 7th day of March, 1929.

CARL WEITZ,  
*Attorney for Plaintiff-Respondent.*

40

## Summons

## DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON

STATE OF NEW JERSEY, }  
HUDSON COUNTY, } ss. : 10

The State of New Jersey, to any Constable or Sergeant-at-Arms of said County,

(L.S.)

## SUMMON

WEST SHORE RAILROAD COMPANY, Weehawken Terminal, Weehawken, New Jersey, to appear before the District Court of the First Judicial District of the County of Hudson, Lewis B. Eastmead, Judge, to be held at the Court Room, Dispatch Building, 404 Thirty-eighth Street, Union City, on the 28th day of November, One Thousand Nine Hundred and Twenty-eight, at ten o'clock in the forenoon to answer unto ELBERT PALING, an infant, by ERNEST PALING, next friend, and ERNEST PALING, individually, on an Action in Tort. Damage Five Hundred (\$500.00) Dollars. 20

WITNESS, LEWIS B. EASTMEAD, Esq., Judge of said District Court of the First Judicial District, of the County of Hudson, aforesaid, the 22nd day of November, in the year One Thousand Nine Hundred and Twenty-eight. 30

HENRY BENDER,  
*Clerk.*

CARL WEITZ,  
*Plaintiff's Attorney.*

40

**State of Demand**

(Filed November 22, 1928)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON, NEW JERSEY

10

ELBERT PALING, an infant, by  
ERNEST PALING, next friend,  
and ERNEST PALING, individually,

*Plaintiffs,*

vs.

WEST SHORE RAILROAD COMPANY,  
a corporation,  
*Defendant.*

20

IN TORT

State of  
Demand

Plaintiffs residing in the Borough of Bergenfield, County of Bergen, State of New Jersey, says that:

FIRST COUNT

30 1. On or about August 9th, 1928, at or about 5:30 o'clock in the afternoon, daylight saving time, the plaintiff was a passenger for hire in one of the defendant's day coaches operating from the Weehawken Terminal to Bergenfield, New Jersey.

40 2. At the aforementioned time and place, while the plaintiff was lawfully riding in said coach, a pane of glass, which was negligently placed in the frame of said window, fell from the said frame upon the person of the plaintiff, and injured him

*State of Demand*

severely about the head, face, hands and other parts of his body.

3. As a result of the defendant's negligence, the plaintiff sustained a wound on his wrist requiring (3) sutures to close the said wound.

10

The plaintiff, Elbert Paling, by Ernest Paling, next friend, demands as damages the sum of Three Hundred Dollars (\$300.00).

## SECOND COUNT

1. The plaintiff Ernest Paling repeats the allegations contained in paragraphs one, two and three of the first count, and makes them part hereof as if set out in full length.

20

2. As a result of the defendant's negligence, the plaintiff Ernest Paling was compelled to expend various sums of money for the treatment of said wound, and was also compelled to expend various sums of money for medical treatment and medicines.

3. As a further result of the defendant's negligence, the plaintiff Elbert Paling was confined to his bed for a period of time and could not attend to his usual occupation and, therefore, the plaintiff Ernest Paling was deprived of his son's earnings.

30

The plaintiff, Ernest Paling, demands as damages the sum of Two Hundred Dollars (\$200.00).

CARL WEITZ,  
*Attorney for Plaintiff.*

40

**Transcript of Judgment**

(Filed March 16, 1929)

STATE OF NEW JERSEY, }  
HUDSON COUNTY,        } ss.:

10   DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF HUDSON, N. J.

Before: LEWIS B. EASTMEAD, Esq., *Judge.*

	No. 39930			
	ELBERT PALING, <i>et al.</i> ,			
20	vs.			
	NEW YORK CENTRAL RAILROAD Co.			
	COST	AL.		TORT
	Summons and Copy 1.50			Damages
	Service and Return        .60			\$500.00
	Mileage                       .20			
	Trial Fee                    1.50			
30	Attorney's Fees            15.00			
		3.00	15.80	
			18.80	

Bond and notice of appeal filed March 7th, 1929.

40   Stipulation to extend time for filing state of case filed March 13th, 1929.

*Transcript of Judgment*

CARL WEITZ, *Plaintiffs' Attorney.*

WALL, HAIGHT, CAREY and HARTPENCE, *Defendant's Attorneys.*

A summons was issued tested November 22nd, 10  
A.D. 1928, returnable November 28th, A.D., 1928,  
at 10 o'clock in the forenoon. The Constable or  
Sergeant-at-Arms returned the summons as fol-  
lows, viz.: I served the within summons Novem-  
ber 23rd, 1929, on the within named corporation,  
the defendant, by reading the same to Charles B.  
Brule, Chief Clerk, and delivering to him a copy  
thereof.

OSCAR B. SPENCER, 20  
*Constable.*

Plaintiffs' demand was filed November 22nd,  
A.D. 1928.

On the part of the plaintiffs, Elbert Paling,  
William Keto, Ernest Henry Paling.

On the part of the defendant, Henry E. Bates.

Whereupon it is on this twentieth day of Febru-  
ary, A.D. 1929, by this Court considered and ad-  
judged that said Elbert Paling, by Ernest Paling 30  
as next friend, plaintiff, recover against said New  
York Central Railroad Co., defendant, the sum of  
Three Hundred and Eighteen Dollars and Eighty  
Cents costs of suit.

**Clerk's Certificate**

I hereby certify that the within Transcript is a true copy of the records on file in this office.

10 IN WITNESS WHEREOF, I have hereto set my hand and the seal of the Court this 13th day of March, A.D. 1929.

HENRY BENDER,  
*Clerk.*

(SEAL)

A true copy.

