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NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.
OCEAN COUNTY.

LESLIE POTTER,

Plaintiff,

v.

THE PENNSYLVANIA RAIL-
ROAD COMPANY, a corpo-
ration of the State of
Pennsylvania,

Defendant.

Action at Law.
Notice of Appeal and
Grounds.

10

*To Howard Ewart and Franklin H. Berry, Attorneys
of Plaintiff, or to whom it may concern:*

20

Dear Sirs:

Please take notice that the defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause, on the following grounds, to wit:

1. Because the Supreme Court erred in giving judgment to the plaintiff, stead of to the defendant. 30

2. Because the judgment of the Supreme Court is contrary to the credible evidence given in the cause.

Notice of Appeal and Grounds

3. Because the Court erred in refusing to admit the second of the following questions:

“By Mr. Apgar:

Q. If you don't recall whether he said it or not, would you put it down as part of a record which is presumed to be a truthful record unless verified by Mr. Potter or someone else?

10 A. It might have been information derived through accident.

Q. Have you any doubt in your own mind as to whether or not that was the way the accident happened?

Mr. Berry: I object.

The Court: Objection sustained.

Mr. Apgar: Exception.

(Exception noted as ground for appeal.)”

20 4. Because the Court erred in not directing a verdict for the defendant, as requested at the close of the taking of testimony, for the following reasons:

(a) Because there was no evidence showing negligence upon the part of the defendant or its employees.

(b) Because under Section 55 of the Compiled Statutes, page 4245:

30 “Anyone jumping on or off a car while in motion * * * shall be deemed to have contributed to the injuries sustained, and shall not recover therefor any damages from the company owning or operating said railroad.”

and the credible testimony shows that the said plaintiff did so jump off a car while in motion.

Notice of Appeal and Grounds

(c) That it was clearly proven and uncontradicted that there was a printed regulation of the company, posted up in a conspicuous place, inside of the passenger cars through which the plaintiff was passing on the train on which he was traveling, on which were the words:

“Passengers must keep off of platform until the train stops.”

10

as clearly appears in the photograph, Exhibit D3. That likewise there was attached to the door of the car, a plate on which was the inscription:

“Passengers are not allowed to stand on the platform.”

as clearly appears in the photograph, Exhibit D2, and that it further appeared that in attempting to pass from one car to another, as the plaintiff himself stated, he was going in search of rubbers, and not in search of a seat, there being plenty of seats in the car through which he passed to reach said platform, and that said evidence being uncontradicted, Section 39, page 4240, Compiled Statutes, was applicable, and that by reason of said statute, he thus violating the same, and now claiming injury because of said passing from a car in which there were seats, under said statute the defendant company was not liable for any injury that he might have sustained. 20 30

(d) Because the trial Judge was asked to direct a verdict upon the ground that the clear weight of credible evidence being with the defendant, the de-

fendant was entitled to the benefit thereof before the case was submitted to the jury, rather than to be considered an *ex post facto* right to be exercised only upon the jury disregarding the clear weight of credible evidence.

5. That the Court erred in charging the seventh
10 request of the plaintiff as follows:

“Since the chief purpose of a vestibuled train is to furnish to passengers a safe means of passage between the cars, it is the duty of train employees to exercise a high degree of care to see that the trap-doors over the steps of such cars are closed and kept closed while the train is in motion.”

6. That the Court erred in charging the eighth
20 request of the plaintiff as follows:

“It was the duty of the trainmen to close the vestibule doors and platforms immediately upon the train leaving the station.”

7. That the Court erred in refusing to charge the following request of the defendant:

30 “5. That if plaintiff went on the platform of the car in violation of the printed regulations of the defendant, posted up in a conspicuous place inside of said car, and in consequence received the injuries complained of, he cannot recover, and your verdict must be for the defendant.”

8. That the Court erred in refusing to charge the following request of the defendant:

Notice of Appeal and Grounds

“6. That the action of the defendant’s trainman in opening the vestibule door as the train was running and before reaching the station was not an invitation for the plaintiff to alight before the train stopped.”

9. That the Court erred in refusing to charge the following request of the defendant: 10

“7. That the action of the defendant’s trainman in opening the vestibule door as the train was running between stations was not an invitation for the plaintiff to go upon the platform of the car.”

10. That the Court erred in refusing to charge the following request of the defendant:

“8. That if you find that the evidence is equally consistent with the existence or non- 20
existence of negligence, your verdict must be for the defendant.”

11. That the Court erred in refusing to charge the following request of the defendant:

“11. Considering the short distance between stations between Long Branch and Bradley Beach, at which the trains must stop, it was not negligence on the part of the defendant company to leave the vestibule and trap-doors open 30
between such stations.”

12. That the Court erred in refusing to charge the following request of the defendant:

“12. Section 55, of the statute on railroads

Notice of Appeal and Grounds

and canals, and which is the law in our State at the present time, provides:

10 ‘If any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injuries sustained, and shall not recover therefor any damages from the company owning or operating said railroad.’

If, from the testimony given in this case, you should find that the plaintiff stepped off the rear platform of the rear car, he cannot recover in this case.’”

13. That the Court erred in refusing to charge the following request of the defendant:

20 “13. Section 39 of our statutes applying to railroads and canals, and which is the law at the present time, provides that:

30 ‘In case any passenger on any railroad shall be injured by reason of his going or remaining on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury; provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers. (P. L. 1903, p. 666.)’

If it appears, as the testimony of the plaintiff himself would tend to show, that he was not

Notice of Appeal and Grounds

passing from one car to another for the purpose of obtaining a seat, but for the purpose of finding a pair of rubbers, or some other article which had been left in the rear car in which he had been riding from New York to Asbury Park, and that he then fell off the train, between the cars which he was passing through for the purpose of finding such article, the provisions of the above quoted statute will apply, provided the printed regulations of the company, relative to standing on the platform, has been posted and complied with by the defendant company, and the plaintiff cannot recover.” 10

14. That the Court erred in refusing to charge the following request of the defendant:

“14. Whether the cars be vestibuled or not, the above statute is in effect as it has been quoted, and applies to all such cars.” 20

15. That the Court erred in refusing to charge the following request of the defendant:

“15. If you find the plaintiff’s testimony is false in one or more particulars, you have the legal right to reject it all, and apply the legal maxim, ‘False in one—false in all,’ and should so do in this case.” 30

16. The plaintiff, Leslie Potter, was a trespasser. The undisputed testimony is that he had not paid any railroad fare. That, therefore, there being no proof of wanton or wilful negligence, the defendant

Summons

company owed him no duty that it has not performed, and hence, he can not recover.

W. HOLT APGAR,
Attorney of Defendant.

10

[ENDORSED]

Service of a copy of the within notice of appeal and grounds hereby acknowledged this 22nd day of March, A. D. 1934.

Howard Ewart,
Franklin H. Berry,
Attorneys of Plaintiff.

20

SUMMONS.

STATE OF NEW JERSEY TO THE PENNSYLVANIA RAILROAD COMPANY:

30

You are summoned to answer the annexed complaint of Leslie Potter, in an action at law, in the New Jersey Supreme Court, Ocean County, and take notice (Seal) that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Complaint

9

Witness, WILLIAM S. GUMMERE, Chief Justice of
the New Jersey Supreme Court, at Trenton, New
Jersey, this 28th day of September, 1932.

FRED L. BLOODGOOD,
Clerk.

HOWARD EWART,
Attorney.

10

COMPLAINT.

NEW JERSEY SUPREME COURT.

OCEAN COUNTY.

LESLIE POTTER,

Plaintiff,

v.

THE PENNSYLVANIA RAIL-
ROAD COMPANY, a corpo-
ration of the State of
Pennsylvania,

Defendant.

Action at Law.
Complaint.

20

Plaintiff, Leslie Potter, residing at 1027 Embury
Avenue, in the City of Asbury Park, County of
Monmouth and State of New Jersey, says that: 30

1. Defendant is now and was at all times herein-
after mentioned a corporation of the State of Penn-
sylvania, doing business in the State of New Jersey.

Complaint

2. Defendant is now and was at all times herein-after mentioned a common carrier by railroad, engaged in the operation of a steam railroad between the City of New York, in the State of New York, and Bay Head Junction, in the State of New Jersey.

10 3. Plaintiff, on the fifth day of December, 1931, was a passenger on a train of the defendant which was being operated between New York City and Bay Head Junction.

4. Plaintiff, while a passenger on said train of the defendant, at the time aforesaid, was injured through the negligence of the defendant.

20 5. Defendant was negligent in that it failed to use reasonable and proper care to have the cars of said train, the passageways, doors, platforms and connecting plates, with the appurtenances, in proper and safe condition for the use of passengers, but, on the contrary, the platforms, doors, passageways and connecting plates were in such defective and unsafe condition and so insecurely fastened, that while plaintiff was going from one car into another, he was caused to fall to the tracks and right of way of defendant and was injured.

30 6. Plaintiff was at all times in the exercise of due care for his safety.

7. By reason of said negligence, plaintiff was injured in and about the right side of his face, his scalp was lacerated and torn, the sight of his right eye was impaired, his right hand was injured and he

was otherwise injured about his body and suffered great pain and distress of body and mind.

8. By reason of said injuries, plaintiff has been and will in the future be compelled to expend large sums of money for medical treatment, and attendance, and has lost earnings he otherwise would have made.

10

9. The within action is commenced within two years next after the cause of action herein accrued.

Plaintiff demands \$10,000.00.

HOWARD EWART,
Attorney for Plaintiff.

ANSWER.

NEW JERSEY SUPREME COURT.
OCEAN COUNTY.

20

LESLIE POTTER,

Plaintiff,

v.

THE PENNSYLVANIA RAIL-
ROAD COMPANY, a corpo-
ration of the State of
Pennsylvania,

Defendant.

Action at Law.
Answer.

30

Defendant, a corporation of the State of Pennsylvania, answering the complaint of the plaintiff, says that:

1. Admits paragraph 1.
 2. Denies paragraph 2 as stated in the complaint.
 3. Has no knowledge of the facts stated in paragraph 3 and leaves the plaintiff to make such proof as he may deem fit and proper.
 - 10 4. Denies paragraph 4.
 5. Denies paragraph 5.
 6. Denies paragraph 6.
 7. Denies paragraph 7 as stated in the complaint.
 8. Has no knowledge of the facts stated in paragraph 8 and leaves the plaintiff to make such proof
20 as he may deem fit and proper.
 9. Denies paragraph 9.
- Denies that it owes the plaintiff anything.

SPECIAL DEFENSES.

- 30 1. Defendant denies that any time it was, as alleged in the said complaint, guilty of any such negligence as charged therein, but affirms that if the said plaintiff was a passenger on a train owned, managed and run by the said defendant company, it, at all times, exercised due care in so transporting him as a passenger.

Answer

2. Avers that if the plaintiff was a passenger upon a train of the said defendant company, and was injured at any time while a passenger thereon, as in said complaint alleged, said plaintiff was guilty of contributory negligence, in that while a passenger thereon, he was under the influence of intoxicating liquors, was boisterous and quarrelsome, and having been conducted safely to the Asbury Park Station, New Jersey, to which station, it is averred, alone he had paid any fare or transportation, and that having safely alighted from said train at Asbury Park, his destination, and to which destination alone he had paid the fare, he afterwards re-embarked upon the said train, became a licensee thereon, and if injured while he had thus re-embarked upon said train, he was injured by himself, while in an intoxicated condition, walking off of the platform of the said train while it was moving, and thus contributed to the injuries, if any such there was as alleged in the said complaint, and that whether he was intoxicated or not, as hereinabove stated, his walking off the platform of the car while the train was in motion, was such negligence as caused any injury, if any such injury he suffered.

3. If he had disembarked at Asbury Park, his destination, and afterwards, without paying for his transportation thereon, he re-embarked and re-entered upon said train, and that while it was moving, he attempted to alight therefrom, he was not only guilty of contributory negligence, as above stated, but he also assumed all risk of any injury that happened to him because of his said re-embark-

ing and walking off the said train while the same was in motion.

4. The said train at the time when the said plaintiff walked off of the platform thereof, was proceeding in its usual manner, without any jerk, lurch or unusual motion, and the defendant company was not
10 guilty of any wilful or other negligence by reason of which the said plaintiff, as a licensee thereon, was injured, if injured as claimed.

5. Avers that said plaintiff at the time he alleges the accident occurred, if it did occur, and to which he refers in the complaint, was not a passenger upon said train, had paid no railroad fare or other compensation to the said company, and the said defendant owed no duty to him at the time of the alleged
20 accident, excepting that of refraining from wilfully and wantonly injuring him, and which it avers it did not do.

W. HOLT APGAR,
Attorney of Defendant.

*Reply—Statement of First Trial, Verdict
and Setting the Same Aside*

15

REPLY.

NEW JERSEY SUPREME COURT.
OCEAN COUNTY.

10

LESLIE POTTER,

Plaintiff,

v.

THE PENNSYLVANIA RAIL-
ROAD, a corporation of the
State of Pennsylvania,

Defendant.

Action at Law.
Reply.

20

Plaintiff replying to the answer of the defendant herein, denies all the affirmative allegations contained in said answer and joins issue thereon.

HOWARD EWART,
Attorney for Plaintiff.

STATEMENT OF FIRST TRIAL, VERDICT
AND SETTING THE SAME ASIDE.

30

This case was first tried in the Ocean County Circuit Court, before his Honor, Judge Lawrence, and a jury, on May 16, 1933. Verdict was rendered in

*Statement of First Trial, Verdict and
Setting the Same Aside*

favor of the plaintiff against the defendant in the sum of five thousand (\$5000.00) dollars. On May 18, 1933, Judge Lawrence allowed a rule to show cause, which was argued before him by the attorneys for both sides, and later on Judge Lawrence said:

10 “A review of the evidence leads to the conclusion that the verdict was contrary to the weight of the credible evidence, not only as to the issue of negligence and contributory negligence, but in particular as to his relation to the train as a passenger at the time of the accident. The rule to show cause will be made absolute, to the end that a new trial may be had.”

all of which appears by the record now on file in the office of the Clerk of the Supreme Court.

20 It likewise appears by the record on file, that within proper time after the second trial, application was made to his Honor, Judge Lawrence, for a rule to show cause why the second verdict should not be set aside. He refused to grant the rule, but without prejudice to defendant making an application to the Supreme Court for a rule to show cause on the ground that the verdict was against the weight of evidence. Application having been made to the proper Part of the Supreme Court, and the
30 same being refused, the question relative to the weight of evidence, etc., has not been passed upon, excepting by the jury, and a review of the testimony by a court competent to set aside the verdict, has not been had.

POSTEA.

NEW JERSEY SUPREME COURT.
OCEAN COUNTY.

LESLIE POTTER,

Plaintiff,

v.

THE PENNSYLVANIA RAIL-
ROAD COMPANY, a corpo-
ration of the State of
Pennsylvania,

Defendant.

Postea.

10

20

This case was tried before Circuit Court Judge Lawrence and a jury, at the Ocean Circuit on January 15, 16, 17, 1934. The jury rendered a general verdict in favor of the plaintiff, and against the defendant, in the sum of three thousand (\$3000.00) dollars.

RULIF V. LAWRENCE,

Judge. 30

TESTIMONY.

OCEAN COUNTY CIRCUIT COURT.

10 LESLIE POTTER, *Plaintiff,*
 v.
 THE PENNSYLVANIA RAIL- *Action at Law.*
 ROAD, a corporation of the
 State of Pennsylvania,
Defendant.

20 Toms River, N. J., January 15, 1934.

Before HON. RULIF V. LAWRENCE, Judge, and a jury.

PRESENT:
 HOWARD EWART and FRANKLIN H. BERRY, attorneys
 for plaintiff.
 30 W. HALT APGAR, attorney for defendant.

The above-entitled cause came on to be heard in
 the Circuit Court, Ocean County, in the court house

Leslie Potter—Direct

at Toms River, New Jersey, before Hon. Rulif V. Lawrence, Judge, and a jury, on Monday, January 15, 1934, at 3 o'clock p. m.

LESLIE POTTER, the plaintiff herein, being first duly sworn, was examined and testified as follows: 10

Direct examination.

By Mr. Berry:

Q. Where do you live?

A. 1135 Heck Avenue, Neptune.

Q. Where were you just about midnight on the night of December 4, 1931, Mr. Potter?

A. Just before midnight we left 131st Street, New York City, for the Pennsylvania Station, just before midnight. 20

Q. Did you go to the Pennsylvania Station?

A. Yes, I left home just in time to get the theater train, five minutes past 12.

Q. Who was with you?

A. My brother and brother-in-law.

Q. What did you do when you got down to the Pennsylvania Station?

A. We got off of the subway train, looked at the clock, and we only had a couple of minutes between the subway and the railroad train, and we run all the way to the train, and we didn't have time to get no tickets. My brother and brother-in-law had their return tickets, and the man was standing at the 30

gate with his hand on it, and he let us through and we boarded the train.

Q. A train for where?

A. Asbury Park.

Q. What car did you ride in?

A. We rode in the smoker all the way.

Q. Where was that on the train?

10 A. The last coach, the last car.

Q. What did the three of you do after the train left the Pennsylvania Station?

A. When the train pulled off from Manhattan Transfer, one of the workmens, a conductor or brakeman, came through, and I asked him did he have a deck of cards and a card board, and he said yes. Well, he returned with the card board and a deck of cards. We played cards all the way in as far as Allenhurst.

20 Q. What happened when you got to Allenhurst?

A. We decided to stop playing cards, and returned the card board and the cards back to the conductor with a small tip, and then we sat back down again until the train pulled off from North Asbury Park, and we put our coats on and started to walk from the smoker towards the front of the car, towards the front of the train. We only walked through one car when the train pulled up to the Asbury Park Station, and we got off, and as we got off we started

30 to walk south towards the front of the train, and my brother or brother-in-law spoke to me, I don't remember which one, about the package, and as I was walking next to the train I said, "I will get the package," so I goes aboard while the train was standing still. I goes back on the train, and just as

Leslie Potter—Direct

I reached the top of the platform the train pulls off. My brother hollered to me, "I will meet you in Bradley Beach with a taxi." As the train was pulling off I waved my hand to let him know that I heard him.

Q. Which car did you get on?

A. The front of the first car—the front of the second car, right behind the baggage car. 10

Q. And you started back?

A. Yes. I walked through that car and into the second car. I went through the joint of the train where they join together. I stepped over that and I reached for the doorknob of the second car. I didn't open the door, and the rocking of the train caused me to lost my balance, and I was out.

Q. What happened next?

A. I don't know how long I laid there, but some way or another I scrambled up. 20

Q. Which side did you fall out?

A. I fell off on the right-hand side going south.

Q. That would be the west side?

A. Yes, sir. After I fell I don't know how long I laid there, but I seemed to revive some way or another and to start hollering, "Help me, Lord help me." I got up through a struggle, and all I could see was far ahead of me this very dim light, and I was following this light. So, I got to the Corlies Avenue crossing; I didn't know which crossing it was, but I turned at Corlies Avenue crossing to this garage, where I heard voices of men. I was hollering, "Someone help me, please; Lord help me, please." I heard a voice saying, "All right, buddy, 30

I will help you," and that is all I remember until I was in the hospital.

Q. You did not pay your fare from Asbury Park to Bradley Beach?

A. No.

Q. Why not?

A. The reason I didn't pay my fare, as I walked
10 through the coach there was no conductor or brakeman, no workmen on that coach. It was my intention if I saw him I would pay my fare, which I had the money to pay my fare.

Q. After this man said, "Buddy, I will help you," the next thing you remember was when you came to in the hospital?

A. Yes, sir.

Q. Just how were you hurt?

A. I was hurt about the—you can see the scar in
20 my face and scalp. My scalp was ripped open, covering this right eye, and I was partly blind from the flowing of blood in my left eye, and I hurt my finger. Here is the cut here, here and around in here (indicating). That is the only scars I got, and the little finger on my left hand was cut.

Q. How long were you in the hospital?

A. I was in the hospital from the 5th until the 21st of December, 1931.

Q. About 16 days?

A. About 16 days.
30

Q. Did you leave the hospital on the 21st?

A. I was discharged from the hospital on the 21st, I think.

Q. Was that wound in your head healed up then?

A. No, it was yet open.

Leslie Potter—Direct

Q. Where did you go when you left the hospital?

A. I returned back to 1135 Heck Avenue, my brother's house, and from there I went on into New York and spent Christmas in New York.

Q. When did you go to New York?

A. The 24th day of December, the day before Christmas.

Q. Did any doctor treat you after you left the 10 hospital?

A. Yes, Doctor Oliver treated me.

Q. In New York?

A. In New York City.

Q. Did you go to any other doctor?

A. I made one visit to the Pennsylvania Railroad; I didn't go back there any more.

Q. Did you see the doctor there?

A. Yes, sir.

Q. After that you went to Dr. Oliver?

20

A. Yes, sir.

Q. How long did he treat you?

A. Dr. Oliver treated me about a month.

Q. How often during that period of a month did he treat you?

A. Why, for about two weeks I was going to him every other day for two weeks, and then probably after that I went about twice a week to him.

Q. Did you ever go to him again after that month was up?

30

A. Yes, I had to, because I suffered quite a bit with pains, which I suffer yet, pains, dizziness and blind staggers in the head. I had to go back to him.

Q. How long did that continue?

A. It has never stopped yet. It is growing worse.

Once or twice a week I have dizzy spells and have to go to bed that day. I can't work; I can't bend down. I get swimming and dizziness of the head, and I can't work. I have to go right to bed. It is really affecting me something terrible. It is something like a thousand needles. Then I have these pains and warm flowing of blood. It seems I feel
10 the warm flowing of blood and I put my hands up to see if there is any blood. Right up here this spot will break open. It broke open twice.