FRED L. BLOODGOOD,  
*Clerk.*

20

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**State of Case Settled by the Court**

FIRST JUDICIAL DISTRICT COURT OF  
THE COUNTY OF HUDSON

---

ELBERT PALING, an infant, by  
ERNEST PALING, next friend,  
and ERNEST PALING, individ-  
ually,

*Plaintiffs,*

vs.

NEW YORK CENTRAL RAILROAD  
COMPANY, a corporation,  
*Defendant.*

---

In Tort

10

20

CARL WEITZ, Esq., *Attorney of Plaintiffs-  
Appellee.*

WALL, HAIGHT, CAREY & HARTPENCE, Esqs.,  
*Attorneys of Defendant-Appellant.*

The parties hereto, or their attorneys, having  
been unable to agree upon a state of the case for  
appeal, and having applied to me within the time  
limited by law, I do hereby settle the case as fol-  
lows:

30

The action was brought by Elbert Paling, an  
infant of the age of eighteen years, by his father  
Ernest Paling, as his next friend, and by Ernest  
Paling, the father, individually, to recover dam-  
ages from the defendant for injuries sustained by  
Elbert Paling through the alleged negligence of  
the defendant. By consent of counsel, it was  
stipulated that the name of the defendant West  
Shore Railroad Company be amended to read

40

*State of Case Settled by the Court*

New York Central Railroad Company as that Company had superseded the West Shore Railroad Company.

10 Plaintiff, Elbert Paling, testified that on August 9, 1928, at about 5:30 P. M., he boarded a West Shore Railroad Train at Weehawken Terminal which was scheduled to leave there at 5:48 P. M.; he was on his way to his home in Bergenfield, New Jersey, and was accompanied by a friend, one William Keto. They selected one cross seat where they proposed to sit together, and they attempted to open the window alongside thereof, to let in some air. The car window in question had a double sash, inner and outer. They raised the inner sash and tried unsuccessfully to  
20 raise the outer sash.

After Elbert Paling and his friend had desisted from opening the window and had resumed their seats, the glass of the outer sash suddenly and without warning fell into the car and upon Elbert Paling, the infant plaintiff, badly cutting him about the hand, causing a deep laceration about three inches long. Previous to the breaking of the glass, there had been no cracks therein or anything to indicate that it was likely to fall out.

30 Paling and Keto left the car and went to the First Aid Station in the depot where treatment was administered by the Railroad Company's physician, Doctor Sweeney. Some ten or twelve further treatments were subsequently administered by the Railroad Company's nurse at the same station, all of them being gratuitous. Plaintiff has a scar on his left thumb which will apparently be permanent. Elbert Paling is a minor, eighteen years of age, and employed by  
40 Funk & Wagnalls, as a shipping clerk at Nineteen

*State of Case Settled by the Court*

(\$19.00) dollars per week. He lost about two weeks' wages.

Plaintiff also testified that he made Six (\$6.00) dollars a week driving a truck at night for his father, which he also lost as a result of the accident, for a period of two weeks.

On cross examination, Elbert Paling's attention was called to a written statement which he had signed and given to the Railroad Company eight days after the accident. His attention was called particularly to a portion of his statement on which he was alleged to have said that the glass broke and fell into the car while Keto was pounding on the window pane. He admitted that he had made such a statement voluntarily but he said the said statement was inaccurate in this respect, viz.: the glass did not fall or break until after he and Keto had ceased their efforts and had just sat down. The alleged statement, however, was not put into evidence by the defendant.

William Keto testified that he lived in Bergenfield, New Jersey, and that on August 9, 1928, at about 5:30 P. M., in company with Elbert Paling, he boarded a train at the Weehawken Depot of the West Shore Railroad which was due to leave there at 5:48 P. M., for Bergenfield, and other commuting points on the West Shore Railroad. He testified that he was a friend of Elbert Paling and that he also lived in Bergenfield. He further testified that he had tried to open the inside window adjacent to where Elbert Paling and he intended to sit, and that he tried to open the outside window without success. He testified that Elbert Paling had sat down and he, William Keto, had given up trying to open the outside window, when the glass suddenly and without warning fell into

*State of Case Settled by the Court*

the car and upon Elbert Paling badly cutting him about his left hand. He went with Elbert Paling to the First Aid Station in the Depot after the accident, where the cut was dressed. Keto was also asked on cross examination about some alleged statement which he had made to the Railroad Company, which was said to differ with the statement he had given on direct examination. This alleged statement was also not put in evidence by the defendant.

Ernest Paling, the father of the aforesaid Elbert Paling, testified that his son did not turn over his wages to him but kept part thereof and turned the balance over to his mother, and that this was by his consent. Plaintiffs then rested. Defendant's counsel moved for a non-suit on the following grounds:

(1) That there had been no showing of the relationship of passenger and carrier between plaintiff and defendant inasmuch as there was no testimony as to the purchase, or intention to purchase, a ticket, or pay a fare on the train which the plaintiff testified that he had boarded and (2) that there had been no showing of any negligence upon the part of the defendant.

This motion was denied because I felt a *prima facie* case had been made by plaintiff, Elbert Paling, sufficient to put defendant on its proof. An exception to this ruling was asked and allowed.

Defendant called Henry Bates who testified that he had been employed for the last eight years by the West Shore Railroad Company in the capacity of car inspector and master carpenter; that he was familiar with the structure of the window sashes and window frames used on all of the suburban cars; that in view of this structure it is

*State of Case Settled by the Court*

impossible for such a window glass to fall inwardly into the car without someone applying force to same, such as the pounding of one's fist on the glass.