Q. How often do those attacks hit you?

A. I have those attacks two or three times a week.

Q. You are not able to work?

A. Nothing where I have got to bend down.

Q. You were accompanied on this trip by your brother and your brother-in-law?

A. Yes, sir.

20 Q. Are they here?

A. My brother is here.

Q. Your brother-in-law is not?

A. No, he is not here, because I am not able to send carfare to him to come up.

Mr. Apgar: I object to that. It is not evidential except to excite sympathy or prejudice.

30 The Court: I think he has a right to explain why he is not here, in the event you should want to comment as to why the brother isn't here. I will allow it to stand.

Mr. Apgar: That is all premature.

Leslie Potter—Cross

By Mr. Berry:

Q. Why isn't your brother-in-law here?

A. Because I haven't got the money, to be frank with you, to send for him to come from Richmond, Virginia.

Mr. Apgar: I move to strike out all of the answer 10
except that he is in Richmond, Virginia.

The Court: Yes.

Mr. Berry: That is all.

Cross-examination.

By Mr. Apgar:

20

Q. How old are you?

A. I am 32—33, rather.

Q. When were you 33?

A. The 15th day of August, 1933.

Q. What is your business?

A. I am—well, any ordinary work, just a common worker.

Q. That, I understand, you say you cannot do now?

A. I can't do nothing heavy.

30

Q. What was your business prior to the accident?

A. I was working around New York on moving vans, and such as that.

Q. How tall are you?

A. Five foot six inches.

Q. Are you sure?

A. Something like that; I don't know. With my shoes on I will measure five foot six.

Q. Come down here and stand up. You are taller than I am, are you not?

A. Yes, sir.

10 The Court: What are you?

Mr. Apgar: Five feet seven inches.

By Mr. Apgar:

Q. What do you weigh?

A. The last time I weighed I weighed 155.

Q. What did you weigh at the time of the accident?

20 A. I can't tell you; I don't know.

Q. Well, you weighed just about the same, didn't you?

A. No, I was much stouter than I am now.

Q. Now, you and your brother and your brother-in-law were in the compartment, were you not, in the front end of the rear coach from the time you left Manhattan Transfer until you got down here?

A. Yes, sir.

Q. Playing cards?

30 A. Yes, sir.

Q. Did you see any of the men that were on the train, that were running the train that day?

A. I saw them when they came up and got our tickets.

Q. You didn't have tickets, did you?

A. When they came up to take up the tickets which they had, and my fare.

Q. You saw a railroad man?

A. Yes, sir.

Q. You don't know whether it was a conductor or a brakeman?

A. I didn't pay any attention. It was a workman on the train, with his uniform on. 10

Q. You paid him in cash?

A. Yes, sir.

Q. How much did you pay?

A. I think it was \$1 even.

Q. Are you sure of that?

A. \$2 and some cents; I don't know what the fare was.

Q. Do you know whether you got any change or not?

A. I think it was \$2, maybe \$2.10, but I don't think there was no change coming back. 20

Mr. Apgar: Mr. Scales, stand up.

(A man arose in the court room.)

By Mr. Apgar:

Q. Do you remember seeing this man on the train? 30

A. No.

Q. Do you remember whether he was or was not the man you paid the cash to?

A. I can't say.

Q. Nor you cannot tell how much you paid him?

A. I didn't pay any attention; I knew he was a uniform man, and he give me a drawback.

Q. How much was the drawback for?

A. I don't know whether it was two or three cents.

Q. When you got to Asbury Park what did you three do?

A. Got off.

10 Q. What car did you get off of the train?

A. We got off of the second car from the rear, and we walked out of the smoker into the other car, across the joint.

Q. And clear through to the end of that? Did you get off of the forward end or the rear end of car number 5?

A. We got off of the front end of it.

Q. After you had gotten off what did you and your two friends do?

20 A. Walked beside the train.

Q. How far?

A. We walked to the front of the car. I don't know whether we got past—we got to the baggage car but didn't walk past. I didn't have to turn around to go back.

Q. If I understand you right, you got on the passenger coach in which passengers ride, which was right next to the baggage car; is that right?

A. Yes, sir.

30 Q. Do you know whether the baggage car was what we call a combination car, both baggage and passengers?

A. It was a combination.

Q. Now, after you got on the train did it then start?

A. After I reached the top of the platform the train started.

Q. As you walked up the steps did you notice whether the lights in the vestibule were lighted or not?

A. I didn't pay much attention to that; lights was in the train and at the station.

Q. You could see plenty of light? 10

A. There was light enough for me to see the steps; I didn't stumble going up.

Q. But you did not notice whether the lights in the vestibule were lighted?

A. I didn't look up; I was paying strict attention to where I put my feet.

Q. You started to walk through that car, the second passenger car? You opened the door and started to go through?

A. Yes, sir. 20

Q. Now, then, in going through that coach, were there many passengers there?

A. I paid no attention.

Q. Do you know whether there were vacant seats there or not?

A. All the seats wasn't occupied. It could have been someone sitting up close.

Q. There were plenty of seats for anybody to sit down?

A. Yes, sir. 30

Q. Now, when you got back to the rear of the second coach, what did you do?

A. When I got to the rear I opened one door and shut it and started across the joining of the train.

Q. That was a vestibuled coach?

A. Yes, sir.

Q. You were not outdoors at all, were you?

A. No, sir.

Q. Now, as you stepped out from the second coach did you notice whether the lights in the vestibule were lighted or not?

10 A. It wasn't exactly what you call dark so I couldn't see where I was walking at. There was enough light shining from somewhere.

Q. There was plenty of light when you reached for the doorknob, wasn't there?

A. The light would show through the door.

Q. What happened after you took hold of the doorknob?

A. I didn't open the door; I reached for the doorknob.

Q. You did not get hold of the knob?

20 A. No, sir.

Q. You did not?

A. No, sir. The rocking of the train caused me to lose my balance and I was ditched out, tossed out by the rocking of the train.

Q. How did you fall out?

A. I fell on my head.

Q. How do you know you fell on your head?

A. There is no scars on any other part of my body.

30 Q. Was it because of the scars that you say afterwards you judge that you fell on your head?

A. That is the only way I could be hurt, by falling on my head.

Q. You testified in the other case that you reached for the doorknob, and that is all you remember?

A. Yes, sir.

Q. You don't remember whether you fell down over the steps or how you struck, or what?

A. The door was open.

Q. You don't know how you fell down, or what part of your body struck the ground at all, do you? As you fell you didn't know, did you?

A. Why, I fell on my head. 10

Q. Didn't you say in the other trial, and didn't you say to Counsel just now after you fell that is all you remember?

A. I said as I reached for the doorknob —

Mr. Berry: Mr. Potter has explained that he landed on his head.

Mr. Apgar: Make your objections and the Court will rule upon them. 20

By Mr. Apgar:

Q. Do you know what time in the morning it was?

A. Why, it was either a little before two or after two; sometimes the train varies, ahead of time or behind time.

Q. That was the owl train?

A. Yes, sir.

Q. Do you know what number train it was? 30

A. No, sir.

Q. You don't know that it was 701?

A. I don't know.

Q. What was the next thing you knew after you found yourself on the ground?

A. Why, as I said, I don't know how long I laid there, but I revived and I got up crying, and I hollered before I got up, "Help me, please, Lord help me."

Q. Do you remember in the other trial Dr. Parry said that it was between 3 and 3:30 in the morning when he got to the hospital?

10 A. I remember him saying it in the court house.

Q. You say you fell off around two o'clock?

A. Yes, sir.

Q. From two o'clock until you got in the hospital what did know?

A. I didn't gain consciousness until sometime around nine o'clock Sunday morning. I didn't know nothing after I heard the voice of the man say, "Buddy, I will help you."

20 Q. You don't remember being taken to the hospital?

A. No, sir.

Q. About nine o'clock the next morning you came to?

A. Yes, sir.

Q. And you knew where you were?

A. No, sir.

Q. Well, you knew it was a hospital, did you not?

A. Not until I asked.

30 Q. In your former testimony you said you were taken to the Ann May Hospital; it was the Fitkin Hospital, wasn't it?

A. The Fitkin Hospital wasn't open at that time.

Q. Who were the doctors out there, do you remember, that attended you?

Leslie Potter—Cross

A. After I gained consciousness I learned after several treatments that the doctor was Dr. Parry.

Q. Did you get acquainted with an intern in the hospital?

A. No, I can't say I did.

Q. Do you remember an intern by the name of Dr. Hill there?

A. No, sir. 10

Q. Do you remember whether there were some interns that attended you?

A. Several doctors came and looked at me right along with Dr. Parry.

Q. That is all you can tell us about this accident, is it? That is all you know about it?

A. Yes, sir.

Q. Were there any bones broken?

A. The doctor didn't state there was any bones broken. 20

Q. You haven't had any bones heal?

A. As far as I know of there was no bones broken.

Q. The trouble with the side of your face was the cut and the scar resulting therefrom?

A. Yes, sir.

Q. I show you a piece of paper and ask you to look at the signature. If you want to read what is printed there I have no objection; I want to know if that is your signature? 30

Mr. Apgar: I ask that this paper be marked for identification.

(Paper referred to marked P1 for identification.)

By Mr. Apgar:

Q. Did you get a chance when you were reaching for the door in the third car to look in that car to see whether there were any people in there or not?

A. It could have been some people setting close to the left and right.

10 Q. But you don't know whether there were or not?

A. No, sir.

Q. Have you had any accident or injuries since on the railroad?

A. No, sir.

Q. Where is your home now?

A. Asbury Park, 1135 Heck Avenue—Neptune, rather.

Q. Where was it at the time of the accident?

20 A. In New York just for the winter, but I was a resident of Asbury Park. I was just for the winter in New York.

Q. Where was your wife's home?

A. She was in New York with me, also.

Q. You and she lived together in New York?

A. Yes, sir.

Q. And you were so living together at the time of the accident?

A. Yes, sir.

30 Mr. Apgar: That is all.

Mr. Berry: That is all.

Charles Potter—Direct

CHARLES POTTER, a witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Berry:

10

Q. You are a brother of the plaintiff in this suit?

A. Yes, sir.

Q. Were you with him on the night of December 4th and 5th, 1931?

A. I was.

Q. Did you accompany him on this trip from New York to Asbury Park?

A. I did.

Q. Tell us what happened on that trip, will you, 20
beginning from the time you reached the Pennsylvania Station in New York?

A. Well, we left Harlem just in time to catch the theater train, about five minutes of twelve. We drew down to the station and just had a few minutes to make it and we run all the way from the subway to the station and didn't have time to get my brother's ticket. When we got close the man opened the gate and we rushed down to the train. We got in the end coach and remained there. We 30
set there a few minutes, and the train removed up to Manhattan Transfer. The train moved off from Manhattan Transfer, and my brother asked the conductor for a deck of cards. Later on the conductor returned back with the cards and a card board, so

we started playing cards all the way down to Allenhurst Station. The train moved off from Allenhurst, and we returned the cards and the card board back, and my brother paid 50 cents to the conductor. We remained in the same coach until we got to North Asbury, and then we moved into the next coach, getting ready to get off at Asbury Park, so we drewed
 10 towards the front of the coach, and just as we got to the front the train pulled into the station. We stepped off the train on the east side of the track and started down towards Bradley Beach.

Q. Towards the front of the train?

A. Towards the front of the train. On our way traveling we found we left a package on the train, and my brother said, "I will return and get it," so he returns to go get the package, and he steps on the steps, and as he was on the steps I hollered to
 20 him, "I will meet you in Bradley Beach with a taxi," and then he waved me his hand and the train was going on.

Q. Where did he get on the train, what part of the train?

A. Well, he got on the baggage coach—next to the baggage coach, the second car.

Q. The second car of the train?

A. Yes, sir. He got on the front end.

Q. Then the train pulled out?

30 A. Then the train pulled out, and I returned to get a taxi, and I went to Bradley Beach station, and just as I got to Bradley Beach the train moved off and I got out of the taxi and didn't see nothing of him, and I come on back to Asbury Park. I roams around the street a few minutes to see if I could

locate him, but I couldn't see nothing of him, so I returned home, and as I went home I was waiting for him to come in. While I was setting there there come a knock on the door, so I got up and went to the door to see who it was, and there was an officer. He said, "Is this Charley Potter?" I said, "Yes." He said, "Do you know your brother is in the —"

10

Mr. Apgar: I object.

By Mr. Berry:

Q. You cannot relate conversations.

A. He said, "Do you know your brother is in the hospital —"

Mr. Apgar: I object.

20

Mr. Berry: That is all.

Cross-examination.

By Mr. Apgar:

Q. Where was your home?

A. 1135 Heck Avenue.

Q. West Asbury?

A. No, sir, Neptune.

Q. Neptune Township?

30

A. Neptune, no Township.

Q. Neptune City?

A. Neptune.

Q. Is there a Neptune City and a Neptune Township?

A. Neptune, New Jersey.

Q. Heck Avenue is how far from the railroad tracks?

A. Well, about a block—a couple of blocks.

Q. It runs parallel with the railroad?

A. No, sir.

Q. Across it?

10 A. It runs right straight into the railroad.

Q. How far below Heck Avenue or south towards Bradley Beach is Corlies Avenue?

A. I don't know.

Q. Do you know where Corlies Avenue is?

A. I do.

Q. How many blocks is Heck Avenue north of Corlies Avenue?

A. It is south.

Q. How many avenues south?

20 A. About three.

Q. Then you do know the distance, don't you? You do know how far it is, don't you?

Mr. Berry: If you don't know, say so.

The Witness: I do.

By Mr. Apgar:

30 Q. Why did you say you did not know?

A. I had to get myself together and think about it.

Q. You have gotten yourself together, have you?

The Court: Never mind, go on; don't waste time on matters that are not material.

By Mr. Apgar:

Q. You had a ticket already that paid your fare to where?

A. I had a return ticket.

Q. Your brother had no ticket?

A. No.

Q. Did he pay his fare?

10

A. I paid his fare.

Q. From where to where?

A. New York to Asbury Park.

Q. To whom did you pay the fare?

A. The conductor.

Q. Are you sure it was the conductor?

A. It wasn't nobody else.

Q. Do you know the conductor?

A. I do not.

Q. Do you know the man to whom you paid the 20 money?

A. I do not.

Q. You are sure, however, that it was the conductor?

A. It wasn't no different.

Q. I am asking you whether you are sure it was the conductor?

A. It was the conductor, in uniform.

Mr. Apgar: Is Mr. McChesney in the room?

30

(A man arose in the court room.)

By Mr. Apgar:

Q. Is that the man?

A. I don't know.

Mr. Apgar: Is Mr. Scales in the room?

(A man arose in the court room.)

By Mr. Apgar:

Q. Is that the man?

10 A. I don't know.

Q. Did you see Mr. Scales, over there (indicating)?

A. If I saw him I wouldn't know him.

Q. Did you see him when you looked just now?

A. Would I know him?

By the Court:

Q. You saw the man stand up over there?

20 A. Yes, sir.

By Mr. Apgar:

Q. Now, are you sure that your brother got on the front end of the second car or the second coach of the train?

A. He got on next to the baggage coach.

Q. Did you notice that car particularly?

A. I looked at him.

30 Q. Did you look at the car?

A. Yes, I looked at the car.

Q. Do you know whether it was lighted or not?

A. Yes, it was lit.

Q. You saw him walk up the steps on the platform?

A. Yes, sir.

Q. That platform was lighted?

A. I wasn't close to the train.

Q. How far were you from your brother when he left?

A. We was close to the engine.

Q. Illustrate in here how close you were?

A. How far does them coaches run? 10

Q. I am asking you to tell us by illustration how far you were from your brother, about how far you were from your brother when he got on the second coach?

A. Around about five or six foot from him.

Q. Then you were as close to him as I am to you now?

A. Is that five or six foot?

Q. I am asking you?

A. A little bit further. 20

Q. And you could see plainly?

A. We was close to the engine.

Q. I am asking you if you saw him walk up the steps?

A. Yes, sir.

Q. And you saw that the platform was lighted, didn't you?

(No answer.)

30

The Court: If you didn't notice that, say so.

The Witness: I didn't notice.

Mr. Berry: It is entirely irrelevant, in any

event; we do not say that there was anything wrong with the lights.

By Mr. Apgar:

Q. Your brother went back after whose package?

A. My brother-in-law's.

10 Q. What was in the package?

A. A pair of rubbers.

Q. Where had you been riding from Jersey City, or New York, down to Asbury Park?

A. In the rear coach, the smoker.

Q. Do you know how many cars were on the train?

A. No, sir.

Q. What part of the rear coach were you sitting in?

A. Just as you enter the steps there is an offset.

20 Q. A little compartment?

A. Yes, sir.

Q. From the aisle there was an open space to go in?

A. Yes, sir.

Q. And you played cards in there?

A. Yes, sir.

Q. Of whom did you get the cards and the card board?

A. From the conductor.

30 Q. Was that the gentleman that stood up?

A. I don't know.

Q. Who gave the man that you got the cards from the tip, you or your brother?

A. My brother.

Q. Did you see to whom he gave the money?

A. The conductor—I don't know who he was.

Q. That is all you know about this?

A. Yes, sir.

By Mr. Berry:

Q. When you paid your fare did you look at the cap of the man you paid it to to see whether it had the word "Brakeman" or "Conductor" on it? 10

A. No, sir.

Mr. Berry: That is all.

Mr. Apgar: That is all.

GEORGE JOVES, a witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows: 20

Direct examination.

By Mr. Berry:

Q. You are a police officer in Neptune Township, are you not?

A. Yes, sir.

Q. And you were on December 5, 1931? 30

A. Yes, sir.

Q. Where were you, Mr. Joves, about 2 o'clock in the morning?

A. In Shafto's Garage, Corlies Avenue and Main Street.

Q. That is in Neptune Township?

A. Yes, sir.

Q. Did you see Mr. Potter at that time?

A. I did.

Q. How did you happen to see him?

A. I got off duty at midnight on December 4 and I hung around the garage for a few minutes and went
10 back washing my car. I got almost through washing my car and I heard this man coming along the side of the garage mumbling. I thought it was somebody that had been out, so I hollered to him to go on home and make less noise, and the man got to the front of the garage and the garage man hollered this man is hurt. I could see him with his head down hollering, "Help me," and I seen the side of his head laying down on his shoulder. I immediately
20 got a chair and sat the man in it and all he could say was, "Help me; I am cold," so I told the garage man to call headquarters and get the ambulance, which he did. I rode in the ambulance to the Spring Lake Hospital, where we took the man, and I was holding him on the cot going down.

Q. How far is that?

A. I should judge between three and a half and four miles.

Q. You rode with him all the way?

A. All the way down.

30

By the Court:

Q. Was he conscious?

A. Well, the only thing I could get out of him was, "Help me, save me; I am cold."

By Mr. Berry:

Q. Did you notice any alcohol on his breath?

A. No, sir.

Q. You were close enough to have observed it?

A. I was right over him.

Q. Later on, Mr. Joves, did you go back along the railroad tracks to find out where Mr. Potter had fallen from the train? 10

A. I did.

Q. Did you find the place?

A. I did. I found blood stains and a pencil and a diary and a stamp book.

Q. About how far south from Asbury Park Station was that?

A. I would judge 550 or 600 feet.

Mr. Berry: That is all.

20

Cross-examination.

By Mr. Apgar:

Q. He was pretty bloody?

A. Yes, sir.

Q. You smelt the odor of blood, too, didn't you?

A. Yes, sir.

30

Mr. Apgar: That is all.

WILTON L. MOORE, a witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

10 By Mr. Berry:

Q. Where are you employed?

A. Shafto's Garage.

Q. Were you employed there on December 5, 1931?

A. I was.

Q. Were you there at the garage about 2 o'clock on the morning of that day?

A. I was.

Q. Did you see Leslie Potter there at that time?

20 A. Yes, sir.

Q. Tell us how you happened to see him and what his condition was?

A. I was sitting in the garage, and there wasn't anything doing, and all at once I heard this fellow hollering, "Help me, save me," so I walked out, and he came around the corner of the garage with his hands out and the side of his head laying on his shoulder. I called Officer Joves, and he came running up. He says, "Go call the ambulance," so I
30 went in and called the ambulance—or, rather, I called headquarters and they called for the ambulance. We sat him down in a chair and got a blanket and threw it around his shoulders, and when the ambulance came we got him on the cot, and Officer Joves and him went to the hospital.

Q. Do you know about how long he was there before the ambulance came?

A. Well, no more than five or ten minutes.

Q. Did you notice any alcohol on his breath?

A. I didn't, and I was just as close to him as I could get when I was helping put the bandage around his head to put his skull back where it belonged.

10

Mr. Berry: That is all.

Cross-examination.

By Mr. Apgar:

Q. You also noticed that he was very bloody?

A. Yes, sir.

Q. Could you detect the odor of warm, fresh 20
blood?

A. I imagine I could if I was close to him like I was then.

Mr. Apgar: That is all.

Mr. Berry: I wish to offer in evidence interrogatories which were submitted to the defendant, and the answers thereto.

(Papers referred to marked in evidence Exhibit P2.)

30

Mr. Apgar: I object to the interrogatories unless they are all read. These are corrected.

The Court: I will allow you to read them both ways, as they originally were and the amendment. You may offer those you originally received. He says they are amended, and I will allow him to read the amended answers.

10 Mr. Berry: Under the rules and practices of the court the plaintiff is entitled to serve interrogatories on the defendant, which consist of questions to be answered by the defendant, in this case by the defendant corporation under the oath of a properly authorized officer or agent of the railroad who has knowledge of the facts asked for in the questions. I will read you first the questions and then the answers in their order.

20 The first interrogatory was: "Were the cars of train referred to in the complaint vestibule cars; that is, were they equipped with doors and platforms which might be closed over the steps of the car?" The answer is "Yes."

The second interrogatory is: "If the answer to the first interrogatory be in the affirmative, were the doors and platforms or trap doors of said vestibules open as said train was being operated between Asbury Park and Bradley Beach Stations?" The answer is "Yes, on right-hand side; closed on left side."

30 The third interrogatory is: "If the answer to the second interrogatory be in the affirmative, at what point during said trip from New York were said doors, trapdoors and platforms last in a closed position"? The answer was: "At Long Branch, New Jersey."

Dr. Hudson J. Oliver—Direct

Mr. Apgar: I think the amended answer should be read.

The Court: No, sir; I will allow you to do it as a defense.

Mr. Berry: I would like to read the testimony of Dr. Oliver, taken at the previous trial. 10

The Court: Yes.

Mr. Berry: This is testimony given by Dr. Hudson J. Oliver at the previous trial, which Mr. Apgar and I have agreed to use instead of bringing the Doctor down from New York City.

20

(Previous testimony of Dr. Oliver read by Counsel for both sides, as follows:)

“DR. HUDSON J. OLIVER, sworn for plaintiff.

“Direct examination.

“By Mr. Berry:

“Q. You are a practicing physician in the State of New York? 30

“A. Yes, I am.

“Q. Where did you obtain your medical training?

“Mr. Apgar: I have no question of this Doctor's qualifications; he practices in three states.

“By Mr. Berry:

“Q. You have been practicing a number of years?

“A. A few.

“Q. How many?

“A. 19.

“Q. Do you know Mr. Potter?

10 “A. I do.

“Q. Did you have occasion to treat him some time subsequent to December 21, 1931, for the wound which has been described Dr. Parry?

“A. I did.

“Q. Do you recall the date of his first visit to you, Doctor?

“A. I believe it was the 28th of December, 1931.

“Q. What was his condition at that time?

20 “A. He had a large scar extending from his eye all the way back over the ear, as has been explained. It was still open in places and had a low grade infection. He complained of pain in the head and slight dizziness.

“Q. What do you mean by a low grade infection?

“A. I mean that at every dressing there was a small collection of pus.

“By the Court:

30 “Q. It was not of extensive nature?

“A. No, sir. A virulent infection is fast collection of pus.

“By Mr. Henry:

“Q. How often did Mr. Potter come to you for treatment, Doctor?

Dr. Hudson J. Oliver—Direct

“A. Every other day for the first couple of weeks and then twice a week for the next two weeks. He came in the following summer and fall. He came in once during the summer and still complained of pain in his head and dizziness, and later on he came in complaining that he could not keep his job because his eyesight was bad. I think that was around November. 10

“By the Court:

“Q. What sort of work was he doing?

“A. He said he was driving for a private man out in Long Island and could not stand up under it.

“By Mr. Berry:

“Q. Did that eye condition result from this accident, Doctor, in your opinion? 20

“A. I couldn't say.

“Mr. Apgar: I object.

“The Witness: I wouldn't want to say that it did, not knowing the condition of his eyes previously and not having examined them myself. I advised him to go to an eye specialist to have them checked over. 30

“By the Court:

“Q. When did you last see him?

“A. Around November.

“Q. What was his condition then, Doctor?

“A. That is when he complained of his eyes. Physically he seemed to be pretty good.

“Q. A scar had developed?

“A. That had practically healed when I discharged him.

10 “Cross-examination.

“By Mr. Apgar:

“Q. That was in November, 1932?

“A. Yes, sir.

“Q. And you for a month saw him about every other day, and then twice a week; what month was that?

20 “A. All during the month of January, 1932, he came in.

“Q. And then until you have seen him here you have not see him since?

“A. He came in in the summer and fall.

“Q. November was the last time you examined him?

“A. Yes, sir.

“Mr. Apgar: That is all.

30 “Mr. Berry: That is all.”

Dr. Oliver K. Parry—Direct

DR. OLIVER K. PARRY, witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Berry: 10

Q. You are a physician practicing in Asbury Park?

A. I am.

Q. How long have you been practicing medicine?

Mr. Apgar: The Doctor's qualifications are admitted.

By Mr. Berry: 20

Q. Are you connected with any hospital?

A. I am attending surgeon at the Fitkin Hospital.

By the Court:

Q. What was the date of this accident?

A. December 5.

Q. At that time you were connected with the hospital?

A. I was attending surgeon at the Ann May Hospital, Spring Lake. 30

By Mr. Berry:

Q. Did you treat Leslie Potter September 5, 1931, and subsequently?

A. Yes, sir.

Q. Where?

A. At the Ann May Hospital, which has since been fused with the Fitkin Hospital.

Q. What was his condition when you first saw him?

A. He was lying in bed in a semi-comatose condition, in shock, and apparently badly injured.

Q. What wounds, if any, did he have?

A. He had a wound of the scalp extending from almost the base of the skull forward and down over the forehead. His scalp was torn free from the skull and turned down over his face. He was not recognizable as a human being with his scalp turned down over his face and covered with blood.

Q. Was there any foreign matter in this wound?

A. Yes, the wound was full of cinders and dirt
20 such as you would see alongside of a railroad track.

Q. Did you clean out the wound that night, or morning?

A. No, we spent that night giving him restoratives and keeping him alive. His condition was what we classify as shock, and in a condition of that type we do not attempt any more than we have to but to keep the patient alive and then repair what damage is done.

Q. What treatment did you give him later,
30 Doctor?

A. At that time we gave the usual restorative methods, and the next day I sutured these wounds in his scalp, and put in drains.

Q. How many stitches were required?

A. I think 25 or 30.

Dr. Oliver K. Parry—Direct

Q. How long did he remain at the hospital?

A. He was there until the 21st, a little over two weeks.

Q. Was he discharged on the 21st?

A. As I recall it, yes.

By the Court:

10

Q. The 21st of what?

A. December, 1931.

Q. He was there how many days?

A. 16.

By Mr. Berry:

Q. Had his wound entirely healed?

A. No, it was still draining at that time. When a patient is able to leave and have dressings done outside or in the dispensary we let them go and come back for dressings. 20

Q. There was no fracture of the skull?

A. Yes, sir.

Q. Was there concussion?

A. There was concussion of the brain, yes.

Q. Was there any evidence of alcohol on this man when you first saw him?

A. No, there was not, neither then nor afterwards. In cases that are alcoholic we very often give alcohol in our treatment of those cases; they require it, but he showed no evidence at that time or subsequently of having alcohol. 30

Mr. Berry: That is all.

Cross-examination.

By Mr. Apgar:

Q. When were the Fitkin and Ann May Hospitals united, do you recall?

A. Yes, a year ago last March first.

10 Q. Were the records of the Ann May Hospital after the consolidation sent to the Fitkin Hospital?

A. Yes, sir.

Q. Was there another physician who assisted you in looking after the wounds of Mr. Potter?

A. Dr. Pietre, neurological specialist, to determine the extent of the injuries to the man's brain, and at that time Dr. Pietre put a needle in his spine

Q. I am not asking you what treatment he gave.
20 Do you recall what intern had charge of this man?

A. Dr. Hill.

Q. Do you know Dr. Hill as an intern down there?

A. He had been there from the 15th of June, I believe.

Q. And stayed there sometime afterwards?

A. He was there for six months after that.

Q. Now, I show you a record here, to which has been attached P1 for identification, a statement that Mr. Potter says is in his handwriting, and ask you
30 to look at that record and ask you whether that is the record at the Ann May Hospital of Leslie Potter?

A. That is right.

Mr. Berry: May I see it?

Mr. Apgar: Not yet.

By Mr. Apgar:

Q. I show to you the last page of the treatment record and ask you whether they are your signatures thereto?

A. No, we don't sign that record; we sign on the first sheet.

Q. There is a statement here, and I ask you to look at it and ask you whether you authorized anybody to sign your name? 10

A. When we give verbal orders the nurses sign the names.

Q. As you look at that do you recall whether you gave those orders or not?

A. That is right.

Q. I show you this first page of this personal history and ask you whether you know the handwriting? 20

A. Yes, Dr. Hill.

Q. I show you the second page; is that the same handwriting?

A. Yes, sir.

Q. I show you the third page and ask you to look at the two statements, the two paragraphs on the top there, and ask you whether you recognize that handwriting?

A. Without the signature I wouldn't recognize it.

Q. With the signature do you recognize it? 30

A. I think that is Dr. Pietre's.

Q. I understood you to say, Doctor, that there was no fracture?

A. X-rays were taken and showed no fractures, as I recall.

Q. Now, you saw him about what time in the morning first?

A. About 3 o'clock in the morning.

Q. Was his condition then that of semi-consciousness?

A. Yes, I would say it was.

Q. When next did you see him, do you recall?

10 A. The following morning.

Q. At about what time?

A. That is, the same morning, later on.

Q. Now, do you recall —

A. At about 11 o'clock, I think.

Q. You said in the other trial it was about 9 o'clock; I ask you to think over which is right?

A. The reason I said 11 o'clock is I usually make my rounds at 11 o'clock.

Q. In your other answer you said about 9 o'clock.

20 Now, at that time when you saw him what was his condition as to consciousness?

A. He was still semi-conscious, and at times had been delirious.

Q. Do you know whether he cleared up that day?

A. He wasn't clear when I saw him.

Q. Do you recall saying that he was fairly clear the following morning at about 9 o'clock, and by the next day was entirely clear?

A. That is right.

30

Mr. Apgar: That is all.

By Mr. Berry:

Q. The next day would be Monday morning, wouldn't it?

A. I haven't looked at the calendar; what was the 5th?

The Court: Counsel may agree the accident happened on Sunday morning at about 2 o'clock.

By Mr. Berry:

Q. You say he was entirely clear Monday morning?

10

A. Yes, sir.

By Mr. Apgar:

Q. Doctor, you said you would like to see the record?

A. I wanted to get the dates, that is all.

Mr. Berry: The plaintiff rests.

20

EVIDENCE ON BEHALF OF DEFENDANT.

DR. E. M. HILL, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

30

By Mr. Apgar:

Q. What is your profession?

A. Physician.

Q. How long have you been a practicing physician?

A. Well, I have been licensed in Jersey since about the first of August, 1932, and in Pennsylvania about August 15, 1932.

Q. Prior to 1932 did you serve any time as an intern?

10 A. I served in my senior year in medical college as what we call a junior intern in a hospital in West Chester, Pennsylvania, and after completion of that service I served a year's internship in the Ann May Memorial Hospital, which later was consolidated into the Fitkin Memorial Hospital, serving from June 15, 1931, to the same time in 1932.

Q. By the Ann May and Fitkin Hospitals you mean the Ann May that was located in Spring Lake and the Fitkin, which is now out Corlies Avenue
20 from Asbury Park?

A. Yes, sir.

Q. Do you recall seeing Mr. Potter there?

A. I have seen him before.

Q. Do you recognize him as a patient that was there or not?

A. I would say yes.

Q. Do you recall anything about any scar that he had, or any trouble with his face?

A. Well, my vague recollection, without refresh-
30 ing my memory from the records, is that he came in pretty well banged up, his face swollen and a gash on his head.

Q. I ask you whether that gash you see now would enable you to any better recognize him as Potter?

A. Well, of course, his whole countenance is dif-

ferent from when I saw him the first time, but I would say he is still the same man.

Q. I hand you paper marked P1, and ask you to look at the first page and tell me what that is?

A. Why, this is what we call the personal history, which the intern is supposed to take when the patient is admitted. Now, of course, the personal history is divided up into a few phases. The first we speak of is the chief complaint — 10

Q. Just one question. That personal history is in whose handwriting?

A. Mine.

Q. Can you tell me the day and time it was written?

A. 12-5-31.

Q. Does the hour appear there?

A. No, but I had been in the habit in the hospital of doing all my histories and ward rounds before the Chief got in, so that would place it between probably 9 and 11 in the morning. 20

Q. Now, do you recall going to this man personally and taking that record?

A. Yes, sir.

Q. Did you have a talk with him?

A. Yes, sir.

Q. How was his mind at that time?

A. Clear.

Q. Had you any knowledge that before that time, or, when he was brought in in the morning, whether it was clear or not? 30

A. It was not clear.

Q. You did not ask him when he came in and his

mind was not clear any of the questions to which you attached answers there?

A. No, sir.

Q. When you questioned him between 9 and 11 o'clock in the morning of December 5, tell us the questions you asked him and what answers he gave you. You are permitted to refresh your memory
10 from the record.

Mr. Berry: The Doctor has not testified that he questioned Mr. Potter between 9 and 11 Sunday morning.

By the Court:

Q. When did you question him?

20

A. Between 9 and 11 on 12-5-31.

By Mr. Berry:

Q. Do you have definite recollection?

A. This is my personal record.

By the Court:

Q. That refreshes your memory so that you now say you did question him?

30 A. Yes, sir.

By Mr. Apgar:

Q. Will you state what questions you asked him and the answers that he gave?

Dr. E. M. Hill—Direct

A. Well, of course, we tried to ascertain just why he is there, in his words. I know why he was there from looking at him; he needed hospital care, but in a general way we inquire just what happens to them. Then I incorporated in writing his answers to these questions for the hospital records. I knew he had come in during the night, and his answers to the questions were along the line very definitely that 10 prior to his admission in the hospital in the morning that upon leaving the train he found that he had left overshoes on the train.

Mr. Berry: Don't read from the paper.

The Court: He may refresh his memory.

By the Court:

20

Q. Tell us generally what the conversation was?

A. He said he went back to get his rubbers, and he left the train while it was in motion, jumped off.

By Mr. Apgar:

Q. What else did he say to you, if anything?

A. Well, of course, for the hospital records I have to delve into his past history and get a lot of information that way.

30

Q. Well, now, generally, you inquired about what?

A. Well, as I say, when we take a history we have a form to take. We have a chief complaint, which is not directly taken from the patient but is a statement as to why he is there in terms which would

describe the case, and after we get the patient's story verbatim from the bedside—of course, with the patient in an intelligent mood. After we complete that we go into the past personal history, which might have some relation to the present condition. I got his past personal history, diseases, afflictions and accidents.

10 Q. They cover two pages of that record, do they not?

A. The second page is the physical examination.

Q. What condition did you find the man in in so far as his physical condition was concerned and which appears upon the record?

A. He was in a sane state of mind, able to answer questions intelligently, fairly orientated at that time, and clear of mind.

Q. Did he continue to improve?

20 A. Yes, sir.

Q. From the record of the case, was there any fracture of bones or anything of that kind?

A. X-rays were taken, and I believe they were negative, and in the treatment of the case neurological examinations were made, which were negative.

Q. Do you recall his being discharged later on?

A. Yes, sir.

30 Q. Now, during that whole period—I think the record will show that he was there from December 5 to December 21, 16 days—did you observe his condition as to whether there was continual improvement?

A. Yes, because I was on Surgical Service at the time.

Q. He came particularly under your care?

A. Yes, I was the subordinate in charge.

Mr. Apgar: That is all.

Cross-examination.

By Mr. Berry:

10

Q. Doctor, do you recall the exact words of the examination you had with Mr. Potter that Sunday morning?

A. No. It has been quite some time ago, and I have gone through lots of things since then.

Q. You said in answer to Mr. Apgar's questions that he told you he had gotten off the train while it was in motion, had jumped off; do you remember just how he described that, whether he said he 20 jumped or leaped or fell?

A. He said he jumped off. The whole picture was that he had regained the lost overshoes and was anxious to leave the train, and he jumped off.

Mr. Apgar: That is all.

Mr. Berry: That is all.

30

HULET R. SCALES, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

10 By Mr. Apgar:

Q. What is your business?

A. Passenger brakeman, Pennsylvania Railroad.

Q. Were you such on September 5, 1931?

A. Yes, sir.

Q. And you are now in their employ?

A. Still in their employ.

Q. Have you ever seen Mr. Potter before?

A. I seen him as a passenger, yes, sir.

20 Q. On what train and at what time?

A. Train 701.

Q. Running from New York at what time?

A. 12:10 midnight.

Q. On what day of the month and what year?

A. December 4, 1931.

Q. Do you mean the 4th or the morning of the 5th?

A. The morning of the 5th.

Q. Now, at that time what was your position on that train?

30 A. Rear brakeman.

Q. And as such what were, among other things, your duties as to the last two coaches?

A. Collect transportation.

Q. On how many cars?

A. Six cars.

Q. Did you then perform the duties of brakeman and also of collector of tickets on those two cars?

A. I did.

Q. Do you remember this man and two other colored men coming in with him?

A. Yes, sitting in the compartment of the smoking car, the rear car.

Q. Do you know whether they had tickets, all of 10 them?

A. Two had tickets and one paid a cash fare.

Q. Do you know who paid the cash fare?

A. I don't know which one.

Q. Do you remember what the amount was?

A. \$2.05.

Q. Did they have the exact change?

A. They gave me \$2.10.

Q. And you gave them a nickel change?

A. Yes, sir.

20

Q. You don't know whether it was the plaintiff or his brother?

A. No, sir.

Q. During any of the trip down did either one of the three ask you anything about cards and a card table?

A. After I collected the transportation they asked me if I had cards and a card table.

Q. What did you do?

A. I gave them cards and a card table.

30

Q. Where did they go with that?

A. They sat in the compartment in the head end of the rear car.

Q. They played cards?

A. Yes, sir.

Q. You saw them, did you?

A. Yes, sir.

Q. What kind of a cap did you have on, if any, that night?

A. A brakeman's cap.

Q. What word, if any, was on there?

A. "Brakeman."

10 Q. You had no cap on with the title of conductor?

A. No, sir.

Q. You are the attache of the train that took up the tickets and cash fare and furnished the card table and the cards?

A. Yes, sir.

Q. Coming down from New York, did you notice the actions of these men?

A. Leaving Manhattan Transfer they were very noisy and used profane language.

20 Q. What did you do?

A. I asked them to be quiet, the passengers were complaining.

Q. Did they obey?

A. They stopped for a while; I had to stop them three times.

Q. Can you recall where the other two places were you stopped them?

A. Between Newark and Red Bank, before they went to sleep.

30 Q. And after Red Bank was the other one?

A. They went to sleep. At North Asbury Park, I had to awaken two of them to tell them it was Asbury Park.

Q. Did you observe anything in the compartment

as to what they were doing other than playing cards?

A. Yes, they had three bottles on the window and was drinking from them, and asked me to have a drink.

Q. Do you know what was in the bottles?

A. They were marked "Gin."

Q. Were there any actions on the part of these 10 men that would lead you to believe they were drinking gin?

A. One man started giggling in the aisle of the car, and I asked him to sit down.

Q. Did he obey?

A. Yes, sir.

Q. What else did you observe?

A. They were very noisy and boisterous.

Q. When you got to Asbury Park, did you notice them getting off the train? 20

A. I assisted two of them down the steps at the head end of the smoker.

Q. Why did you consider it necessary to assist them?

A. They were staggering.

Q. Did you detect an odor of gin in the car?

A. Very much so.

Q. After they got off of the train did you see either of them again?

A. After we left Asbury Park I was collecting 30 transportation, and a colored man brushed by me; I couldn't say it was either one.

Q. What have you to say as to whether it was one of those three or not?

A. I couldn't say, he brushed by me so quick.

- Q. Did he say anything to you?
A. I asked him for transportation and he said,
"You have my ticket."
Q. What car were you in at that time?
A. The 5th car, next to the rear.
Q. Where did that man go?
A. Into the 6th car.
- 10 Q. Did you see him?
A. I took notice so I could go back and get his
transportation.
Q. You were working from the rear forward?
A. Yes, sir.
Q. Did you see that man again after that?
A. No.
Q. Did you go back in the car?
A. I went back in the car and he wasn't there at
Bradley Beach.
- 20 Q. Did you get back there before the train got to
Bradley Beach?
A. Just as we were coming into Bradley Beach.
Q. Did you see any men in the car other than the
colored man that brushed by you?
A. Three passengers.
Q. Who were they? *Malton*
A. Mr. Barton, Mr. McChesney, and I don't know
the engineer's name.
- 30 Q. An empyoee of the Pennsylvania?
A. Yes, sir, Mr. Briers.
Q. Did you see anything of either of these three
colored men after you had seen this one go into the
rear car?
A. I did not.

Q. Where was the conductor at the time this man went through the 5th car?

A. Working from the head end back to meet me.

Q. Where did you meet him?

A. The 3rd car from the rear.

Q. Now, Mr. Scales, who has charge of the trap-door and vestibule on the rear end of the train?

A. I have.

10

Mr. Apgar: I want at this time to offer the amended answers to the interrogatories.

The Court: I understand you answered them first, and then what happened?

Mr. Apgar: Mr. Berry very properly said that they included all, and you permitted testimony from Mr. Scales, but did not let Mr. McChesney say anything about it, that all of the vestibules were open on the right-hand side of the car. After the other trial I served upon Mr. Berry amended answers by Mr. McChesney, and the answer of Mr. Scales, who had charge of the rear of the train.

20

Mr. Berry: The amended answers are certainly in no different position than the answers to the interrogatories.

30

The Court: I think Mr. Apgar may show that there was an error of some character, if that be the situation, in one of the answers. You do not have to offer the amended answers.

Mr. Apgar: In the other trial you wouldn't let me interrogate the witness who made the answers.

The Court: Is he here?

Mr. Apgar: Yes, sir.

10 The Court: Let us deal with that when you interrogate him.

Mr. Apgar: I will not make my offer now.

By Mr. Apgar:

Q. Mr. Scales, the rear vestibule and trapdoor on that 6th car, was it or was it not open?

20 Mr. Berry: I object to that. These interrogatories were submitted to the corporation, and the corporation is bound to answer them by a person who has knowledge of the facts. I object.

The Court: Objection overruled.

Mr. Berry: Exception.