There was no evidence of any inspection whatsoever of THE PARTICULAR CAR in which Elbert Paling was injured nor was there any testimony whatsoever as to its condition either before or after the accident. 10

Defendant's counsel then rested his case and moved for a directed verdict on the same grounds as advanced in his argument on a motion for a non-suit. The Court denied this motion for the reasons hereinafter set forth, to which exception was taken by the defendant and duly allowed:

There was some other testimony in this case which I do not now recall in detail, the evidence not being taken stenographically. 20

From all the evidence in the case, I found the following facts:

1. That on August 9, 1928, plaintiff Elbert Paling was a passenger who had boarded a train of the West Shore Railroad which was due to leave the Weehawken Terminal for Bergenfield at 5:48 P. M., of that day. 30

2. I found as a fact that the defendant was guilty of negligence in that it failed to keep its cars and equipment in safe condition as to avoid injury to its passenger Elbert Paling, who certainly had a right to open a car window, on an August day. I further found that the negligence of the defendant was the proximate cause of the injury to Elbert Paling and that he was not guilty of contributory negligence. 40

*State of Case Settled by the Court*

3. I found that plaintiff, Ernest Paling, had suffered no financial loss whatsoever by reason of his son's injury.

10 As I had found that plaintiff, Ernest Paling, the father of Elbert Paling was not entitled to recover individually, I suggested that a non-suit be entered as to him, which was agreed to by counsel and accordingly entered.

I rendered a judgment in favor of the infant plaintiff Elbert Paling and against the defendant New York Central Railroad Company, in the sum of Three Hundred (\$300.00) Dollars.

(Signed) LEWIS B. EASTMEAD,  
*Judge.*

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## Opinion

## NEW JERSEY SUPREME COURT

No. 420, MAY T., 1929

ELBERT PALING, by next friend,  
*et al.*,

*Appellee,*

vs.

NEW YORK CENTRAL RAILROAD  
COMPANY,

*Appellant.*

10

Submitted May 17, 1929; decided June , 1929. 20  
Defendant's appeal from District Court.

Before: Justices PARKER and BODINE.

*For the Appellant*, GEORGE G. TENNANT, JR.

*For the Appellee*, IRVING PRINCE.

*Per Curiam:*

The plaintiff, who according to his claim was a  
passenger on the defendant's railroad, boarded a  
train of the defendant at Weehawken on his way  
home at about 5:30 P. M., and took a seat with a  
friend. It was a hot day and they wished to open  
the window. This window was double. They suc-  
ceeded in opening the inner window, and accord-  
ing to the testimony for the plaintiff, as they were  
working on the outer window to open that also,  
the entire pane of glass of that window fell in-  
ward and broke, cutting the plaintiff's hand.

30

40

*Opinion*

There was no explanation in the plaintiff's case as to why the pane of glass dropped out. The case for the defendant was that the two young men were hammering on the glass and broke it in that way. This seems to have raised a question of fact for the trial judge sitting as a jury.

10

On the trial it was urged that there was no evidence to show that the plaintiff was a passenger; but this seems to be now abandoned.

It was further urged that there was nothing in the circumstances to indicate negligence of the defendant; and this naturally raised the question of *res ipsa loquitur*. We think that a question for the jury was raised by the occurrence of the accident in the manner claimed by the plaintiff and which the judge sitting as a jury was entitled to believe, and are content to rest this conclusion on the case of *Hughes v. Atlantic City Railroad Company*, 85 N. J. L. 212. This case is relied on for the appellant; but the reversal of the judgment for plaintiff in that case was based upon error in the charge in which the Court improperly shifted the burden of proof.

20

The final ground urged was and is that the evidence conclusively showed that the plaintiff was guilty of contributory negligence; and this depends entirely upon the view that the trial judge took of the facts. If, as we must assume, he found that the glass fell out because the plaintiff was trying to lift the window there was no reason why as a matter of law he should be required to find that the plaintiff was negligent in what he did.

30

The judgment will be affirmed.

Filed June 21, 1929.

40

FRED BLOODGOOD,  
*Clerk.*

## New Jersey Court of Errors and Appeals

ELBERT PALING, an infant, *et al.*,  
*Plaintiff-Appellee,*

VS.

NEW YORK CENTRAL RAILROAD  
COMPANY, a corporation,  
*Defendant-Appellant.*

10

### BRIEF FOR DEFENDANT-APPELLANT

#### Statement of the Case

20

Plaintiff, Elbert Paling, an eighteen-year-old minor, boarded a train of the defendant company August 9th, 1928, together with his friend, William Keto, both of them being on their way to their homes in Bergenfield, New Jersey. Selecting a seat, they attempted to raise the window alongside thereof to let in some air. After raising the inner sash, they tried unsuccessfully to raise the outer sash. When they had ceased their efforts and resumed their seats, the glass of the outer sash fell out and cut the infant plaintiff on the hand. Previous to the breaking of the glass, there had been no cracks therein or anything to indicate that it was likely to fall out. Plaintiff, by Ernest Paling, his next friend, brought suit against the defendant carrier, and Ernest Paling (the father), as an individual, joined with him in a count for medical expenses and loss of services.

30

40

10 A trial was held in the First Judicial District Court of the County of Hudson on February 20th, 1929. At the close of plaintiff's case, defendant's counsel moved for a non-suit on the ground (1) that there had been no showing of the relationship of passenger and carrier between plaintiff and defendant; and (2) that there had been no showing of any negligence on the part of defendant. The Court denied this motion and the defendant prayed for and was granted an exception.