(Exception noted as ground for appeal.)

30 (Question read, as follows:)

“Q. Mr. Scales, the rear vestibule and trapdoor on that 6th car, was it or was it not open?”

The Witness: It was closed at all times.

By Mr. Apgar:

Q. Where did you first close it?

A. New York.

Q. Was it before or after you started that you closed it?

A. As we started I closed it.

Q. Was it opened between there and Long 10 Branch?

A. At Manhattan Transfer I used it to flag from.

By the Court:

Q. Which side?

A. The right-hand side—I couldn't recall whether it was the right-hand side or left side.

By Mr. Apgar:

20

Q. When you got on the train and started from Manhattan Transfer did you get on the rear end?

A. Yes, sir.

Q. You had both trapdoors and vestibules closed?

A. Yes, sir.

Q. Were they opened at any time from there to Asbury Park?

A. They were not.

Q. Were they opened at Asbury Park?

30

A. They were not.

Q. What have you to say, Mr. Scales, as to the vestibule lights in the cars 5 and 6 in which you were?

A. They were lit.

Q. They were lighted that night?

A. Yes, sir.

Q. Do you have any knowledge at all as to the 5th car, to which you say this man went, as to whether there were any vacant seats?

A. Lots of vacant seats.

Q. Do you know anything about car number 2, 10 through which Mr. Potter said he went, as to vacant seats?

A. I don't know about that.

Mr. Apgar: That is all.

Cross-examination.

By Mr. Berry:

20 Q. You do remember collecting fares from this group of three men, don't you?

A. Yes, sir.

Q. Do you remember furnishing them with a board and a deck of cards?

A. I do.

Q. How many bottles did you say there were on the window sill?

A. Two or three—three bottles.

Q. How large were they?

30 A. Gin bottles.

By the Court:

Q. How large are they?

A. Fifths, nearly a quart.

By Mr. Berry:

Q. Did each one have a label on it?

A. Yes, sir.

By the Court:

Q. Do you remember the label?

10

A. I do.

Q. What was it?

A. "Gin."

Q. What else?

A. That is all I seen.

By Mr. Berry:

Q. When did you first see them?

A. When they handed a bottle to me at Manhattan
Transfer to have a drink. 20

Q. Were the bottles full?

A. The bottle they handed me was full.

Q. How about the other two?

A. I didn't notice whether they were full or not.

Q. Were those bottles still on the window-sill when
they got off the train?

A. No, sir.

Q. When did you last see them?

A. When I woke them up at North Asbury Park. 30

Q. They were still there?

A. Yes, sir.

Q. Were they full or empty?

A. I didn't notice.

Q. You didn't accept their offer of a drink?

A. I did not.

Q. You said the only way you could identify it was by the label and the odor?

A. Yes, sir.

Q. You are familiar with the odor of gin, are you?

A. I have tasted it.

Q. Were these the only passengers in the car?

A. Oh, I imagine there was 50 people in the car.

10 Q. Did they all ride down to Asbury Park?

A. No, they got off at different stations all the way down. It was a local train.

Q. How many passengers were there in the car when the train arrived—when the train left Asbury Park?

A. 25 or 30.

Q. Who made the complaint about the noise?

A. Two ladies and a man sitting right outside of the compartment in the first seat.

20 Q. Where was the train then?

A. Between Manhattan Transfer and Newark.

Q. Which one of them was it that did the jig in the aisle?

A. I don't know which one it was, but it was one of the colored men.

Q. Were there any passengers still in the car after the train left Asbury Park besides the three you referred to?

A. No, sir.

30 Q. One works for the Central Railroad?

A. Yes, sir.

Q. Who were the other two?

A. An engineer and fireman on the Pennsylvania Railroad.

Mr. Berry: That is all.

Hulet R. Scales—Re-direct
Ralph Maxon—Direct

Re-direct examination.

By Mr. Apgar:

Q. I show you a plate, and ask you whether you know whether the cars upon this train, at least, the two you were in, had such a plate anywhere on it? 10

A. They are on the door of each car.

By the Court:

Q. Inside or outside?

A. Inside the door.

(Plate referred to marked D4 for identification, reading as follows: "Passengers are not allowed to stand on platform.") 20

RALPH MAXON, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Apgar: 30

Q. What is your occupation?

A. Engineman on the Pennsylvania Railroad.

Q. You are now employed by the Pennsylvania?

A. Yes, sir.

Q. And you have been how many years?

A. Since 1917.

Q. How long have you been an engineman?

A. All but two or three years of that.

Q. During that time you have had passenger or freight trains?

A. Both.

10 Q. On December 5, 1931, did you come out of New York on train 701?

A. Yes, sir.

Q. What had you been doing prior to that?

A. I was working on what we call the Lond Island cars in Penn Station.

Q. Where is your home?

A. Point Pleasant.

Q. What was the reason why you were on the train that night?

20 A. To go home.

Q. You were off for 24 or 48 hours, something like that?

A. 16 hours.

Q. Where were you in the car?

A. In that particular car?

Q. In that particular car?

A. In the rear end, two or three seats from the rear.

30 Q. What car was that as to the train, front, rear, or what?

A. The last one.

By the Court:

Q. What kind of a car was it?

A. A coach.

Q. What was it used for?

A. At that time it was used for a smoking car.

By Mr. Apgar:

Q. Was it steel?

A. A steel car.

Q. Was it vestibuled?

10

A. A vestibuled car.

Q. Who were with you, if anybody?

A. Who was coming home with me?

Q. Yes.

A. I was talking to Mr. Barton and Mr. Briers.

By the Court:

Q. Who are they?

A. Barton is a fireman on the Pennsylvania, and 20
Mr. Briers is a clerk on the Central.

By Mr. Apgar:

Q. Where does Mr. Barton live, do you know?

A. At that time he lived in Belmar.

Q. He was likewise returning to his home after
his run?

A. Yes, sir.

Q. Now, when you got out of Manhattan Transfer 30
did you notice anyone in particular or any men in
particular, colored men?

A. I noticed them, but I can't say whether it was
Manhattan Transfer or Newark or where.

Q. Do you remember Mr. Scales getting a card
board and cards for them?

A. No.

Q. Well, now, where did you see, if you did see, three colored men, as to the car?

A. At the head end of the car on the same side I was on.

Q. Were they out in the open?

A. In the little compartment at the end.

10 Q. What do they call that?

A. I have heard it called the vestibule—I don't know what they call it.

Q. A cubbyhole?

A. Yes, sir.

Q. How many of them were there?

A. Three.

Q. Do you recognize this man as one of the three?
(Indicating plaintiff.)

A. No, I can't.

20 Q. You would not say that he was one of the three?

A. No, sir.

Q. Now, was there anything that called your attention especially to them from the time that you did notice them in the car until you got to Asbury Park?

A. Yes, different times a lot of noise.

Q. What else?

30 A. And one of them was out in the aisle dancing. There was a commotion around there; I don't know whether one was dancing or two.

Q. Do you know whether they had anything in the compartment?

A. No, I didn't see in there.

Q. What did you observe, if anything, to lead you

to think that their conduct was anything other than normal?

Mr. Berry: I object. In the first place, it is leading.

The Court: Reframe it.

10

By Mr. Apgar:

Q. What did you observe as to the actions of those men on the train, if anything?

A. They were very noisy, and what anyone might say feeling good.

Q. Did you notice them get off the train at Asbury Park?

A. I saw them go out the door; I didn't see them step on the ground.

20

Q. Did you notice their walk?

A. No, they didn't walk far enough for me to notice their walk.

By the Court:

Q. You were at all times sitting in the rear of that car?

A. Yes, sir.

Q. You are merely telling us what you saw from 30 where you were sitting?

A. That is right.

By Mr. Apgar:

Q. After the train left Asbury Park and you had

seen these men get off did you see a colored man in the car you were in after that?

A. Yes, sir.

Q. About how long after leaving Asbury Park?

A. Well, it was only a matter of seconds.

Q. Do you know who the man was?

A. No, I do not.

10 Q. Do you know whether he was one of the three or not?

A. Yes, I do.

Q. Are you positive or not as to that?

A. I am positive.

By the Court:

Q. Why are you positive?

A. Because my attention had been attracted so
20 much, and I noticed the fellows; I knew it was one of the three.

Q. What did he do?

A. He came in the car in a hurry and looked in the place where they had been sitting, and then he came through the car to my end, and—well, he wasn't walking or running, but he was in a hurry, and he looked in the other compartment, and then he went out the back door:

Q. Did you see him after that?

30 A. No, sir.

By Mr. Apgar:

Q. After he had gone out there did you get up out of your seat and do anything?

A. Yes, I got up and went out and looked on the back platform.

Q. What did you observe out there, if anything?

A. I didn't see any man.

Q. What did you observe as to the vestibule?

A. The trapdoors were open.

By the Court:

10

Q. Which one?

A. The ones on the right side.

By Mr. Apgar:

Q. Going towards Bradley Beach?

A. Yes, considering the engine ahead.

Q. Did anybody else go out on the platform with you?

20

A. Mr. Barton.

Q. He was with you when you opened the door?

A. Yes, sir.

Q. On the rear platform did you notice whether the lights were lighted or not?

A. They were, because I could see the steps plainly.

Q. How about seats in that car you were sitting in, were there any vacant or not?

A. All vacant but three.

30

By the Court:

Q. Describe the condition of that rear platform when you and Barton went out there?

A. Well, there was nothing wrong with it outside of the platform being up, that is, the little drop platform, and the door open.

Q. On the right side?

A. Yes, sir.

Q. How about the left side?

A. Closed.

10 Q. The platform down and the door closed?

A. Yes, sir.

Q. Was the train running normally or otherwise as it started out?

A. Normally.

Cross-examination.

By Mr. Berry:

20 Q. You said this colored man came back in the car and looked in the compartment at the front end and the rear end; did you see him come out of either one with a package in his hand?

A. No.

Q. Were you riding down on this train at that time every night?

A. Yes, sir, at that time.

Q. Then you went up early in the morning?

A. I went up on 117 in the afternoon from Point Pleasant.

30 Q. What time did you start working?

A. Four o'clock in the afternoon.

Q. And you came down on this train every night?

A. Yes, sir.

Q. Was it your custom to sit up and talk with your fellow passengers all the way down every night?

A. Yes, sir.

Q. You never dozed off and took a nap, or anything like that?

A. I have at times, but not if I had anybody to talk to.

Q. Did you doze off and take a nap at any time on this night?

A. Not that night, no, sir. 10

Q. You were seated at the opposite end of the car from these three men?

A. That is right.

Q. So that the only times you could see them was when they came out of their compartment?

A. Yes, sir.

Q. Where was the train when this dancing took place?

A. I can't remember any particular spot; it was dark. I didn't look out the window, because I didn't think anybody was going to ask me about it. 20

Q. How soon after this man went past you and out on the rear platform did you look out there?

A. Well, that was only a few seconds, I wouldn't say how many.

By the Court:

Q. Was the train in motion?

A. The train was in motion.

Q. When he went on the rear platform? 30

A. Yes, sir.

By Mr. Berry:

Q. Had you been out on the rear platform any other time during the trip down?

A. No, sir.

Q. Then you don't know whether the vestibule door was open before that, do you?

A. No, sir.

Mr. Berry: That is all.

10 Mr. Apgar: That is all.

JOHN J. BARTON, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

20 By Mr. Apgar:

Q. What is your occupation?

A. Locomotive fireman, Pennsylvania Railroad.

Q. For how long?

A. Eight years.

Q. You are in their employ now?

A. I am in their employ now.

Q. You were on furlough at the time of the last trial?

30 A. Yes, sir.

Q. Now, you have been restored to work?

A. Yes, sir.

Q. Were you on this particular train, 701, on 12-5-31 out of New York?

A. I was.

Q. Where was your station on the train?

A. In the rear car, the smoker. I didn't board the train in New York; I boarded the train at Manhattan Transfer.

Q. Were you returning to your home at that time?

A. I was.

Q. Where was your home?

A. Belmar.

10

Q. You lived there at that time?

A. Yes, sir.

Q. Do you live there now?

A. No, sir.

Q. Where do you live?

A. Arlington, New Jersey.

Q. When you got on there whom did you meet that you knew?

A. I met several people that I knew.

Q. Did you meet Mr. Scales?

20

A. Yes, sir.

Q. Where did you find Mr. Briers?

A. He didn't get on until we reached Newark.

Q. Where did you three gentlemen sit?

A. Probably four or five seats down from the rear end of the hind car.

Q. Did you observe three colored men in that train?

A. Not when I boarded the train.

Q. When did you first notice them?

30

A. There was quite a commotion up in the forward part of the car coming into Market Street, Newark.

Q. What was the commotion?

A. Passengers were talking, and I looked up and

I saw—I couldn't say at that time how many colored men in the compartment, but I know there was a party of them.

Q. Did you see them playing cards?

A. No, sir.

Q. Do you know whether cards were taken to them?

10 A. I couldn't say.

Q. During the trip to Asbury Park did you hear anything further of the colored men?

A. I couldn't say the exact distance, but down around the Amboys somewhere I heard another commotion, and I seen Mr. Scales walk up to the compartment and talk to the men, and the noise ceased.

Q. When you got down to Asbury Park did you see the three men then?

A. I did.

20 Q. Where did you see them?

A. I saw them in the forward part of the hind car. I seen Mr. Scales helping one of them off.

Q. What was their condition? Besides boisterousness did you notice anything else?

A. They appeared drunk to me.

Q. What made you think they were drunk?

A. They were staggering around.

Q. Did you notice any of them dancing?

A. No, sir.

30 Q. Did you see the men get off the train?

A. No, not after they left the car.

Q. Did you afterwards see either one of these three men?

A. Yes, sir.

Q. Do you know whether this was the man or not, Mr. Potter? (Indicating plaintiff.)

A. It was one of the party.

Q. You wouldn't say whether it was he or not?

A. No, sir.

Q. Where did you see him?

A. In the smoker.

Q. Tell us how you happened to see him after the 10 train stopped at Asbury Park?

A. The train started out of Asbury Park, out of the station and a colored man reentered the car and looked in the forward compartment, and then he walked to the hind compartment and looked in the hind compartment on the left side. Whatever he was looking for he didn't appear to find, so he walked out on the platform.

Q. In so far as that man is concerned, he came right down the aisle facing you? 20

A. Yes, sir.

Q. I want to know whether you do or not know that he was one of the three men?

A. He was one of that party.

Q. After he had gone out on the rear platform what did you do?

A. Mr. Maxon walked out after him, and I walked out after Mr. Maxon.

Q. What did you find on the rear platform?

A. I didn't find anything outside of Mr. Maxon. 30

Q. Was the vestibule lighted?

A. Yes, sir.

Q. What was the condition of the trapdoors and vestibules?

A. The trap door on the right side was open; the left side was closed.

Q. You had not been out on the rear platform, had you, any time before that?

A. No.

Q. About how long before the train reached Bradley Beach was it that you and Mr. Maxon went
10 out on that rear platform?

A. I should judge about two minutes.

Q. Something like that?

A. Around that.

Q. Were there vacant seats in the rear coach?

A. Practically the car was empty.

By the Court:

Q. The train was in motion when he came
through?

20 A. Yes, sir.

By Mr. Apgar:

Q. Now, on which side of the car was the open vestibule and trapdoor on the rear end when you and Mr. Maxon went out there?

A. On the right-hand side heading south.

Q. That would be any one stepping off would step off of the main line of track on the side?

30 A. They would.

By the Court:

Q. You mean on the right-hand side going towards Bradley Beach?

A. Yes, sir.

Mr. Apgar: That is all.

Cross-examination.

By Mr. Berry:

Q. Are you familiar with the way these doors and platforms work?

A. My work calls for locomotive work, not the train.

Q. Do you know how to open these platforms and doors?

A. I do.

Q. How do you do it?

A. You open the door with a handle and step on a little trap on the side to release the trapdoor.

Q. Just where is that thing you step on?

A. It is about halfway between the trap—you just give it a touch with your foot and it springs up.

Q. Do you have to grab it and fasten it back?

A. It will spring up by itself.

Q. Will it come all the way up, or do you have to fasten it back with your hand?

A. You can hook it back with your hand.

Q. In other words, the spring itself does not hold it up; there is a catch that holds it?

A. I couldn't tell you what kind of a catch it is. If the spring is strong enough it will catch by itself.

Q. And if it is not strong enough you push it up with your hand?

A. Yes, sir.

Q. How long have you been working for the railroad?

10

20

30

A. Locomotive fireman eight years; working at the roundhouse two years.

Q. Were you coming down on this train every night regularly?

A. Yes, sir.

Q. And you went up in the morning?

A. No, I went up at 1:30 in the afternoon from
10 Belmar.

Q. What time did you stop work?

A. 12 o'clock.

Q. Just in time to make the train?

A. Yes, sir.

Q. Did you stay awake all the way down on this particular night?

A. I played cards all the way down.

Q. With whom were you playing cards?

A. I wasn't playing that night, but the majority
20 of times.

Q. You never take a nap or anything like that on the way down?

A. No, sir.

Mr. Berry: That is all.

Mr. Apgar: That is all.

HARRY M. BRIERS, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Apgar: 10

Q. What is your occupation?

A. Night yard clerk, Central Railroad.

Q. Where do you work?

A. Newark.

Q. How long have you been in the employ of the railroad?

A. Between 43 and 44 years.

Q. Where is your home?

A. Belmar. 20

Q. Were you at work on Saturday, December 5, 1931?

A. Yes, sir.

Q. What train did you take for home?

A. The owl.

Q. Is that train 701 on the Pennsylvania?

A. Yes, sir.

Q. Where did you get on the train?

A. Market Street.

Q. Newark? 30

A. Yes, sir.

Q. Did you see Mr. Scales, Mr. Maxon and Mr. Barton there?

A. Yes, sir.

Q. Where did you sit, in what car?

A. About the 5th seat from the hind end.

Q. Which car?

A. The hind car.

Q. This was a steel vestibule car?

A. Yes, sir.

Q. Did you see any colored men there?

A. Yes, sir, I seen three of them sitting in the
10 compartment as I got in, playing cards.

Q. Did you look in the compartment to see anything more?

A. I seen them sitting there playing poker, and they had a bottle of gin setting on the window sill.

Q. How do you know it was gin?

A. I could smell it.

Q. Now, after you had gotten your seat did you observe anything as regards these three men?

A. Every now and then Scales had to quiet them
20 down; they was hollering and raising the mischief. Hulet went to quiet them down.

Q. Did you see them doing anything out in the aisle?

A. Only in Asbury Park, nearly Asbury Park, they got up and raised the mischief.

Q. What did they do?

A. They got up and was cutting up at the end of the car. One fellow was trying to get his hat over his ears, one thing and another.

30 Q. Did you see them get out of the car?

A. I seen them going out the door.

Q. What did you observe about them, if anything, as to their actions in going out of the door?

A. They looked as though they were about steamed.

Q. Did they stagger or not?

A. They didn't have room enough to stagger; the three of them was close together.

Q. After the train had started from Asbury Park did you see any of these three men?

A. I seen one of the three come back through the hind door.

Q. The car you were sitting in? 10

A. Yes, sir.

Q. Do you know whether it was Mr. Potter or not?

A. It was one of the three; I couldn't swear it was positively him.

Q. You saw one of these three come back?

A. Yes, sir.

Q. What did the man do when he got in the 6th car, or smoker?

A. He looked in the compartment where they had been sitting, came right straight on through, opened 20 the back door and went out.

Q. When he came down the aisle was he coming fast or slow?

A. He walked pretty fast.

Q. Did you notice whether he looked in the rear compartment?

A. No, he just opened the door.

By the Court:

Q. Did you watch him as he came along? Were 30 you looking at him?

A. Yes, sir.

Q. Did you see him go out of the door?

A. Yes, sir.

Q. How could you see him?

A. I turned around and looked.

Q. Did you actually turn around?

A. Yes, sir.

By Mr. Apgar:

10 Q. Did you go out on the platform?

A. No, sir.

Q. Did you see this man again afterwards?

A. No, sir.

Q. You went on to Bradley Beach?

A. I went on to Belmar.

Q. You went on to Bradley Beach?

A. Yes, sir.

Q. Did the man come back in the car after you had seen him go back?

20 A. No, sir.

Q. Was there any odor as you went by that compartment?

A. It smelled like there was liquor in there.

Mr. Apgar: That is all.

Cross-examination.

By Mr. Berry:

30 Q. Mr. Briers, when this man came back in the car after the train left Asbury Park, this man who came through and went out the rear door, did he do any staggering going down the aisle?

A. No, he walked pretty fast and went right out of the door.

William Pearson Smith—Direct

Q. He didn't have any trouble navigating at all as he came down the aisle?

A. No, he didn't stagger, that I took notice of.

Q. Did you take a nap coming down that night?

A. No, I never nap coming down; I am afraid of going past and going down to Point Pleasant.

Q. You don't trust your friend Scales?

10

(No answer.)

Mr. Apgar: I think that is a very unfair remark.

Mr. Berry: That is all.

Mr. Apgar: That is all.

20

WILLIAM PEARSON SMITH, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Apgar:

Q. What is your occupation?

A. Passenger brakeman.

Q. What railroad?

A. Pennsylvania.

Q. You are now?

A. Yes, sir.

30

Q. And you were on December 5, 1931?

A. Right.

Q. What was your position on train 701 that night, if any?

A. Baggage master.

Q. You were in what car?

A. The head car, the baggage car.

10 Q. Do you recall stopping at Asbury Park?

A. Yes, sir.

Q. How long did you stop there, do you recall?

A. Oh, I should say—we had a little baggage and mail to put off—I wouldn't say any more than 5 or 6 minutes.

Q. It was as long as that?

A. Well, it might have been 4 or 5 minutes.

Q. Now, while you were there and before you gave the signal for the train to move, did you notice
20 any colored men coming alongside of the train?

A. I noticed them standing still, a loud commotion, talking.

Q. Where were they?

A. Up towards the head end of the train on the platform.

Q. Did you notice them after that? What did you see them do? What did you see them do after that?

30 A. They were shaking their arms and talking loud; there was a lot of commotion, and I waited for the signal from the conductor to start the train, and I had to walk the length of the train to pull the whistle cord to start the train.

Q. After that what did you do?

A. I looked out and saw a man get on the train.

Q. Was he white or colored?

A. Colored.

Q. Was he one of those three that you had seen there?

A. He was one of the three.

Q. What car did he get on?

A. He either got on the head end of the second car or the rear end, I am not quite sure. 10

Q. But he got on the car next to you?

A. Yes, sir.

Q. Was that the last you saw of him?

A. Yes, sir.

Q. Did you see him go in the car?

A. No, sir.

Q. Do you know whether the vestibule was lighted or not?

A. I couldn't say; I was in the baggage car.

Q. Do you know whether this was one of the men? 20
(Indicating plaintiff.)

A. I couldn't say.

Q. That is all you know?

A. That is all.

Mr. Apgar: That is all.

Cross-examination.

By Mr. Berry:

30

Q. Just where in the baggage car were you standing?

A. By the baggage car door, the head end of the first door.

Q. Near the locomotive?

A. Yes, sir.

Q. You were quite a distance away from where this group was?

A. Quite a distance, yes, sir.

Mr. Berry: That is all.

10

Mr. Apgar: That is all.

HOWARD MCCHESENEY, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

20

By Mr. Apgar:

Q. What is your occupation?

A. Conductor, Pennsylvania Railroad.

Q. How long have you been a conductor for the Pennsylvania Railroad?

A. I have been employed about 23 years with them, in train service.

30 Q. Were you on duty on the night of the 5th of December, 1931?

A. Yes, sir.

Q. What train were you running at that time?

A. 701.

Q. What time did that leave New York?

A. 12:05 A. M.

Howard McChesney—Direct

Q. What time was that train due, do you recall now?

A. I would have to refer to the timetable.

Q. I hand you a timetable schedule in effect September 27, 1931, and ask you whether that is the timetable or schedule of trains that were running on the 5th day of December, 1931?

A. Yes, sir.

10

Q. Now, will you refer to train 701?

A. Yes, sir.

Q. Is that the train you were running?

A. Yes, sir.

Q. What time was it to leave New York?

A. 12:10 at that time.

Q. What time was it due in North Asbury Park?

A. North Asbury Park at 1:55.

Q. Do you know whether the train was on time or not that morning?

20

A. To the best of my knowledge it was on time.

Q. What part of the train did you collect tickets in?

A. I worked from the front end of the train back.

Q. To what car?

A. Wherever I met the brakeman.

Q. Who had charge of the rear end of the train?

A. Harry Scales.

Q. Now, during the work you and he were doing, where did you two meet on that train?

30

A. Well, probably in the third car.

Q. Did you ever get back as far as the 5th and 6th car?

A. No.

Q. Were you at any time after you left New York back in the rear smoker?

A. No, sir.

Q. Did you furnish any cards or card table to any colored men back there?

A. No, sir.

Q. You received no tip?

10 A. No, sir; I wasn't in on that.

Q. The fare wasn't paid to you, was it?

A. No, sir.

Q. Now, do you remember stopping at Asbury Park?

A. Yes, sir.

Q. Do you remember whether any colored men got off there or not?

A. No, I don't remember.

Q. You don't recall anything of that kind at all?

20 A. No, sir.

Q. You stopped some little time?

A. Yes, sir.

Q. After you started, what car did you go into to collect tickets further down the line?

A. We had work to do there, mail and baggage to be unloaded. I satisfied myself that there was nobody on the combine.

Q. What do you mean by combine?

A. The first car, baggage and passengers.

30 Q. How about the second coach?

A. Nobody in there.

Q. How about the third one?

A. There was somebody in there, so I stepped to the ground and waited for the baggage man to finish his work.

Howard McChesney—Direct

Q. Where else did you go on that train?

A. I boarded the train and started to work the train towards the rear.

Q. At any time did you meet any person going through there?

A. I didn't meet anybody.

Q. Did anybody go by you?

A. Yes, a colored man brushed by me. 10

Q. In what car?

A. The third car.

Q. The third car counting the baggage car as one?

A. Yes, sir.

Q. Did he offer you any money for his fare?

A. No, sir.

Q. Did you collect anything from him, ticket or otherwise?

A. Nothing.

Q. But he did go by you? 20

A. He just went by me hurriedly; I didn't have a chance to get him.

Q. Where did he go?

A. Towards the rear end of the train.

Q. Did you see him go out of the car in which you and he were?

A. I knew he went out; I didn't come in contact with him again.

By the Court: 30

Q. When did you first learn about the accident?

A. On my arrival at the terminal at Bay Head.

Q. How about at Bradley Beach?

A. Well, some of the employes may have mentioned it to me; undoubtedly they did.

Q. What is your recollection? If you have no recollection you had better say so.

A. Well, I was positive of what happened after I arrived at Bay Head.

By Mr. Apgar:

10 Q. You heard something between Bradley Beach and Bay Head?

A. Naturally.

Q. Do you know who you heard it from?

A. Naturally, it would come through my brakeman.

Q. What is your memory?

A. I don't remember.

Q. Now, you were asked to state as to the condition of the vestibule and trap-door, were you not?

20 A. Yes, sir.

Q. And you gave the answers to the interrogatories that have been read here; is that right?

A. Yes, sir.

Q. And you have made for me subsequently an amended interrogatory?

A. Yes, sir.

Q. When you gave these answers had you in mind anything at all about the rear end of the train?

30 Mr. Berry: I object.

The Court: Objection overruled. Any mistake may be explained.

By Mr. Apgar:

Q. Did you or did you not understand that these

Howard McChesney—Direct

interrogatories had reference to the rear end car of that train?

A. I understood it referred to the train.

Q. Did you know anything about the vestibule and trap-door on the rear end of the train?

A. I know my instructions are that the door should be closed, and I had no occasion to open it.

10

By the Court:

Q. You, yourself?

A. I, myself, but I don't know of any condition arising that it should be opened.

Q. You are sure no condition arose it should be opened between New York and Asbury Park?

A. Yes, sir.

By Mr. Apgar:

20

Q. Did you, when you said in answer to the interrogatories that they were open on the right side going towards Bradley Beach, did you have in mind answering that question to have any reference to the vestibule and door on the rear end?

(No answer.)

By the Court:

30

Q. Did you inspect the train between New York and Asbury Park?

A. No, sir.

Q. With reference to the vestibules and trap-doors and the doors?

A. No, I did not.

Q. How were you in a position to answer the interrogatories, then? You have not investigated it, had you?

A. It is not my custom to go through and examine the trap-doors of the train.

10 Q. How would you know whether they were up or down?

A. By being in charge of a reliable employee.

Q. You assumed that they were doing that which the rule required?

A. Yes, sir.

Q. Do your employes always obey the rules? How about yourself?

A. I have fractured the rules.

By Mr. Apgar:

20

Q. Whose duty was it to inspect the rear?

A. Brakeman Scales.

Q. There was nothing reported to you that it was out of the ordinary?

(No answer.)

By the Court:

30 Q. But actually you did not know whether the door was open or closed between New York and Asbury Park on the morning of this accident?

A. Not from personal observation.

Mr. Berry: He has taken an affidavit that it was open.

By Mr. Apgar:

Q. How about as to the use of the rear end vestibule on the 6th car? Is it customary or not to use it?

A. It is not.

By the Court:

Q. Suppose the brakeman got off at Manhattan Transfer and opened it? 10

A. He would close it again. He wouldn't have to open the door at Manhattan Transfer. You step off on a level platform.

By Mr. Apgar:

Q. Did you intend your answer to apply to all the trap-doors or to those of which you have knowledge? 20

A. I didn't have in mind the rear trap-door, because of the fact we don't use it.

Q. Now, I am showing you a photograph, and ask you to look at it and tell me whether you can identify it?

A. Yes, sir.

Mr. Apgar: I offer these photographs in evidence.

(Photographs referred to marked in evidence Exhibits D2, D3 and D4, respectively.) 30

By Mr. Apgar:

Q. Are these photographs correct representations

of the vestibules and platforms on trains such as you were running?

A. Yes, sir.

Q. I notice on the doors of each of these shown in the photograph there seems to be a plate?

A. Yes, sir.

10 Q. I show you D1 for identification and ask you if that is exactly similar to those you see there?

A. Yes, sir.

Q. What have you to say as to whether similar plates were on the doors of this train at this time?

A. Yes, sir.

Q. I call your attention especially to Exhibits D3 and D4, as marked, near the ceiling on the right-hand side a notice; will you read what it is?

A. "Passengers must keep off of platforms until the train stops."

20 By the Court:

Q. What is the lettering on the plate?

A. "Passengers are not allowed to stand on platforms."

By Mr. Apgar:

Q. Now, I also show you D4, and ask you whether a similar notice is up in the ceiling there?

30 A. Yes, sir.

Q. What does that read?

A. "Passengers must keep off of platform until the train stops."

Q. Was that notice in the cars of this train at that time?

A. Yes, sir.

Howard McChesney—Direct

Mr. Apgar: I offer the plate in evidence.

(Plate heretofore marked D1 for identification marked in evidence Exhibit D1.)

By Mr. Apgar:

Q. How long had you been running on the Long Branch Railroad prior to this time? 10

A. Three or four years.

Q. You were well acquainted with it?

A. Yes, sir.

Q. Won't you look at the time-table and look at the distance between Long Branch and Bradley Beach and tell me whether that is accurate and known to be accurate by railroad men?

A. Yes, sir.

By the Court: 20

Q. What is the distance from Long Branch to your first stop? That is, of the train we are talking about?

A. At that time the next stop was West End.

Q. What is the distance from Long Branch?

A. The distance is 8/10 of a mile.

Q. What is the next one after that?

A. Elberon.

Q. What is the distance? 30

A. The distance is 1.6 miles.

By Mr. Apgar:

Q. I think your subtraction is wrong; it is 1.4, isn't it?

A. Yes, sir.

By the Court:

Q. What is next?

A. Allenhurst.

Q. What is the distance from station to station?

A. The difference between 54.7 and 55.2.

Q. How much is that?

10 A. That would be 1.5.

Q. How about from Allenhurst to North Asbury Park?

A. 1.8 miles.

Q. Are you sure of that?

A. .8 of a mile.

Q. What is the distance from North Asbury Park to Asbury Park?

A. That would be .7 of a mile.

Q. What is the distance from Asbury Park to
20 Bradley Beach?

A. .1 mile.

Q. It is a mile less one-tenth, isn't it?

A. It is .9 miles.

Q. Was that train 701 scheduled regularly to stop at each one of those stations on that time-table at that time?

A. At that time Bradley Beach was a flag stop.

By Mr. Apgar:

Q. Every one of those stations you have named
30 between Long Branch and Bradley Beach—was that train scheduled to make all those stops?

A. Yes, sir.

Q. The owl train always made most of those stops, didn't it?

A. Yes, sir.

By the Court:

Q. It had stopped at each one of those stations coming down this night?

A. Yes, sir.

Mr. Apgar: I offer in evidence the time-table.

10

(Time-table referred to marked in evidence Exhibit D5.)

By Mr. Apgar:

Q. How long have you been a conductor on a vestibuled train? How long had you at the time of the accident?

A. Approximately eight or ten years.

Q. What is the effect of the vestibules and trap-doors as to making time on a road where you have the stations together as they were between Long Branch and Bradley Beach? What is the effect on the time if you have to open and close them after the train stops at each station and then close them before the train starts?

A. It would result in a terrible delay; you would not be able to make your time.

By the Court:

30

Q. You observe the rules; what was the rule in force?

A. The rule is on a local train of this type the doors are all to remain open.

Q. On which side?

A. On the right-hand side—on the side discharging passengers.

Cross-examination.

10 By Mr. Berry:

Q. Will you say that Mr. Potter here was the man who went past you in the third car after the train left Asbury Park?

A. I don't recognize him as being the man.

Mr. Berry: That is all.

Mr. Apgar: That is all.

20

Mr. Apgar: I offer in evidence the Exhibit P1 for identification, which Potter says has his signature attached thereto as shown by Dr. Hill and Dr. Parry, is the record in the hospital of the sickness, and which Dr. Parry testified as to some of the items and others in Dr. Pietre's notes, and Dr. Hill himself has testified that was the record.

30 Mr. Berry: I object to any portion thereof except such as has been identified by Dr. Hill.

Mr. Apgar: I offer that which has been identified by Dr. Parry.

The Court: You cannot offer that. There is ap-

Discussion

parently some statement by Dr. Pietre preceding his signature. Counsel has had no opportunity to cross-examine Dr. Pietre on it.

Mr. Apgar: I ask for a continuance of the case until tomorrow morning to get Dr. Pietre here.

Mr. Berry: I object. 10

The Court: The difficulty is you did not subpoena Dr. Pietre.

Mr. Apgar: The doctor said positively he would be here if it could be arranged so that he could come at 10 o'clock in the morning and not have to put off an operation. He went to the hospital and to New York. I don't know why he should not have come, but we usually take a reputable doctor's word, that what he says he will do he will do. 20

Mr. Berry: That is not an excuse for a continuance at this time. This defendant knew weeks in advance that this case would be reached yesterday or today. They had plenty of opportunity to subpoena witnesses.

Mr. Apgar: We were ready and have had everybody else we wanted here. 30

The Court: Haven't you a matter you desire to get in through Pietre already testified to by Parry and the other doctor?

Mr. Apgar: Dr. Parry has not testified to it, but the other man has testified to it. Pietre's was a separate examination, entirely apart from that of Dr. Hill. Dr. Hill was not there when he asked the plaintiff to answer these questions. We understood Dr. Parry had an appointment in New York this afternoon.

10

The Court: I cannot get your viewpoint; it is material that Dr. Pietre be examined.

Mr. Berry: It certainly is not fair to the plaintiff to have another case go on and come back and hear this case piece-meal.

20

The Court: You will not agree that if Dr. Pietre were here he would say what is over his signature in the record?

Mr. Berry: Not without opportunity to cross-examine him.

30

The Court: Then I think you are putting yourself in a position where the merit of the present application for a continuance is apparent. In other words, the defendant now says that if Dr. Pietre were here he would testify to a certain matter which is already entered upon the record.

Mr. Berry: It is not our fault that Dr. Pietre is not here; they should have subpoenaed him.

The Court: It strikes me that they are entitled to have Dr. Pietre produced. Of course, they could have subpoenaed him, probably should have done it

yesterday, but evidently they did have some arrangement with him through counsel here.

Mr. Apgar: I will put Mr. Hill on the witness stand and tell the conversation. The doctor said it squarely and fairly—we think he is a man of truthfulness—he said he would come, did not want any subpoena, and we took the man's word.

The Court: Well, you will not consent to a stipulation that if Pietre were here he would testify to the matter that is above his signature in the hospital record because you say you want to cross-examine him; I think you are entitled to cross-examine him.

Mr. Berry: There is nothing to indicate the hour at which this was recorded except 12/5/31.

The Court: I am strongly inclined to grant a continuance unless you will consent that if he were here he would testify to the matter that is in the record.

Mr. Berry: What position does that put us in with relation to the cases that are to follow?

The Court: I will give you preference tomorrow morning at 10 o'clock. If Dr. Pietre is not here we will have to close the case. I think that would be the better way to dispose of the present impasse. While it is unfortunate that this case cannot be completed at the moment, the testimony of Dr. Pietre undoubtedly would be material from the standpoint of the defendant, and counsel for the plaintiff ought to have an opportunity to cross-examine. I will grant you a continuance until 10 o'clock tomorrow morning.

10

20

30

Howard McChesney—Direct
Dr. Raul Pietre—Direct

Tuesday, January 16, 1934.

HOWARD MCCHESENEY, recalled by defendant.

10

By Mr. Apgar:

Q. Do you know the length of a steel vestibule car such as was on your train that night?

A. 80 feet.

Mr. Apgar: That is all.

20

DR. RAUL PIETRE, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Apgar:

Q. You are a physician?

30 A. Yes, sir.

Q. Were you connected in 1931 with the Ann May Hospital, December, 1931?

A. Yes, sir.

Q. Do you recall whether this plaintiff was a patient or not?

Dr. Raul Pietre—Direct

A. Yes, sir.

Q. What time did you see him on that day first?

A. I don't recall.

Q. I show you what has been identified as the record, and ask you to look at this page and see whether that name "Pietre" is your signature?

A. That is my handwriting and name.

Q. Do you recall making that minute? 10

A. I don't recall the actual doing of it, but it is mine.

Q. What day was that written?

A. The 5th of December.

Q. What year?

A. 1931.

Q. You have no personal recollection excepting as you refresh your memory?

A. That is all.

Q. Do you remember what he said as to how the accident happened, having looked at that paper and refreshed your memory? 20

Mr. Berry: The paper does not indicate that Potter said anything.

By the Court:

Q. Having looked at it, are you able to tell whether he said anything or not, and if so, what? 30

A. This is clear to me, what I have written, but I don't recall just how I got the information.

Q. Did you get it from Potter?

A. I don't remember, your Honor.

By Mr. Apgar:

Q. You must have got it from someone or you wouldn't put it there, would you?

A. Naturally.

Q. From the way it is written do you know whether it was said to you? You see in there the
10 word "No"?

Mr. Berry: I object to counsel's repeating what is in it.

The Court: Let him say whether it does refresh his memory and whether he did talk with the man.

By the Court:

20 Q. Is it recalled to your mind that you talked with him?

A. I can't recall exactly what happened and what was said. I have a clear recollection of the injuries; I was more interested in that. I don't know whether I got this information from him or whether it was given to me by somebody else.

By Mr. Apgar:

30 Q. You wouldn't have put it down there if it wasn't true?

(No answer.)

The Court: He might have put it down as a result of something said by somebody else.

By Mr. Apgar:

Q. If you don't recall whether he said it or not, would you put it down as part of a record which is presumed to be a truthful record unless verified by Mr. Potter or someone else?

A. It might have been information derived through accident.

10

Q. Have you any doubt in your own mind as to whether or not that was the way the accident happened?

Mr. Berry: I object.

The Court: Objection sustained.

Mr. Apgar: Exception.

20

(Exception noted as ground for appeal.)

By Mr. Apgar:

Q. You have told us about this to the best of your recollection?

A. Yes, sir.

Cross-examination.

By Mr. Berry:

30

Q. Doctor, what was Potter's condition on Sunday morning, December 5, 1931?

Mr. Apgar: I object as not being proper cross-examination.

The Court: Really the doctor hasn't said anything.

Mr. Berry: I will make him my own witness for that purpose.

The Court: I will allow you to do that.

10 (Question read as follows:)

“Q. Doctor, what was Potter's condition on Sunday morning, December 5, 1931?”

20 The Witness: When I saw Potter that morning I recollect one thing clearly in my mind, because I never have seen a wound so dirty. There was a large laceration of the scalp full of coal dust, so full of coal dust that it was impossible to clean it out the first day. That is one thing, and then the pressure, the intracranial pressure was increased.

Q. Pressure on his brain?

A. Yes, it was increased considerably.

By the Court:

Q. Did he have a concussion?

A. Yes, sir, with edema.

30 Q. Swelling?

A. Yes, sir.

By Mr. Berry:

Q. How did the pressure compare with normal pressure on the brain?

Dr. Raul Pietre—Cross

A. I don't exactly recall what the figure was; it must be in the chart, if I may look at it, but it was considerably increased.

Q. Under such conditions, Doctor, would it not be probable for a man to suffer from loss of memory for a considerable length of time?

Mr. Apgar: I object; he is not qualified as an expert. 10

By Mr. Berry:

Q. What was his mental condition, Doctor?

Mr. Apgar: I object to that; he wasn't put on the witness stand as an expert.

The Court: He is being used as his own witness. 20

Mr. Apgar: Then he must use him as an expert.

By Mr. Berry:

Q. How long have you been practicing?

A. 13 years.

Q. In what lines have you specialized?

A. The last 7 years, neurology.

By the Court:

30

Q. Would that involve the central nervous system?

A. Yes, sir.

(Previous question read, as follows:)

“Q. Under such conditions, Doctor, would it not be probable for a man to suffer from loss of memory for a considerable length of time?”

Mr. Apgar: I object; it is leading.

The Court: Withdraw it and reframe it.

10

By Mr. Berry:

Q. Do you recall what time of day you saw him, Doctor?

A. I don't recall. May I ask a question?

The Court: Yes.

The Witness: What day of the week was it?

20

Mr. Berry: Sunday.

Mr. Apgar: I object to counsel answering questions of the witness, and move to strike it out.

The Court: Strike it out.

By the Court:

30 Q. Do you remember when you saw him?
A. No, sir.

The Court: What is the use of pursuing it?

LESLIE POTTER, plaintiff, recalled by plaintiff in rebuttal.

Direct examination.

By Mr. Berry:

Q. Do you recall having heard Dr. Hill testify yesterday?

10

A. Yes, sir.

Q. Do you remember Dr. Hill testifying that he asked you on Sunday morning, December 5, 1931, how you were injured, and that you told him you jumped off of a train?

Mr. Apgar: I object to the form of the question; he is putting words in the witness' mouth.

20

The Court: He is quoting what Dr. Hill said. Put it directly.