20 At the close of defendant's case, defendant's counsel moved for a directed verdict on the ground that (1) there had been no showing of the relationship of passenger and carrier; (2) that there had been no showing of any negligence on the part of defendant; (3) that the evidence showed that the plaintiff had been guilty of contributory negligence. The Court denied this motion and defendant prayed for and was granted an exception. A judgment was entered for plaintiff in the sum of \$300 damages together with costs of suit. Defendant appealed from said judgment to the New Jersey Supreme Court, which affirmed the judgment in a per Curiam opinion (R. p. 21). Defendant appeals from this judgment of affirmance.

30

### Argument

The Supreme Court erred in affirming the judgment of the First Judicial District Court of the County of Hudson, since there was no evidence from which the Trial Court could find that defendant had been guilty of negligence.

40

**There was no evidence from which the Trial Court could find that defendant had been guilty of negligence.**

Plaintiff, Elbert Paling, testified that the window glass fell out *after* he and his friend Keto had tried unsuccessfully to raise the window. Previous to the breaking of the glass there had been no cracks therein or anything to indicate that it was likely to fall out. This was the *only* testimony presented to the Trial Court bearing on the occurrence of the accident or the explanation of same. *The mere happening of an unusual occurrence raises no presumption of the negligence of the defendant.*

*Paynter v. Bridgeton Traction Co.*, 67 N. J. L. 619, 625;

*Vecsy v. Central Railroad of N. J.*, 88 N. J. L. 177, 179;

*Eaton v. New York Central Railroad Co.*, 195 N. Y. 267, 272;

*Kingsley v. Delaware L. & W. R. R. Co.*, 81 N. J. L. 536;

*Fanshawe v. Rawlins*, 89 N. J. L. 344, 347;

*Ryan v. Public Service Ry. Co.*, 101 N. J. L. 361;

*Murphy v. Boston Elevated Ry. Co.*, 229 Mass. 38.

Counsel has cited (in his brief in the Supreme Court) *Mumma v. Easton & Amboy R. R. Co.*, 73 N. J. Law 653, in support of the proposition that "the occurrence itself in the absence of explanation, affords *prima facie* evidence that there was

a want of due care." In this and all other cases in which negligence has been inferred from the mere happening of the accident, the thing causing the accident has been under the *exclusive* control of the carrier, and *not*, as in the case at bar, under the partial control and subject to the intervention of the passenger.

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*Chadwick v. Louisville & N. R. Co.* (213 Ky. 831, 281 S. W. 1018, 45 A. L. R. 1537) was a case where the plaintiff had taken a seat alongside of an open car window. Through some unknown cause, the window sash fell and injured plaintiff's arm. Plaintiff made no attempt to account for the fall of the sash. It was shown that *no* servant of the defendant company had raised the window. The Trial Court sustained a motion for a directed

20 verdict in favor of the defendant. In affirming judgment for defendant, the Kentucky Court of Appeals held that the question involved is "whether the doctrine of *res ipsa loquitur* has application to the facts of this case." Justice Sampson, speaking for the Court of Appeals, said:

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"It is not unreasonable to require a carrier of passengers to explain an injury to a passenger when the thing causing his injury is *entirely* within its control and in the ordinary course of things no accident would have resulted if due care had been exercised, and when such accident is unexplained by the company, courts are authorized to find negligence from the evidence showing that the thing causing the injury is entirely within the control of the company or carrier, and that no accident would ordinarily result if due care were exercised, leaving to the carrier, to whom it must be

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presumed the facts are all well known, the explanation. But this rule does *not* apply when the thing causing the accident is *not* under the exclusive control and management of the carrier. The exception is well illustrated by the facts of this case.

“It is common knowledge that the window sash in a passenger coach is often raised and lowered by passengers, acting entirely independently of the company and its servants in charge of the train, and is therefore not under the exclusive control and management of the carrier, and the doctrine of *res ipsa loquitur* is inapplicable for this reason. 3 Thomp. Neg. Sec.s 2754-2762; 4 Wigmore Ev. Sec. 2509; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L. R. A. 820, 10 Am. St. Rep. 601, 17 Atl. 14, 10 Am. Neg. Cas. 164; *Barnowski v. Helson*, 89 Mich. 523, 15 L. R. A. 33, 50 N. W. 989; *Louisville & N. R. Co. v. Mink*, 168 Ky. 394, 182 S. W. 188.”

In *Boucher v. Boston & M. R. R.*, 79 Atl. 993 (a case involving facts identical with those in the *Chadwick* case, *supra*), Chief Justice Parsons, speaking for the Supreme Court of New Hampshire, said:

“The difficulty with the case is the almost entire absence of evidence. The plaintiff rests upon the single fact of the fall of the window sash, and invokes the rule *res ipsa loquitur*. ‘There are decided cases to the effect that negligence may properly be inferred against common carriers from the mere happening of an accident; \* \* \* but this is a doctrine altogether too broad to be

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sustained, and it has been expressly overruled in cases of high authority.' *Paine v. Railway*, 58 N. H. 611, 613; 2 Shearm. & Red. Neg. Sec. 516." (Judgment for defendant.)

10 In *Gillick v. D., L. & W. R. R. Co.*, 83 New York Misc. 430, the plaintiff, a passenger on defendant's train, was suddenly injured by the breaking of a pane of window glass. In holding for the defendant, Judge Seabury said at page 431:

20 "The evidence fails to suggest the cause of the accident. The plaintiffs have recovered upon the theory that the doctrine of *res ipsa loquitur* is applicable to the facts of this case. I think the learned Court below erred in applying this doctrine. The doctrine is applicable only when the inference of negligence is *required* by the nature of the occurrence. *It has no application when the res could have happened without negligence.* Where some other cause than the negligence of the defendant could have caused the occurrence, there is no reason to infer that the occurrence was due to the negligence of the defendant. If the accident itself indicated that the accident was the result of the defendant's negligence, a different situation would be presented. The fact that the accident was of an unusual character, does not of itself justify the application of the maxim *res ipsa loquitur*. See *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37." (Italics ours.)