By the Court:

Q. You heard the doctor testify yesterday to that effect?

A. Yes, sir.

By Mr. Berry:

30

Q. Do you remember any such conversation with Dr. Hill?

A. No such conversation whatsoever.

By the Court:

Q. Well, did you have such a conversation with Dr. Hill?

A. No, sir.

10 MOTION FOR DIRECTION OF VERDICT.

Mr. Apgar: I move for a directed verdict upon the ground that the unquestioned testimony in this case shows that the plaintiff, taking his own testimony, as we must on a motion to direct, was to the effect that he got on this train just about as it was to start; that he walked through one car, where there were plenty of vacant seats and no passengers in that car at all. He attempts to cross the vestibule, reaches for the door-knob, and, as he says, falls out. He says he got back on the train to get a pair of rubbers. Now, this brings the case clearly, to my mind, under Sections 39 and 55 of the Compiled Statutes.

(Argument by counsel.)

The Court: I incline to the view that there is a prima facie case, at least, here, which may have been rebutted so far as the testimony is concerned, but that situation involves the jury passing upon the weight and credibility of the testimony.

Mr. Apgar: The clear preponderance of evidence in this case shows that the story told by Potter can-

Motion for Direction of Verdict

not be the correct one as to how the accident happened, and that it did happen by reason of the plaintiff walking off of the rear platform of the train. I ask you to consider the question as to the weight of the evidence, and if in your judgment the preponderance or weight of the evidence is with the defendant to so direct the jury to consider and find a verdict accordingly. 10

The last ground is on the contributory negligence of the plaintiff.

The Court: I am not prepared to say at the moment that even though the trial Judge may have been impressed with the fact that the weight of the evidence may rest with the defendant in this case, that he has a right to withdraw that question from the jury, who are judges of the facts.

Whether on a rule, in the event of an adverse verdict, the trial Judge, who now hears such rules, would set aside such a verdict, would seem to be a post facto right rather than one involving the disposition of a motion for a direction on such a ground. 20

As I view it, that seems to be the legal phase involved, and, in the circumstances, I conclude to submit the questions at issue with regard to the negligence of the defendant company and the contributory negligence of the plaintiff to the jury. 30

Mr. Apgar: I pray an exception for such refusal upon all the grounds urged.

PLAINTIFF'S REQUESTS TO CHARGE.

On behalf of the plaintiff the Court is respectfully requested to charge the jury as follows:

- 10 1. Where a person boards a railroad train for the purpose of becoming a passenger, and with the means and intention of paying his fare, the actual payment of the fare is not essential to the establishment of the relation of carrier and passenger.
2. Where a person boards a train with money sufficient to pay his fare, it will ordinarily be presumed that he intends to pay his fare on demand.
- 20 3. If you find that when the plaintiff reentered the train of the defendant at the Asbury Park Station he had sufficient money to pay cash fare to Bradley Beach, and intended to pay his fare, you must determine that he was a passenger, and entitled to that degree of care due a passenger, even though he had not actually paid his fare at the time of the mishap.
- 30 4. A common carrier of passengers must use a *high* degree of care to protect them from danger that foresight can anticipate.
5. The obligation of the carrier is to use a degree of care as high as is necessary for the protection of passengers against injury.

Defendant's Requests to Charge

6. Where a railroad company provides its passenger cars with vestibule doors and platforms, it owes its passengers the duty to exercise a high degree of care to see that such doors and platforms shall be closed and the vestibules rendered reasonably safe.

7. Since the chief purpose of a vestibuled train is to furnish to passengers a safe means of passage between the cars, it is the duty of train employes to exercise a high degree of care to see that the trap-doors over the steps of such cars are closed and kept closed while the train is in motion. 10

8. It was the duty of the trainmen to close the vestibule doors and platforms immediately upon the train leaving the station.

9. If you find that any witness has intentionally testified falsely in any respect, you would be justified in totally disregarding the entire testimony of such witness. 20

DEFENDANT'S REQUESTS TO CHARGE.

The Court is respectfully requested to charge:

1. That the mere fact that an accident happened is no proof that the defendant was negligent. 30

2. That negligence in the performance of a duty to use due care for the safety of plaintiff cannot be imputed to defendant unless the facts proved will fairly support the inference that the duty existed.

Defendant's Requests to Charge

3. That the burden of proof is upon the plaintiff to prove by the greater weight of evidence that the defendant was guilty of negligence, and if he has failed to do so your verdict must be for the defendant.

10 4. That if plaintiff was negligent to any extent whatsoever, which contributed to cause the accident, he cannot recover, and your verdict must be for the defendant.

5. That if plaintiff went on the platform of the car in violation of the printed regulations of the defendant, posted up in a conspicuous place inside of said car, and in consequence received the injuries complained of, he cannot recover, and your verdict must be for the defendant.

20 6. That the action of the defendant's trainman in opening the vestibule door as the train was running and before reaching the station was not an invitation for the plaintiff to alight before the train stopped.

7. That the action of the defendant's trainman in opening the vestibule door as the train was running between stations was not an invitation for the plaintiff to go upon the platform of the car.

30 8. That if you find that the evidence is equally consistent with the existence or non-existence of negligence, your verdict must be for the defendant.

9. That in reaching your verdict, more weight must be given to the affirmative testimony of witnesses who saw or know that the defendant had

Defendant's Requests to Charge

warning signs posted in its passenger car, than to the negative testimony of witnesses who testified merely that they did not see the same, even though the latter were in a position to see.

10. That the actual management of the train and not the resultant effects should determine the question of the negligence of the defendant. 10

11. Considering the short distance between stations between Long Branch and Bradley Beach, at which the trains must stop, it was not negligence on the part of the defendant company to leave the vestibule and the trapdoors open between such stations.

12. Section 55, of the Statute on railroads and canals, and which is the law in our State at the present time, provides:

“If any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injuries sustained, and shall not recover therefor any damages from the company owning or operating said railroad.” 20

If, from the testimony given in this case, you should find that the plaintiff stepped off the rear platform of the rear car, he cannot recover in this case. 30

13. Section 39 of our statutes applying to railroads and canals, and which is the law at the present time, provides that:

“In case any passenger on any railroad shall be injured by reason of his going or remaining on the

platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury; provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers (P. L. 1903, p. 666).”

10 If it appears, as the testimony of the plaintiff himself would tend to show, that he was not passing from one car to another for the purpose of obtaining a seat, but for the purpose of finding a pair of rubbers, or some other article which had been left in the rear car in which he had been riding from New York to Asbury Park, and that he then fell off the train, between the cars which he was passing through for the purpose of finding such article, then

20 the provisions of the above quoted statute will apply, provided the printed regulations of the company, relative to standing on the platform, has been posted and complied with by the defendant company, and the plaintiff cannot recover.

14. Whether the cars be vestibuled or not, the above statute is in effect as it has been quoted, and applies to all such cars.

30 15. If you find the plaintiff's testimony is false in one or more particulars, you have the legal right to reject it all, and apply the legal maxim, "False in one—false in all," and should so do in this case.

16. If the plaintiff, Leslie Potter, jumped off a moving train he cannot recover.

CHARGE OF THE COURT.

LAWRENCE, J.:

Members of the jury, you have just listened to the respective counsel for the plaintiff and defendant here express their views as to the merits or demerits of the case from their standpoint, and you will understand, of course, that they are talking in behalf of their clients. For that reason they become partisans for the moment of the cause which they advocate, and, while a license is given counsel under our rules of procedure to say almost anything they feel like saying, sometimes, indeed, to go entirely outside the evidence and argue matters that have no place in the case properly, you will understand that their individual views become of no importance unless based upon the evidence in the case received during the trial. 10 20

You may have noticed that respective counsel called witnesses, and, indeed, the parties, falsifiers, using the short and ugly term instead of a more polite one, such as economizing on the truth, but, because they call the witnesses or the parties by such a term does not make it so.

You are the judges of the facts, and it is for you to say whether you believe the testimony as given, no matter from which side it comes. I might express my own opinion as to where the weight of the credible evidence rests in this case, but unless it be supported by the evidence and in accordance with your views as judges of the facts, my opinion would not mean anything. 30

Now, the case is important enough, ladies and gentlemen, to consider it solely from the standpoint of the merits, impartially. It makes no difference whether the plaintiff was seriously hurt and the defendant is a railroad company. You are not going to decide this case from any such standpoint whatever. The plaintiff may have been hurt through his
10 own fault. Such things do happen, and in a proper case where the evidence so shows the plaintiff cannot recover damages of the defendant merely because he was hurt. That is not the law. He has a right to come here, but he cannot recover unless he shows negligence on the part of the defendant, through its employes, and that that negligence was the proximate cause of his injury. He does not have to show that he was not guilty of contributory negligence. That is a defense, and the railroad company is setting it up in this case, and if you found that the
20 railroad company was negligent as claimed by the plaintiff, but, at the same time, you also found that he himself was guilty of contributory negligence, that is to say, that the defense in that respect has been made out under the fair preponderance of the proof, he could not recover, no matter how badly he was hurt.

This is a case in which a sympathetic attitude might be assumed as you sit and listen to the nature
30 of the injury which this plaintiff received. He was badly hurt; there appears to be no question about that, but that is not enough. Suppose he was hurt through his own fault, or it was not due to the negligence of the defendant at all? Suppose it appeared that he was not a passenger on the train, with rights

Charge of the Court

of such at the time of the accident; in other words, that, at most, he was a mere licensee to go back and do that for his brother which, perhaps, the latter should have done himself. He volunteered to go back to the train to recover a pair of rubbers that had been left, not his own, but his brother's; that he went upon the train not with the idea of paying his fare to Bradley Beach, merely to recover a pair of rubbers belonging to his brother, and after the train got in motion, then, having made his search and either discovered them or did not discover them (the evidence does not indicate whether he got the rubbers or not), and then, having performed that errand, he jumped off himself, why, of course, he did a foolhardy thing and got hurt, and he could not recover if the evidence so shows under the fair preponderance of the proof. 10

Look at it from a practical standpoint, not from a sympathetic standpoint. 20

A railroad is not an insurer of safety of its passengers, and does not undertake to be liable or responsible under the law to a person who gets on a moving train and jumps off. That is not the law. Common sense would indicate that, irrespective of the law. So, you will approach the case apart from any consideration of sympathy.

Now, what is the case? It appears that the plaintiff, with two companions, one of whom was his brother, got on the train in question at the station of the Pennsylvania Railroad in New York about midnight, with the intention of going to Asbury Park. It does appear that they paid their fare and became passengers. 30

When the train arrived at Asbury Park they got off, in what condition depends upon whom you believe in the case. The trainmen say that at least one or more of the party was under the influence of intoxicating liquor. They do not say that the plaintiff was, but the evidence would fairly tend to indicate that after they had alighted it was discovered that
10 the brother of the plaintiff had left his overshoes in the car where they had been sitting.

The plaintiff's statement is that he volunteered to go back upon the train for the purpose of recovering the lost overshoes. His statement is that he intended to pay his fare from Asbury Park to Bradley Beach, the next station. Now, whether that was true or not is sharply contradicted by witnesses produced in behalf of the defendant company, namely, the trainmen, two of them, the conductor
20 and the brakeman, and their testimony is circumstantial. They do not say that they recognized this plaintiff as the man, but they do say that after the train had gotten in motion a colored man came through the third car where the conductor then was, and went into the next car, in which the brakeman was; that that individual brushed by the brakeman, who asked him for his fare. He said, "You already have my ticket."

Then, it appears again in a circumstantial way
30 that occupants of the smoking car, which was the last one, saw a colored man come in, look into the compartment where the three men had been sitting before the train arrived in Asbury Park, and then passed through the car to the rear, one of the witnesses testifying that he also saw him look into the

Charge of the Court

compartment in the rear and open the door and pass out to the platform, and did not return. Two of the witnesses testified that, impressed with the incident, they went on the rear platform and found no one there, but the trapdoor of the vestibule was up on the right side.

Now, it does appear that this plaintiff fell off, or, as the railroad company claims through at least one witness, jumped off on that side and was injured. 10

Now, you cannot arbitrarily accept the plaintiff's statement as to how the accident happened as true and ignore all other evidence in the case. The law does not permit you to do that, nor could you arbitrarily assume the position that in no circumstances would you believe a railroad man or employee. You cannot do that. These men are brought here and sworn to tell the truth. You have seen them; you have observed their manner and demeanor on the witness stand. Does it appear to you that they were falsifying? The weight and credibility of their testimony is for you, but you could not prejudicially disregard it merely because they were employes of the defendant company. Indeed, one or more of them were not employes! As I recall, one, at least, was employed by another railroad company. There again you could not assume that because he was employed by another railroad he was not telling the truth under oath in this court room. 20 30

I am indicating this to you for the reason that the case ought to be considered purely from a meritorious standpoint, without prejudice and without sympathy merely because this plaintiff was hurt. If you are going to award damages merely because he

was hurt, then we might as well close up our courts and say that anyone who is hurt, no matter in what circumstances, whether it be his own fault, or whether it be due to the negligence of the person of whom recovery is sought, nevertheless he would be entitled to recover because he was hurt. That is not the law. He has undertaken to prove to you
10 under the greater weight of the credible legal evidence that his injury was due to the negligence of the defendant company through failure of its employes to close and keep closed while he was on the train the trapdoor leading to the steps on the right side of the car as the train was proceeding towards Bradley Beach. That is what he charges, that that was the proximate cause of his injury. In relation to that claim, he also says that as he was passing through from one car to the other, and about to
20 reach for the handle of the next car, there was a jolt of the train which threw him off on the right side, and if the trapdoor had been down he would not have fallen, because it was a vestibuled train.

Now, I may say to you that there was a statutory provision passed in 1903 to the effect that a passenger was obliged to occupy a seat in a coach; that if he passed from one car to another and was injured in the act of doing so, if it appeared that the company had provided adequate seats, which made it unnecessary for him to so travel on a moving train from one
30 car to another, there could be no recovery.

I am not able to say to you that that statute applies to this suit, for the reason that the train in question was a vestibuled one, and it may be fairly said that vestibuled trains are provided for the

Charge of the Court

safety of passengers particularly in passing from one car to another, but, whether that be so or not, if the company provided such a train, no matter what the motive may have been, then it was under the duty of exercising a high degree of care to see that such train was kept in proper condition for the safety of its passengers.

While a railroad company is not an insurer of 10
safety of its passengers, it is obliged to exercise a high degree of care in providing safe passage for them. That high degree of care is usually spoken of as the degree of care commensurate with the risk of danger of one traveling upon railway trains. Consequently, where the company provides a vestibuled train it is under a duty to use that appliance, as it were, for the purpose for which it was evidently intended, namely, to keep the doors closed while the train is in motion, that is to say, the vestibule part 20
of the train.

Here the plaintiff claims that the employes were negligent in failing to close the doors between the second and third passenger coaches, because that is where, according to his statement, he fell off.

Now, that develops a sharp contradiction in this case, for the reason that the employes of the company, and others who were sitting in the smoking car, have testified here under oath that a colored man went through the smoker to the rear platform 30
and was not thereafter seen.

Now, has he shown you under the fair preponderance of all the proof in the case, no matter from which side it comes, that the accident occurred by his falling off between the second and third cars?

That is the test. If you are unable to determine where the weight of the evidence rests in that regard, in other words, you say to yourselves in deliberating upon the case, where does the truth rest in all reasonable probability? Is the plaintiff's statement the correct one, that he fell off due to the jolting of the train through the negligence of the defendant company's employes in not closing the trapdoor in the vestibule between the second and third cars, or does the evidence tend to indicate that he really jumped off from the rear car?

Now, if you are unable to say where the weight of the evidence rests in that regard, considering all the testimony, then you would fail to find that the plaintiff had proven his case under the greater weight of the credible legal evidence. If you so find, then he cannot recover.

20 If, on the other hand, you believe the testimony of the witnesses for the defendant, and that the circumstances identify this plaintiff as the man who came through the smoking car and passed out on the rear platform, and you couple that with the statement of the physician at the hospital, that the plaintiff had said to him that he had jumped off, why, necessarily, that is the end of the case and there can be no recovery.

30 Now, what was the relation of the plaintiff to the train? That, also, is a matter for your consideration. Was he a passenger? Was he a trespasser, or was he a mere licensee, as to whom the railroad company owed the duty to refrain from any wilful negligence? That means an intentional act to cause an injury. There is no evidence of any wilful negli-

Charge of the Court

gence in this case on the part of the defendant company or its employes.

His statement is that he got back on the train intending to pay his fare, but that would not be controlling, the mere fact that he says it. The circumstances would have to bear him out. You have the sworn statement of the brakeman that a colored man brushed by him, of whom he asked for his fare, and he said, "You already have my ticket"; if you believe that occurred, that is the end of this case; there can be no recovery. Therefore, I say his mere statement that he intended to pay his fare would not necessarily be a fact unless it is proven, and if the circumstances are against such a finding under the greater weight of the credible evidence you may say that it is not proven to your satisfaction that he intended to pay his fare. 10

Now, if he did not intend to pay his fare, and got upon the train for the purpose stated, as a mere volunteer, the most that could be said of his relation to the train at the time is that he was a licensee, although it does not appear that he said to anyone that he came back on the train for the purpose of recovering the overshoes. It would have been very easy for him to have said to any of the trainmen that the overshoes had been left in the car and that that accounted for his presence on the train, desiring to recover them. It does not appear that he said anything to anybody. 20 30

If you should find that he got on the train in these circumstances, and that he has failed to satisfy you that he intended to pay his fare to Bradley Beach, then, as I say, the most that he could be regarded

would be as a licensee to whom the railroad company owed the duty of refraining from hurting him through wilful negligence. There is no such evidence in the case, and he, therefore, would not be entitled to recover if you find that relation to have existed.

10 If, on the other hand, he is not to be regarded as a mere licensee because he failed to make known to the employes why he returned to the train, then you may say that he was a mere trespasser, to whom the railroad company owed no duty other than to refrain from any wilful act of negligence. There, again, there is no evidence in that regard, and he could not recover.

20 Assuming, however, that you found that the negligence he charges has been proven to your satisfaction, then you have a second question set up by the defendant company, that, in any event, the evidence proves that he was guilty of contributory negligence. That phase of negligence is said to be present in a given case when the injured person, by his own negligence, has contributed to the injury in such a way that but for it he would have received no injury from the person he charges with responsibility therefor.

30 Now, if the plaintiff walked through the smoking car, and, not finding the rubbers, or, indeed, if he had found them and passed out to the platform, and, not realizing the train was going at the rate which it actually was at the time, and jumped off, why, then, of course, he assumed the risk of a foolhardy act, and in the event that he was hurt because of that fact, then you would have found contributory negligence and he cannot recover.

Charge of the Court

I do not think that it is necessary to charge all of the requests that have been submitted to me by the respective counsel. After all, the rules of law are comparatively simple as they apply to the case. Some of these requests are binding instructions which I decline to give.

The elementary principles of law applicable to the case are, first, that the plaintiff carried the burden during the progress of the trial of proving to your satisfaction, under the greater weight of the credible evidence, the negligence of the defendant company, through its employes. If you find that he has so proven, and that the defense of contributory negligence has not been shown, and you find his relation to the train at the time, under the greater weight of the credible evidence, was that of a passenger, not merely based upon his statement, but upon the evidence, and that the accident occurred in the vestibule or on the platform of the vestibule between the second and third cars, as he says, and that is proven under the greater weight of the credible evidence, and that he fell because the train jolted him off, the employes having negligently failed to close the vestibule door on that side, you may say that he has made out a case which would entitle him to recover. In that event, you would be justified in awarding him a sum which, in your judgment, would properly and adequately compensate him for the injury or injuries he received, you ascertaining the nature of the injury or injuries, the extent of them, the pain and suffering that in all reasonable probability accompanied them; the length of time he was incapacitated, if any,

and if there be a permanent phase to the injury you will, of course, take that into consideration in ascertaining the nature and extent thereof, and then what sum would compensate is left to your sound judgment and discretion.

I notice counsel for the plaintiff designated the amount that he felt would be reasonably right to
10 award this man. You are not controlled by that statement. You are judges of the facts. It is your duty to function as jurors in that regard. What sum, therefore, would compensate is left entirely to your sound judgment in the exercise of a fair discretion. By that I mean an impartial and considerate exercise of discretion.

Now, whether this Plaintiff recovers at all in this case depends upon how you will find the state of the evidence. He has had his day in court; he has
20 had an opportunity to produce all of the available evidence. The defendant, likewise, has had its day in court and has produced its evidence. Now, where the weight of the believable and credible evidence rests, therefore, becomes a question of fact for you to determine.

I reiterate what I said at the opening, you cannot decide this case from the standpoint of sympathy because this plaintiff was hurt. If he was hurt through his own fault, then he would have to take
30 the responsibility. He can only recover in the event that you find the issue of negligence under the greater weight of the credible evidence. If you find to the contrary, then a verdict of no cause would necessarily follow.

If you are unable to say where the weight of the

Charge of the Court

evidence rests, then he would have failed to perform the duty that was upon him to prove the case under the fair preponderance of the proof.

In either aspect, if you fail to find where the weight of the evidence rests, there could be no recovery.

It is only in the event that he established the negligence of the defendant under the fair preponderance of the proof, and the defense of contributory negligence has not been made out, that he can recover. 10

I have said sufficient, it would seem, to indicate to you the issues in the case and the rules of law applicable, and when you decide it in accordance with the evidence, determining where the greater weight of the credibility rests, and recognize the rules of law I have given you, you will have done your full duty. 20

Render a verdict impartially, considerately, without sympathy. We all sympathize with this man, because he was badly hurt, but that is not enough to justify your putting your hands in the treasury of the defendant company and giving money to him. Right to recover must be based upon the rules of law and under the evidence as you have listened to it.

I may say to you, members of the jury, that there was a request to charge on behalf of the plaintiff to this effect, that where a person boards a railroad train for the purpose of becoming a passenger, and with the means and intention of paying his fare, the actual payment of the fare is not essential to the establishment of the relation of carrier and 30

passenger, but he cannot keep that information to himself. There must be evidence in the case from which the circumstances would warrant the finding of fact that the man did return with the intention of paying his fare. His bare statement is not enough; it must be supported by circumstantial evidence which indicates that when he goes into the
10 car and says that he intended to pay his fare, that that was the fact. In other words, if the circumstances are to the contrary you would not be bound by this request to charge.

Where a person boards a train with money sufficient to pay his fare, it will ordinarily be presumed that he intends to pay his fare on demand. That is right, but you have in the case the evidence that a brakeman did ask for his fare and he said, "You
20 already have my ticket." Whether you believe that statement or not is for you to say. Therefore, I say his bare statement that he intended to pay his fare, if not supported by the weight of the evidence, would not be enough.

The third request on the part of the plaintiff is as follows: If you find that when the plaintiff re-entered the train of the defendant at the Asbury Park station he had sufficient money to pay cash fare to Bradley Beach, and intended to pay his fare, you must determine that he was a passenger, and
30 entitled to that degree of care due a passenger, even though he had not actually paid his fare at the time of the mishap. I decline to so charge, for the reason that it is for the jury to say whether the proof shows that he entered the train with intention of paying his fare to Bradley Beach, and you can-

Charge of the Court

not ignore the testimony of the brakeman, nor, I may say, of the conductor, who testified that a colored man passed him in the car where he then was, and went on to the next car.

Mr. Berry: I respectfully pray an exception to the Court's refusal to charge request number three.

I also note an exception to the Court's charge to the effect that the mere statement of the plaintiff that he intended to pay his fare is not sufficient, because under his testimony he had not met any employee of the railroad with whom he could communicate. 10

The Court: I may add that while I have spoken of the mere statement of the plaintiff that he intended to pay his fare, that does not mean you have no right to consider his credibility, the weight of his testimony, in view of circumstances as developed by other testimony of other witnesses. You are the judges of the facts, of course, and the weight of the testimony is for you. If you do believe that he became a passenger, then his relation to the train would involve rights as such, with a duty on part of the company and its employes to use a high degree of care for his safe passage to Bradley Beach, to where it was said he intended to pay his fare, according to his own statement. 20 30

Mr. Apgar: I take exception to so much of your Honor's charge which says the statute does not apply; to charging the 6th, 7th and 8th of plaintiff's requests.

I also take exception to your Honor's not charging all defendant's requests that you did not charge.

I except to all the Court said as to the statute not applying to vestibuled trains.

10

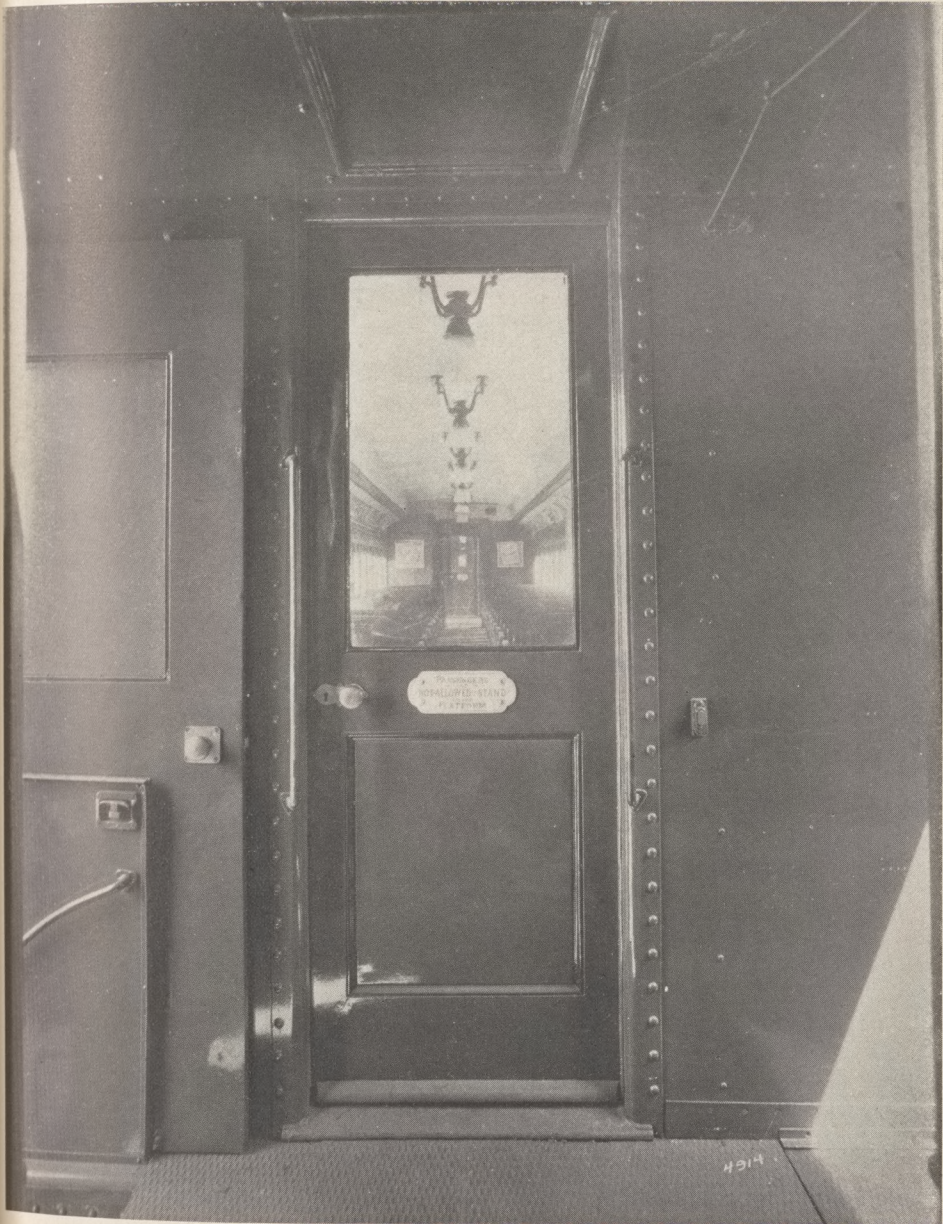
EXHIBIT D1.

Is the brass plate fastened on the door and on which are the words: "Passengers are not allowed to stand on the platform." The same is clearly read on the door of Exhibit D2.

20

30

EXHIBIT D2.



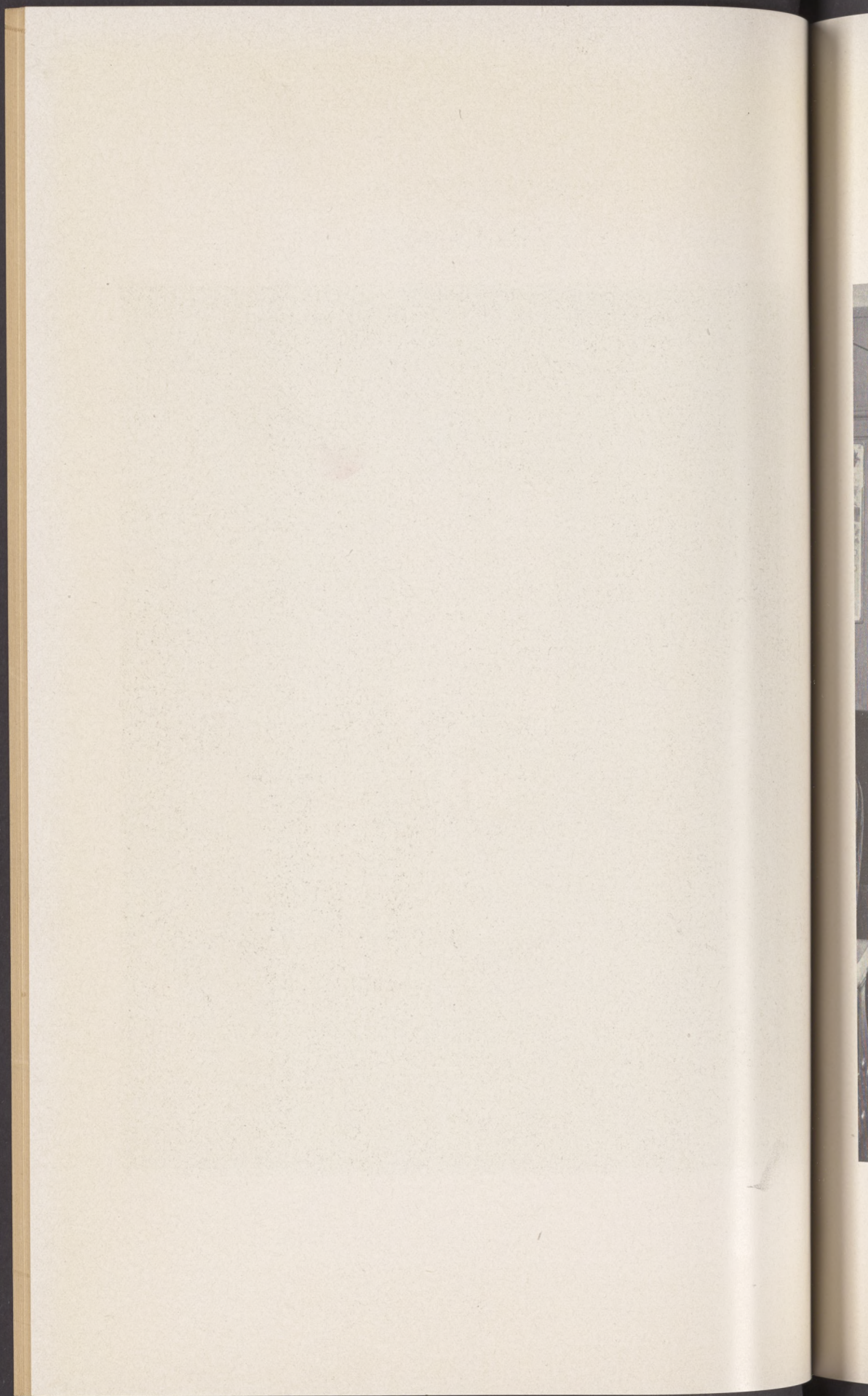


EXHIBIT D3.



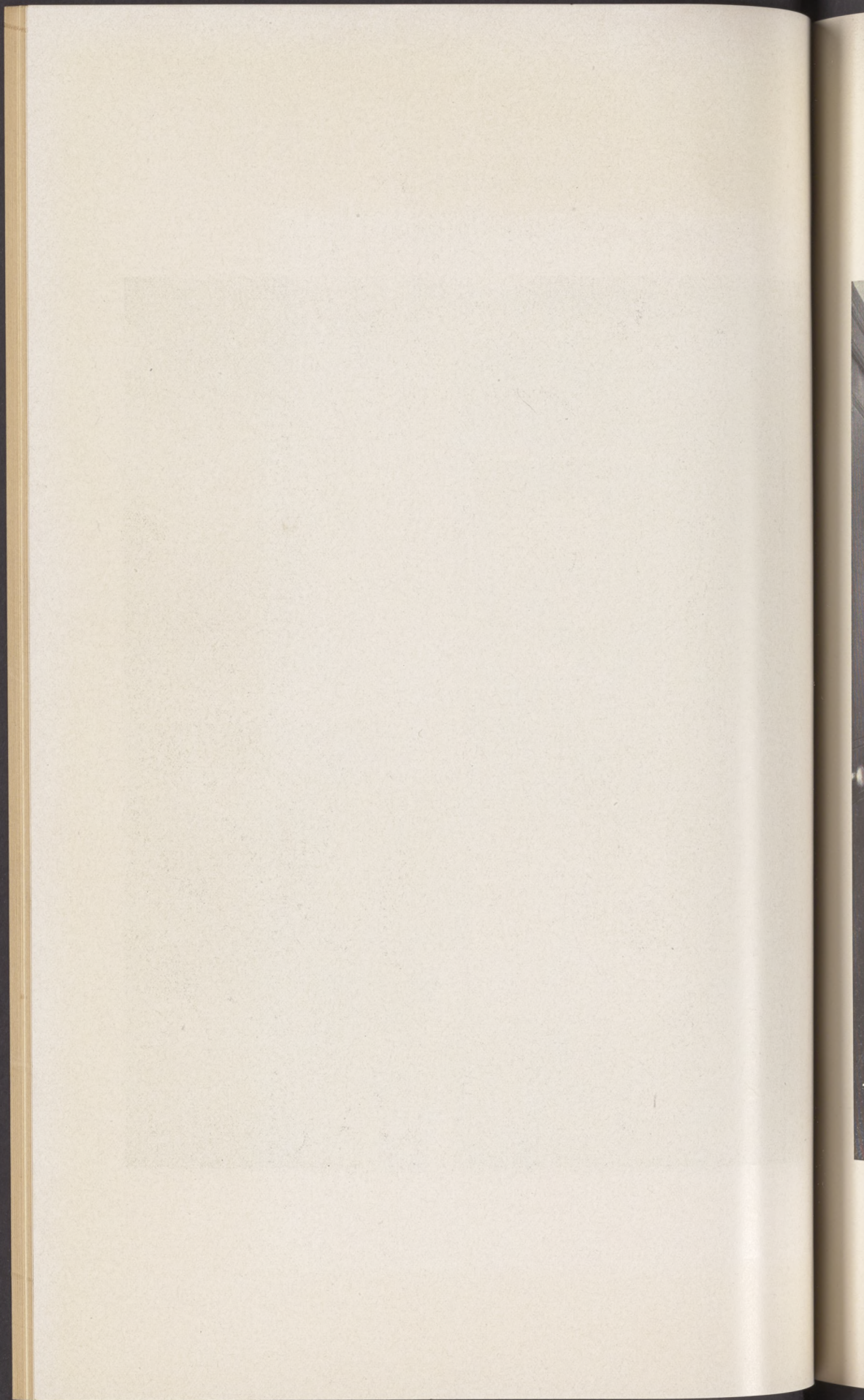


EXHIBIT D4.



Dist.
m
Pound
Sq.

0.0 N

N
J
C
J
V

10.1
15.5
20.8
24.5

27.8
30.0
31.7
33.0

35.2
37.0
41.2
45.2
47.4

40.0
51.0
51.8
51.8
53.2

54.7
55.2
56.0
56.7
57.6
58.5
59.3

60.6
61.4
62.8
63.6
64.1
65.6

66.6

NEW YORK TO BAY HEAD JUNCTION AND SEASIDE PARK

WEEK-DAYS

SUNDAYS

Station	709 The Resortor	711 The Skipper	715 NB-J Sat. only	717 Buffet Parlor Sat. only	719 Ex. Sat.	723 P M	725 The Banter	733 The Broker	735 The Com-muter	737 The Shopper	741 P M	701 NB Buffet Parlor Sun. & Mon.	785 NB	711 The Skipper	787 NB Buffet Parlor	791 P M	701 NB Buffet Parlor Sun. & Mon.
0.0 New York (Penna. Station)	A M 9 10	A M 10 45	P M ...	P M 12 35	P M 12 55	P M 2 45	P M 3 45	P M ...	P M 5 10	P M 5 40	P M 7 30	A M 12 10	A M 9 25	A M 10 45	P M 1 35	P M 5 40	A M 12 10
New York (Hudson Terminal)	9 06	10 40	12 22	12 30	12 40	2 40	3 37	4 52	5 06	5 36	7 20	12 01	9 20	10 40	1 30	5 30	12 01
Jerry City (Exchange Pl.)	u 9 09	u 10 43	12 30	u 12 33	u 12 43	u 2 43	u 3 40	5 00	u 5 09	u 5 39	u 7 23	u 12 04	u 9 23	u 10 43	u 1 33	u 5 33	u 12 04
Grove Street	u 9 11	u 10 45	...	u 12 35	u 12 45	u 2 45	u 3 42	...	u 5 11	u 5 41	u 7 25	u 12 06	u 9 25	u 10 45	u 1 35	u 5 35	u 12 06
Journal Square	9 15	10 49	...	12 39	12 49	2 49	3 46	...	5 15	5 45	7 29	12 10	9 29	10 49	1 39	5 39	12 10
Manhattan Transfer Ar.	9 23	10 57	...	12 47	12 57	2 57	3 54	...	5 23	5 53	7 37	12 18	9 37	10 57	1 46	5 47	12 18
Manhattan Transfer Lv.	9 27	11 01	...	12 52	1 11	3 02	4 02	...	5 27	5 57	7 47	12 27	9 42	11 01	1 52	5 57	12 27
Newark	9 32	11 06	12 46	12 57	1 16	3 07	4 07	5 16	5 31	6 02	7 52	12 32	9 47	11 06	1 57	6 02	12 32
Elizabeth	9 42	...	...	1 06	1 26	3 16	...	...	...	6 11	8 01	12 41	9 57	...	2 07	6 12	12 41
Rahway	9 50	...	...	1 13	1 34	3 24	...	...	...	...	8 09	12 49	10 05	...	2 15	6 20	12 49
Woodbridge	9 56	...	...	1 19	1 41	...	...	...	...	...	8 15	12 59	10 12	...	2 21	6 27	12 59
Perth Amboy	10 03	...	...	1 26	1 48	3 35	4 30	...	...	...	8 22	1 06	10 19	...	2 28	6 34	1 06
South Amboy	10 08	...	...	1 31	1 54	3 39	...	...	...	6 30	8 27	1 10	10 24	...	2 32	6 39	1 10
Laurence Harbor	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Cliffwood	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Matawan	10 16	...	...	1 39	2 06	3 47	...	...	6 08	6 39	8 35	1 18	10 32	...	2 41	6 47	1 18
Hazlet	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Middletown	...	...	...	...	...	...	...	...	...	...	...	1 26	...	...	...	...	1 26
Red Bank	10 28	11 49	1 27	1 51	2 18	3 59	4 52	6 00	6 20	6 51	8 47	1 31	10 44	11 49	2 53	6 59	1 31
Little Silver-Oceanport	...	...	...	1 55	2 22	...	4 56	...	6 24	...	...	1 35	...	...	...	7 03	1 35
Branchport	...	...	...	1 59	...	4 07	5 00	...	6 28	...	8 55	1 39	...	...	...	7 07	1 39
Long Branch	10 38	11 58	1 36	2 03	2 29	4 10	5 04	6 10	6 31	7 01	8 58	1 42	10 54	11 58	3 03	7 11	1 42
West End	...	12 00	1 39	...	...	4 13	...	...	6 34	...	...	1 45	...	12 00	...	7 14	1 45
Hollywood	...	...	...	...	...	4 16	5 08	6 14	6 37	7 05	9 02	1 48	10 58	12 02	...	7 17	1 48
Elberon	10 42	12 02	...	2 07	2 33	4 16	5 08	6 14	6 37	7 05	9 02	1 48	10 58	12 02	...	7 17	1 48
Deal	10 46	12 06	1 43	2 11	2 37	4 20	5 12	6 18	6 41	7 09	9 06	1 52	11 02	12 06	...	7 21	1 52
Allenhurst	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
North Asbury Park	...	...	1 46	...	2 40	4 23	5 15	6 21	6 44	...	9 09	1 55	11 05	...	3 12	7 24	1 55
Asbury Park	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Ocean Grove	10 51	12 11	1 49	2 16	2 43	4 26	5 18	6 24	6 48	7 14	9 12	1 58	11 08	12 11	3 15	7 27	1 58
Bradley Beach	10 54	12 14	1 52	2 19	2 46	4 29	5 21	6 27	6 51	7 17	...	2 01	11 11	12 14	3 18	7 30	2 01
Avon (Neptune City)	...	...	1 56	...	2 49	...	...	6 30	...	...	9 16	f 2 03	11 14	12 14	...	7 33	f 2 03
Belmar	10 58	12 18	1 59	2 23	2 52	4 33	5 25	6 33	6 55	7 21	9 19	2 05	11 17	12 18	3 22	7 36	2 05
Como	...	...	...	...	2 55	...	5 28	...	...	...	...	...	...	...	...	7 39	...
Spring Lake	11 02	12 22	2 03	2 27	2 58	4 37	5 31	6 37	6 59	7 25	9 23	2 09	11 21	12 22	3 26	7 42	2 09
Sea Girt	...	...	...	2 30	3 02	...	5 35	6 40	7 02	...	...	f 2 12	...	...	...	...	f 2 12
Manasquan	11 07	12 26	2 08	2 33	3 05	4 42	5 38	6 43	7 05	7 30	9 28	2 14	11 26	12 26	3 31	7 47	2 14
Brielle	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Point Pleasant Ar.	11 11	12 30	2 12	2 37	3 09	4 46	5 42	6 47	7 09	7 34	9 32	2 18	11 30	12 30	3 35	7 51	2 18
Bay Head Jct. Ar.	11 14	12 33	2 15	2 40	3 12	4 49	5 45	6 50	7 12	7 37	9 35	2 21	11 33	12 33	3 38	7 54	2 21
Point Pleasant Lv.	▲ 11 15	▲ 12 50	...	▲ 3 10	▲ 3 30	...	▲ 6 10	...	...	...	...	...	...	...	▲ 4 40	...	...
Bay Head	▲ 11 20	▲ 12 57	...	▲ 3 15	▲ 3 35	...	▲ 6 15	...	...	...	...	...	...	...	▲ 4 45	...	...
Mantoloking	▲ 11 25	f 1 03	...	▲ 3 20	▲ 3 40	...	▲ 6 20	...	...	...	...	...	...	...	▲ 4 50	...	...
Lavallette	▲ 11 35	▲ 1 10	...	▲ 3 30	▲ 3 50	...	▲ 6 30	...	...	...	...	...	...	...	▲ 5 00	...	...
Seaside Heights	▲ 11 40	▲ 1 17	...	▲ 3 35	▲ 3 55	...	▲ 6 35	...	...	...	...	...	...	...	▲ 5 05	...	...
Seaside Park	▲ 11 45	▲ 1 23	...	▲ 3 40	▲ 4 00	...	▲ 6 40	...	...	...	...	...	...	...	▲ 5 10	...	...
Arrive	A M	P M	P M	P M	P M	P M	P M	P M	P M	P M	P M	A M	A M	P M	P M	P M	A M

NB—No baggage service.
 * Bus on public highway, stopping at cross-roads near station. For complete bus service between Point Pleasant and Seaside Park, see Time Table No. 88.
 † Rail motor car.
 ‡ Will not run Thanksgiving, Christmas, New Year's Days, or Washington's Birthday.