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40 To the same effect is *McKinney v. New York, etc., Railroad Co.*, 179 New York Supp. 535, 537.

*Sommerfield v. Chicago, etc., R. R.*, 180 N. W. 847 (Wisconsin Supreme Court, 1921), was a case involving facts similar to those of the case at bar. Chief Justice Siebecker said on page 848:

“The vice of the claim that this doctrine (*res ipsa loquitur*) is applicable to this case, arises from the fact that the lower courts regarded the jury’s finding under question one as establishing that the accident was *not* caused by anything *other* than defendant’s negligence in furnishing a defective window glass, an imperfect frame, or negligently fitting the glass into the sash. *This claim must fail, because the evidence does not sustain this conclusion.* Some unknown cause may have produced the break in the glass, which was wholly unrelated to the defendant’s duty to furnish a proper glass and place it in a reasonably sufficient sash in an ordinarily careful manner. It is considered that under the facts and circumstances shown, the doctrine of *res ipsa loquitur* does not apply to this case.” (Italics ours.)

The judgment was reversed and remanded with direction to award judgment dismissing plaintiff’s complaint.

In *Ginn v. Penn. R. R. Co.*, 220 Pa. 552, 554, plaintiff, a passenger on defendant’s train, had been injured by the sudden breaking of a car window. Plaintiff testified that immediately before the accident, he heard a train on the next track, and as he turned to look out the window, he heard two explosions and an object flew up and hit the window, and that the object looked like a torpedo.

In affirming the judgment of non-suit, Justice Elkin said:

10           “This appeal raises primarily the ques-  
 tion of burden of proof. Under the facts  
 proven at the trial, was the burden of proof  
 on the defendant to show that the injury for  
 which appellant claims damages was in no  
 way the result of its negligence, or was the  
 burden on the appellant to establish the  
 negligence of the defendant. In order to  
 cast this burden on the defendant, it was  
 necessary for appellant to establish that the  
 injury complained of resulted from the  
 breaking of machinery, collision, derail-  
 ment of cars, or something improper or un-  
 safe in the conduct of the business or in  
 20           the appliances of transportation (*Thomas*  
*v. R. R.*, 148 Pa. 180). This case is also  
 authority for the rule that where a passen-  
 ger on a railroad train while sitting at the  
 window of a car was injured by a missile,  
 the nature and origin of which were un-  
 known, and there was nothing to connect  
 the accident with a defect in any of the ap-  
 pliances of transportation or any negli-  
 30           gence on the part of the company or its em-  
 ployees, there can be no recovery against  
 the company. These principles rule the  
 present case.”

The carrier, while held to a high degree of care  
 in the treatment of passengers, is not bound to  
 furnish *unbreakable* window glass. As Justice  
 Minturn well said in *Kingsley v. D., L. & W. R.*  
*Co.* (*supra*),

40           “the owner of a vehicle is not bound to

furnish appliances which will render an accident *impossible*, but only such as are commonly used by men of judgment and common prudence, *Rattagliata v. Hubbell*, 7 N. Y. Misc. 103.”

In holding that there was a jury question in this case, the *per curiam* opinion of the Supreme Court (R., pp. 21-22) rests its conclusion on the case of *Hughes v. Atlantic City Railroad Company*, 85 N. J. L. 212. Inasmuch as there seems to be some misunderstanding on the part of counsel as to the true interpretation of this decision, we shall briefly review the facts contained therein. Hughes, the plaintiff, was a passenger in one of defendant's cars. He was injured by fragments of glass from the explosion of an electric light bulb in the ceiling of the car. There was no proof of the cause of the explosion, and plaintiff went no further than to testify that “probably it was a weak bulb and the voltage might have run up on it, and of course it had a tendency to burst the bulb.” The Trial Judge applied the doctrine of *res ipsa loquitur*, and instructed the jury that, “when an accident of this kind happens to some of the means of transportation, the law shifts the burden of proof from the plaintiff as to the explanation or showing the actual cause, to the defendant, and imposes upon it the burden of making an explanation exculpating itself from negligence.” A judgment for plaintiff was reversed in the Court of Errors and Appeals, Justice Swayze referring (on pp. 213-214) to the aforesaid instructions of the Trial Judge “as an *unwarranted extension* of the application of the maxim *res ipsa loquitur*.” He then went on to say that:

“The importance of the rule which finds

10 expression in that maxim is found in the province of the trial judge and not in the province of the jury. He is called on in the first instance to say whether there is any evidence of negligence to go to the jury; in the absence of direct evidence, he may, in cases *where the maxim applies*, hold that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence;" \* \* \* (p. 216) "In applying the law to a case like the present, we think it clear (1) that the plaintiff was bound to satisfy the jury by the preponderance of evidence that the defendant was guilty of negligence that caused the accident; (2) *if he introduced no evidence or no evidence from which an inference of negligence could be drawn, it would be the duty of the judge to direct a verdict for the defendant;* (3) if he introduced evidence which permitted or required an inference of negligence, it would be for the jury to say whether they believed the witnesses and, where an inference of negligence was permissible but not required, whether they drew that inference. *The mere occurrence of the present injury did not require a finding of negligence since the bulb may have burst from some cause beyond the defendant's control.*"

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The *Hughes* case falls within the third category, since plaintiff had testified that the bulb which had exploded was probably "a weak bulb and the voltage might have run up on it, and of course it had a tendency to burst the globe."

We submit that the case at bar falls within the second class, namely—that where the plaintiff has introduced *no* evidence from which an inference of negligence can be drawn, it is the duty of the judge to direct a verdict for the defendant. A careful examination of the record in this case reveals that there was not one iota of evidence going to show negligence on the part of this defendant, or of any facts from which negligence could be inferred.

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Upon the findings of fact, as made by the Trial Judge (and these, we submit, are radically different from the facts as stated in the *per curiam* opinion of the Supreme Court—R., pp. 21-22), the pane of glass fell out *after* plaintiff and his friend Keto had ceased their efforts and had sat down (R., p. 16). That being the case, the facts are wholly on all fours with *Chadwick v. Louisville R. R., supra*, in which the Court refused to apply the doctrine of *res ipsa loquitur*, but directed a verdict for the defendant.

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“Negligence is never presumed but must always be proven. The only presumption of fact which the law recognizes is an immediate inference from the facts proven, and mere theories and inferences do not authorize a verdict, *unless they are the only conclusions which can reasonably be drawn from the facts proven*, and if a plaintiff is to succeed it is incumbent on him, in the absence of direct evidence, to show not only existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the plaintiff’s injury was caused by the negligent act of the defendant, *and which would exclude the idea that it was a cause with which the defendant was not connected.*” *Maphet v. Hud-*

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*son & Manhattan R. R. Co.*, 98 N. J. L. p. 369 (Opinion by Justice Bergen).

10 At the trial of this case, counsel took occasion to refer to a recent decision of this Court, *Russell v. Public Service Railway Co.*, 139 Atlantic 322, as supporting the proposition that, where glass falls from the car window of a carrier when said window is raised or lowered, this in itself is *prima facie* evidence that such window was in an unsafe and improper condition. We respectfully submit that the *Russell* case is clearly distinguished from the case at bar. In *that* case, there was uncontradicted testimony by the plaintiff as to the existence of a crack in the window pane before it was shut down. There the counsel for the defendant carrier attempted to argue the  
20 breaking of the glass was attributable, at least in part, *not* to the crack in the window pane, but to the forcible manner with which the plaintiff had shut the window. To that contention, Justice Kalisch pointed out (p. 323) that such testimony raised a factual question for the Trial Judge to decide and that his finding was not reviewable in the Supreme Court.

30 In the case at bar, on the other hand, the only testimony as to the condition of the window prior to the accident was to the effect that there were no cracks in the pane of glass or anything to indicate that it was likely to fall out and there was *nothing* to indicate that the window was not in perfect condition up to the moment when plaintiff endeavored to raise the sash (R., p. 16).

40 Counsel has also referred to *Whalen v. Consolidated Traction Co.*, 61 N. J. Law 606, where Justice Dixon said (p. 609):

“The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier’s servant which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised.” 10

The soundness of this proposition is unquestioned, but it has *no application* to the case at bar. Here the plaintiff was *not* injured “through some defect in the appliances of the carrier, or through some act or omission of the carrier’s servants,” for there is *no* evidence of such a defect, or of any act or omission of the carrier’s servants; but rather he was injured by the breaking of the glass from an *unexplained and unknown cause*, and without some evidence of the cause of breaking, no inference of negligence or want of care can be drawn. The cases are unanimous in so holding (see cases cited, *supra*). 20

In rendering his judgment in this case, the Trial Judge took occasion to refer to *Schreiner v. D., L. & W.*, 98 N. J. L. 899. In that case, plaintiff’s decedent was a foot passenger on the forward end of the defendant’s ferryboat. He stood on a portion of the deck reserved for foot passengers. While he was there, a motor truck operated by another defendant came through the team gangway at a dangerous rate of speed and crashed through the chain which separated this space from that reserved for foot passengers. The chain snapped and struck the plaintiff’s decedent, causing his death. On appeal, the Railroad Company contended that their negligence in failing 30 40

to take the proper precautions for the safety of decedent was not the proximate cause of his injury. The facts upon which that contention was predicated being in dispute, the judgment for plaintiff was affirmed. We respectfully submit that the *Schreiner* case has no bearing whatsoever on the case at bar.

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### Conclusion

It is respectfully submitted that the judgment of the Supreme Court should be reversed and that a judgment should be entered for the defendant.

WALL, HAIGHT, CAREY & HARTPENCE,  
*Attorneys of Defendant-Appellant.*

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## New Jersey Court of Errors and Appeals

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ELBERT PALING, an infant, by  
ERNEST PALING, next friend,  
Plaintiff-Appellee,

v.

NEW YORK CENTRAL RAILROAD  
COMPANY, a corporation,  
Defendant-Appellant.

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### BRIEF FOR PLAINTIFF-APPELLEE.

#### Statement of the Case.

Plaintiff, Elbert Paling, an infant of the age of eighteen years on August 9th, 1928, at about five-thirty in the afternoon, boarded a West Shore Railroad train at the Weehawken Terminal of the West Shore Railroad of the New York Central Lines, which was scheduled to leave there at five forty-eight in the afternoon. He was on his way to his home, in Bergenfield, Bergen County, New Jersey, and was accompanied by a friend, one William Keto. They selected a cross seat where they proposed to sit together, and attempted to open the window alongside thereof, to let in some air. The car window in question, had a double sash; inner and outer. They raised the inner sash and tried unsuccessfully to raise the outer sash. After Elbert

Paling and his friend had desisted from opening the window, and had resumed their seats, the glass of the double sash, suddenly and without warning, fell into the car and upon Elbert Paling, the infant plaintiff, badly cutting him about the hand, causing a deep laceration about three inches (3") long. Previous to the breaking of the glass, there had been no cracks therein or anything to indicate that it was likely to fall out.

Plaintiff, Elbert Paling, by his father Ernest Paling, as his next friend, brought suit to recover damages from the defendant for injuries sustained by reason of the negligence of the defendant. This case was tried by Judge Eastmead, sitting without a jury, in the First Judicial District Court of the County of Hudson, on February 20, 1929, and judgment was rendered by the said court for the plaintiff, in the sum of Three hundred Dollars (\$300) damages, together with costs of suit.

Defendant appealed from said judgment to the New Jersey Supreme Court, which affirmed the judgment of the District Court of the First Judicial District of the County of Hudson. Defendant appeals from this judgment of affirmance.

### **Argument.**

The Supreme Court rightly affirmed the judgment of the District Court of the First Judicial District of the County of Hudson, because there was sufficient evidence from which the court could find that defendant had been guilty of negligence.

## 1.

**There was sufficient evidence from which the court could find that the defendant had been guilty of negligence.**

In *Russell v. Public Service Railway Co.* (5 A. R. 1772, 139 Atl. 322) the plaintiff was a passenger on the defendant company's trolley car; his seat was next to an open window. The day was cold and there was a draft upon him, and, as he pushed the window down to shut off the draft the glass fell out and cut his hand. The window was open about three (3) inches. He noticed that the glass was *cracked* before he shut the window down. Justice Kalisch speaking for the Supreme Court, said (139 Atl. 323) :

“We think the fact that the glass fell out of the window frame while the respondent was shutting the window was prima facie evidence that the window was in an unsafe and improper condition. The falling of the pane of glass or at least some portion of it, out of the frame of the window, *during the act of its being shut down was such an unusual circumstance attendant upon closing a window that it bespoke either a defective condition in the window itself, or a failure on the part of the appellant company's servant to properly perform the duty of inspection.* There was testimony that there was a crack in the window pane before it was shut down.” (Italics ours.)

This case is identical and analogous to the case at bar. In the *Russell* case, *supra*, the plaintiff

was attempting to shut an open window on a cold day, while in the case at bar, the plaintiff was attempting to open a window on a warm day. In the case cited supra, *there was some notice*, to the plaintiff by reason of a crack in the window, which he saw and to which he testified. The case at bar is *much stronger*, by reason of the fact that the *plaintiff had no notice of any defect in the window or the window pane*. The plaintiff in the case at bar had a right to assume that the window was in perfect condition. Justice Kalisch speaking for the Supreme Court (139 Atl. 323) says further:

“Since the trial judge sat as judge and jury it was in his province therefore, to draw inferences from the facts and circumstances developed by the evidence in the same manner as a jury in this province would, and to waive and determine the evidence, both as to its creditability and probative value as is the undoubted function of the jury.”

A reference to the state of case will show that the judge at the trial of the case at bar applied this rule as part of the general rule of negligence, in finding the defendant guilty of negligence. An inference of negligence was raised which was not met by the defendant. There was no testimony produced to show an inspection of the *particular car in question*, and there was no attempt on the part of the defendant company to rebut the inference of negligence.

A common carrier of passengers must use a high degree of care to protect its passengers.

Hansen v. North Jersey Street Railway  
Co., 35 Vroom 686;

Rivers v. Pennsylvania Railroad Co., 83

N. J. Law 513;

McBride v. Pennsylvania Railroad Co., 99

N. J. Law 464.

In Hughes v. Atlantic City Railroad Co., 85 N. J. Law 212, a judgment for the plaintiff in the lower court was reversed. The learned trial judge in the lower court, in view of the high degree of care required of a carrier of passengers instructed the jury that

“When an accident of this kind happens to some of the means of transportation, *the law shifts the burden of proof from the plaintiff* as to the explanation of showing the actual cause to the defendant, and imposes upon it the burden of making an explanation exculpating itself from negligence.”

Counsel for the appellant cites this case in his brief, and from reading the extract in the appellant's brief it would seem that the “unwarranted extension of the application of the maxim *res ipsa loquitur*”, was referred to by Justice Swayze, speaking for the Court of Errors and Appeals, as having been applied to the facts of the case, which is not the fact. The entire criticism is based upon the charge of the trial judge in the lower court as above quoted for that it charged that the inference of negligence from the happening of the accident was so strong that the jury need not consider the defendant's negligence, but only whether the defendant had exculpated himself. He thereby imposed upon the defendant, the duty the law imposes upon the plaintiff.

*In the case at bar the court drew the inference of negligence, which it had a right to do sitting as judge and jury, which inference of negligence and proof of negligence was not rebutted by the defendant.*

In *Mumma v. Eastern and Amboy R. R. Co.*, 73 N. J. Law 653, the Court of Errors and Appeals says in speaking of the meaning of the maxim *res ipsa loquitur*:

“the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care.”

“A very good statement of the law in a case much like *Hughes v. Atlantic City & S. R. Co.*, *supra*, is to be found in *White v. Boston and Albany Railroad*, 144 Mass. 404, 11 N. E. 552. The court said: ‘If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant, would be for the jury; and the fact that it broke and fell from the use for which it was intended would be evidence that it was defective and unsafe and if not explained or controlled, would be sufficient evidence to authorize the jury to find that the defendant was negligent in regard to it.’”

This statement has a direct application to the case at bar. The fact that the window pane fell from the use for which it was intended would be evidence that it was defective and unsafe, and if not explained or controlled would be sufficient evidence to authorize the court sitting as a jury to find that the defendant was negligent in regard to it.

This is a full recognition of the ordinary rule that inferences from the facts of the case are for

the jury. The result reached is sustained by an opinion of Mr. Justice Pitney in the United States Supreme Court, *Sweeny v. Erving*, 228 U. S. 233.

Justice Dixon, speaking for the Court of Errors and Appeals in *Whalen v. Consolidated Traction Co.*, 61 N. J. Law 606, in an action by a passenger against a carrier, says:

“The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier’s servant which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised.”

*The defendant in the case at bar did not attempt to prove that due care was exercised.*

In *Bergen County Traction Co. v. Demarest, et al.*, 62 N. J. Law 753-755 Chief Justice (then Justice) Gummere speaking for the Court of Errors and Appeals, said:

“Where the accident is one which, in an ordinary course of events, would not have happened if proper care had been used by the defendant, ‘*res ipsa loquitur.*’ *Bahr v. Lombard, Ayres & Co.*, 53 N. J. Law, 233, 21 Atl. 190 and 23 Atl. 167; *Sheridan v. Foley*, 59 N. J. Law, 230, 33 Atl. 484. In the ordinary operation of the defendant’s railroad, its cars would not have left the rails. It is a matter of common knowledge that the roadbed of a street railroad is so built, and the cars so constructed, that, when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and, con-

sequently, proof of the derailment of a car, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation. Having proved the happening of an accident which raised an implication of negligence on the part of the defendant, it was not incumbent on the plaintiffs to go further, and show what the particular act of negligence was."

Counsel for the defendant-appellant cites in support of his case, the case of *Chadwick v. Louisville & N. R. Co.* (213 Ky. 831, 281 S. W. 1018; 45 A. L. R. 1537), and quotes Justice Sampson, speaking for the Court of Appeals, as follows:

"It is not <sup>UN</sup> reasonable to require a carrier of passengers to explain an injury to a passenger when the thing causing his injury is entirely within its control and in the ordinary course of things no accident would have resulted if due care had been exercised, *and when such accident is unexplained by the company, courts are authorized to find negligence from the evidence showing that the thing causing the injury is entirely within the control of the company or carrier, and that no accident would ordinarily result if due care were exercised, leaving to the carrier, to whom it must be presumed the facts are all well known, the explanation.* But this rule does not apply when the thing causing the accident is not under the exclusive control and management of the carrier." (Italics ours.)

An examination of this excerpt clearly shows that it is in support of the plaintiff's case, rather than

that of the defendant. The rule clearly states that in such a case the burden is shifted to the defendant of going forward with evidence to explain the occurrence of the accident. The court further says that when such an accident is *unexplained* by the defendant the court is authorized to find negligence. Particular attention is called to the fact that in the case at bar, no attempt was made by defendant to explain the occurrence of the accident. The defendant offered no proof in defense.

Counsel for the defendant-appellant further admits in his brief that there are decided cases to the effect that negligence may properly be inferred from the mere happening of an accident, but states that this doctrine is entirely too broad, and has been overruled in cases of high authority. An examination of the cases cited by the defendant-appellant will show them to be all cases from other states, and does not cite any cases decided in the State of New Jersey.

In Point 1 of his brief, counsel for the defendant-appellant cites in support of the maxim "The mere happening of an unusual occurrence raises no presumption of the negligence of the defendant", as follows:

- Paynter v. Bridgeton Traction Co., 67 N. J. L. 619, 625;  
 Vecsy v. Central Railroad of N. J. 88 N. J. L. 177, 179;  
 Kingsley v. Delaware L. & W. R. R. Co., 81 N. J. L. 536;  
 Fanshawe v. Rawlins, 89 N. J. L. 344, 347;  
 Ryan v. Public Service Ry. Co., 101 N. J. L. 361.

In the Paynter case, the plaintiff, while attempting to alight from a car, fell to the ground and

was injured. There was no further proof produced by the plaintiff. The court held that in this case the happening of this accident raised no presumption of negligence. It was necessary to show by direct evidence that the defendant was responsible for the accident *or to show* the existence of such circumstances as would justify an inference that the injury was caused by the wrongful act of the defendant. This case is not analogous to the case at bar.

In the Vecsy case, the plaintiff, instead of using a handle which was supplied for signalling a train to stop, used a wire attached to this handle, and in releasing this wire the handle flew up and struck the plaintiff. There was no proof that the company was in any way responsible for the presence of this wire. The court held that the doctrine of *res ipsa loquitur* did not apply in this case. Chancellor Walker in this case cites with approval for examples of the doctrine of *res ipsa loquitur* the case of *Bahr v. Lombard, Ayres & Co.*, and *Mumma v. Eastern & Amboy Railroad Co.*, which cases are cited, *supra*, in support of the plaintiff-appellee's case.

In the Kingsley case, the plaintiff while alighting from a railroad passenger coach, missed her footing and fell between the car step and platform of the station, sustaining injury. No further evidence than this having been introduced at the trial, the court held that without some proof of facts showing a violation of duty, negligence would not be inferred. This case has no bearing to the case at bar.

In the Fanshawe case, the plaintiff was injured in a pasture field while a mare was under the control of the plaintiff. The court held that it was not legal error in refusing a requested instruction that

there was a presumption of negligence on the part of the plaintiff since the injury occurred while the mare was under the control of the plaintiff. The rules of law applicable to this case are the same as those cited in the Paynter case, *supra*.

In the Ryan case, the deceased was struck by an electric car. The only testimony produced at the trial was that the car hit the deceased. The court held that this alone did not prove negligence on the part of the defendant. This case is not analogous to the case at bar.

### **Conclusion.**

It is respectfully submitted that the judgment of the Supreme Court should be affirmed with costs.

CARL WEITZ.

Attorney for Plaintiff-Appellee.