J Will not run December 26 or January 2.
 p Stops at West End beginning March 14, 1932.
 q Stops at West End beginning March 20, 1932.
 u Hudson & Manhattan R. R. Station.
 v For transfer of passengers only.

0-5 New York—Bay Head Junction
 Schedule in effect September 27, 1931
 EASTERN STANDARD TIME 1.50

Pennsylvania Railroad

The Standard Railroad of the World

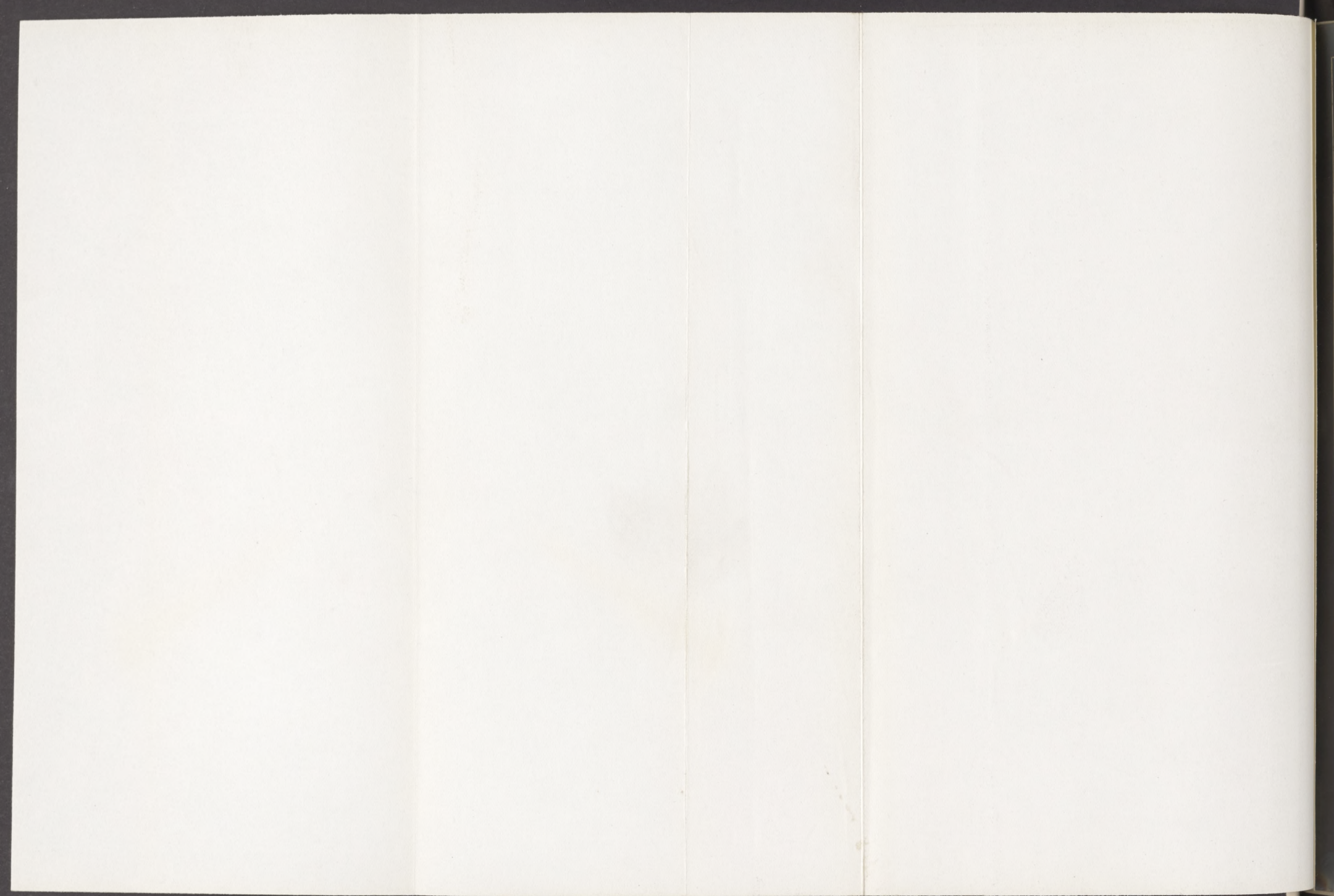


Time Tables

New York
 and
 Bay Head
 Junction

F. W. CONNER
 Passenger Traffic Manager
 Broad Street Station
 Philadelphia

A. H. SHAW
 Passenger Traffic Manager
 Pennsylvania Station
 New York



SEASIDE PARK AND BAY HEAD JUNCTION TO NEW YORK

WEEK-DAYS

SUNDAYS

Leave	WEEK-DAYS										SUNDAYS				
	702	704	706 The Com- muter	708 The Mer- chant	712 The Banker	714 The Shepper	718	720 The Skipper	726 Buffet Parlor Sat.	728	714 Buffet Parlor	782	784 NB Buffet Parlor	786 NB	788
	NB A M	NB H A M	NB A M	H Buffet Parlor A M	NB Buffet Parlor A M	A M	A M	P M	P M	P M	A M	A M	P M	P M	P M
Seaside Park	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Seaside Heights	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Lavallette	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Mantoloking	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Bay Head	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Point Pleasant	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Bay Head Junction	5 53	6 43	6 49	7 21	7 46	9 08	1 08	3 13	5 32	7 43	9 08	1 37	4 43	7 25	8 59
Point Pleasant	5 56	6 46	6 52	7 24	7 49	9 11	1 11	3 16	5 35	7 46	9 11	1 40	4 46	7 28	9 02
Brielle	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Manasquan	6 00	6 50	6 56	7 28	7 53	9 15	1 15	3 20	5 39	7 50	9 15	1 44	4 50	7 32	9 06
Sea Girt	6 03	6 53	...	...	...	...	...	...	...	...	...	...	...	...	9 09
Spring Lake	6 06	6 57	7 01	7 33	8 00	9 20	1 20	3 25	5 44	7 55	9 20	1 49	4 55	7 37	9 12
Como	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Belmar	6 10	...	7 05	7 37	8 04	9 24	1 24	3 31	5 48	7 59	9 24	1 53	5 00	7 41	9 16
Avon (Neptune City)	6 13	7 02	...	...	...	...	...	...	...	...	...	...	5 03	...	...
Bradley Beach	6 16	7 05	7 09	7 42	8 08	9 28	1 28	3 35	5 52	8 03	9 28	1 57	5 06	7 45	9 20
Asbury Park	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Ocean Grove	6 19	7 08	7 12	7 45	8 11	9 31	1 31	3 38	5 55	8 06	9 31	2 00	5 09	7 48	9 23
North Asbury Park	6 22	7 11	7 15	7 48	8 14	9 34	1 34	3 41	5 58	8 09	9 34	2 03	5 12	...	...
Allenhurst	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Deal	6 25	7 14	7 18	7 51	8 17	9 37	1 37	3 44	6 01	8 12	9 37	2 06	5 15	...	9 27
Elberon	6 29	7 17	...	7 55	8 21	9 41	1 41	3 48	6 05	8 16	9 41	2 10	5 19	7 56	9 31
Hollywood	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
West End	6 32	...	7 22	...	8 24	...	...	p 3 50	...	...	...	...	5 22	7 59	...
Long Branch	6 35	7 21	7 25	7 59	8 27	9 45	1 45	3 52	6 09	8 20	9 45	2 14	5 25	8 02	9 35
Branchport	6 38	7 24	...	...	...	9 48	1 48	...	...	...	9 48	...	...	...	...
Little Silver-Oceanport	6 42	...	7 32	...	8 34	...	...	...	...	...	...	...	...	...	...
Red Bank	6 46	7 32	7 36	8 09	8 38	9 56	1 56	4 02	6 18	8 30	9 56	2 24	5 34	8 12	9 45
Middletown	6 52	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Hazlet	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Matawan	7 00	...	7 48	...	...	10 08	2 08	4 14	6 30	8 42	10 08	2 36	...	8 24	9 57
Cliffwood	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Laurence Harbor	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
South Amboy	7 08	...	...	...	...	10 16	2 16	...	6 38	...	10 16	...	...	...	10 06
Perth Amboy	7 12	...	7 58	...	...	10 21	2 21	4 23	6 42	8 52	10 21	2 47	...	...	10 10
Woodbridge	...	...	...	...	...	10 28	2 28	4 30	...	8 59	10 28	2 54	...	...	10 17
Rahway	...	...	...	...	...	10 35	2 35	4 37	...	9 07	10 35	3 01	...	...	10 24
Elizabeth	7 30	...	8 15	8 45	...	10 43	2 43	4 44	6 59	9 17	10 43	3 08	6 10	8 52	10 32
Newark	7 38	8 19	8 23	8 53	9 22	10 53	2 53	4 53	7 08	9 26	10 53	3 18	6 18	9 02	10 42
Manhattan Transfer	7 42	...	8 27	8 57	9 26	10 57	2 57	4 57	7 13	9 31	10 57	3 22	6 22	9 07	10 46
Manhattan Transfer	7 47	...	8 42	9 00	9 27	11 04	3 04	5 02	7 14	9 34	11 04	3 24	6 24	9 14	10 54
Journal Square	7 55	...	8 49	9 07	9 34	11 12	3 12	5 10	7 22	9 42	11 12	3 32	6 31	9 22	11 02
Grove Street	u 7 59	...	u 8 53	u 9 11	u 9 37	u 11 16	u 3 16	u 5 14	u 7 25	u 9 45	u 11 16	u 3 36	u 6 35	u 9 26	u 11 05
Jersey City (Exchange Pl.)	u 8 01	8 38	u 8 55	u 9 13	u 9 39	u 11 18	u 3 18	u 5 16	u 7 28	u 9 48	u 11 18	u 3 38	u 6 37	u 9 28	u 11 06
New York (Hudson Terminal)	8 04	8 45	8 58	9 16	9 42	11 21	3 21	5 19	7 31	9 51	11 21	3 41	6 40	9 31	11 11
New York (Penna. Sta.)	8 00	...	8 45	9 15	9 45	11 25	3 15	5 15	7 30	9 50	11 15	3 40	6 40	9 25	11 05
Arrive	A M	A M	A M	A M	A M	A M	P M	P M	P M	P M	A M	P M	P M	P M	P M

NB—No baggage service.
 * Bus on public highways, stopping at cross-roads near station. For complete bus service between Seaside Park and Point Pleasant, see Time Table No. 88.
 † Rail motor car.
 ‡ Will not run Thanksgiving, Christmas, New Year's Days or Washington's Birthday.

o Stops to discharge passengers except Saturdays.
 k Saturdays only.
 p Stops at West End beginning March 14, 1932.
 u Hudson and Manhattan R. R. Station.
 v For transfer of passengers only.

NEW LOW-FARE One-Day Excursions

BETWEEN
**NEW YORK, JERSEY CITY, NEWARK,
 ELIZABETH and RAHWAY**
 AND
**LONG BRANCH, ASBURY PARK-OCEAN
 GROVE, POINT PLEASANT, Etc.**

From **NEW YORK, Etc.**
 WEDNESDAYS
 September 30, October 14, 28, November 11, 25,
 December 9, 23

EVERY SUNDAY until December 27, inc.
 From **ASBURY PARK-OCEAN GROVE, Etc.**

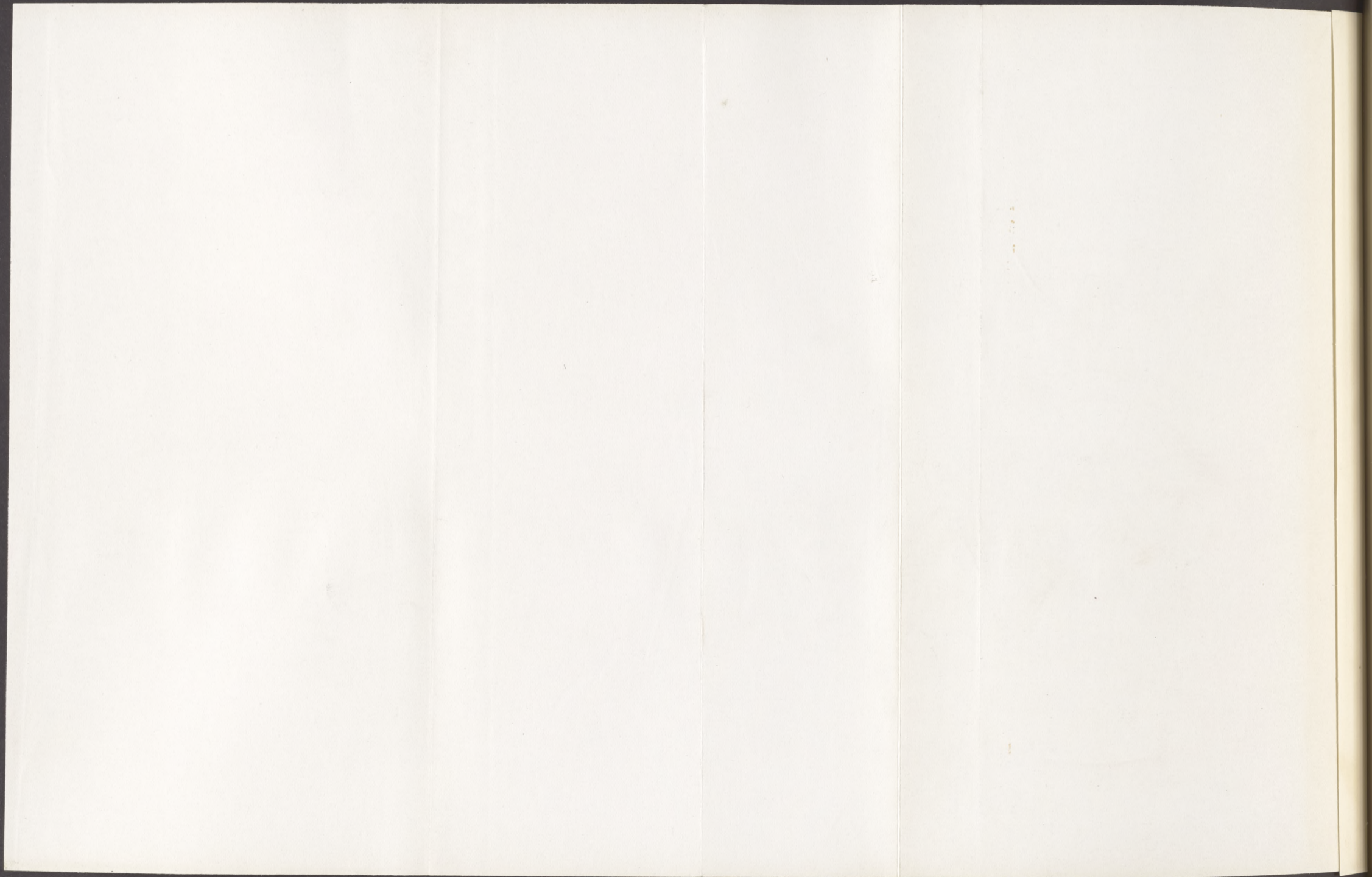
WEDNESDAYS
 October 7, 21, November 4, 18, December 2, 16, 30
 SUNDAYS
 October 4, 18, November 1, 15, 29, December 13, 27

4-DAY EXCURSIONS EVERY WEEK-END DURING OCTOBER

FROM
**NEW YORK, JERSEY CITY, NEWARK,
 ELIZABETH and RAHWAY**
 TO
**LONG BRANCH, ASBURY PARK-OCEAN
 GROVE, POINT PLEASANT, Etc.**

Tickets will be good going on all trains Friday and Saturday, and returning on any train until the last one the following Monday night

Our Ticket Agents will gladly give you
 detailed information



NEW JERSEY COURT OF ERRORS
AND APPEALS.

LESLIE POTTER,
Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF FOR PLAINTIFF-RESPONDENT.

FACTUAL STATEMENT.

On January 15, 16 and 17, 1934, there was tried before Circuit Court Judge Lawrence and a jury at the Ocean Circuit, the cause of LESLIE POTTER *versus* THE PENNSYLVANIA RAILROAD COMPANY. The jury rendered a general verdict in favor of the plaintiff and against the defendant in the sum of \$3,000.00. From the judgment entered on that verdict, this appeal is taken.

The testimony adduced at the trial revealed the following state of facts:

At about midnight on Saturday night, December

Brief for Plaintiff-Respondent

4, 1931, the plaintiff, accompanied by his brother and brother-in-law, boarded a train of the defendant at the Pennsylvania Station, New York City, bound for Asbury Park. They rode in the smoker, which was the rear car of the train, playing cards most of the way, using cards and a board furnished by one of the trainmen. They alighted at the Asbury Park station and started to walk south along the platform, towards the head of the train. One of the group remembered that a package had been left on the train. The plaintiff reboarded the train for the purpose of getting the package. He got on at the front end of the second car, and just as he reached the platform the train started.

Plaintiff's brother called out that he would meet him at Bradley Beach (the next station), with a taxi, and Potter started to walk through the train towards the rear. He walked through the car he had boarded, crossed over onto the platform of the next car and as he reached for the doorknob of that car, the rocking of the train caused him to lose his balance and he fell out on the west side, which was the right-hand side going south (Case, pp. 19-21). After some time, when he had partially regained consciousness, he made his way down the tracks and along Corlies Avenue to Shafto's garage, where he was discovered by Wilton L. Moore, a garage attendant, and George Joves, a police officer of Neptune Township. Potter was walking with his hands outstretched, calling for help, and with "the side of his head laying down on his shoulder." (Case 44, ll. 10-14; p. 46, ll. 23-28.)

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Moore and Joves wrapped him in a blanket and sent for an ambulance, and Joves rode with Potter in the ambulance a distance of between three and a half and four miles to the hospital (Case 44, ll. 18-29; p. 46, ll. 29-35). Potter was treated that night at the hospital by Dr. Oliver K. Parry, who testified that he had a wound of the scalp extending from almost the base of the skull forward and down over the forehead; that his scalp was torn free from the skull and turned down over his face; that he was not recognizable as a human being; that he was in such a weakened condition that they did not clean out the wound that night, but could only apply restoratives to keep him alive (Case 54, ll. 9-29).

The next day (or rather later in the same day, for this was between 2 and 3 o'clock in the morning), the wounds were cleaned and 25 or 30 sutures taken (Case 54, ll. 31-35). In addition to the surface wounds, Potter suffered a concussion of the brain involving a considerable increase in intracranial pressure (Case 55, ll. 25, 26; p. 120, ll. 16-35; p. 121, ll. 1-3). He remained in the hospital 16 days (Case 55, ll. 12, 13), after which he was treated for a considerable period by Dr. Oliver in New York (Case 51, ll. 1-10). At the time of the trial, a little over two years after the accident, he still complained of dizziness and severe pains in the head (Case 23, ll. 31-35; p. 24, ll. 1-14).

LAW AND ARGUMENT.

I.

Appellant has noted sixteen separate grounds of appeal. No argument has been made on the first ground, and it has apparently been abandoned. Counsel for appellant prefaces his brief with an attempt to convince the Court that this appeal has some peculiar status. We cannot permit the Court to be led into any such misapprehension. There is nothing peculiar about the status of the case in any respect. On the contrary, it may be said to be but one more case of an altogether familiar type. The jury rendered a verdict in favor of the plaintiff; defendant was unsuccessful in its attempts to secure a new trial and, therefore, appealed.

Counsel for appellant has inserted in his brief the conclusion of the trial Judge on a rule to show cause why the verdict rendered at a previous trial should not be set aside. It is respectfully submitted that that does not have the slightest bearing upon the decision to be made by this Court, for this appeal results from a trial had on January 15, 16 and 17, 1934, and no other.

Counsel states that the same statement of facts was made at the second as at the first trial. That remark is definitely challenged. The picture may have been the same to the mind of counsel for appellant, but there were many details apparently overlooked by him. In any event, such matter is en-

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tirely irrelevant, for this Court has said time, without number that the question of the weight of the evidence is not reviewable on appeal.

We do not wish to appear too critical of opposing counsel, but the statement on page 3 of his brief, that

“I also believe that as your Honors read the charge of Judge Lawrence, you will be convinced that from the viewpoint of the trial Judge, a verdict of no cause of action, upon the evidence, should have been rendered.”

reveals a hitherto unheard-of attitude upon the part of appellate counsel. He is in effect telling the Court of Errors and Appeals that he thinks Judge Lawrence, had he been on the jury, would have voted for a “no cause” verdict and that, therefore, this Court should reverse the judgment! The argument is naïve, to say the least.

II.

The second ground of appeal, to the argument of which appellant devotes half of its brief, is that the judgment is contrary to the credible evidence in the cause. There is first presented under this point, an argument based upon subdivision (a) of Point 4, dealing with the refusal of a motion for a direction of a verdict for the defendant. The trial Judge was asked that *if* in his judgment the weight of the evidence was with the defendant to direct the jury to find a verdict accordingly. Judge Lawrence quite properly denied the request, for the obvious reason

that the members of the jury are the judges of the facts. If such a rule as that suggested by the appellant were adopted, we would no longer have the system of trial by jury in this State. If appellant advocates the abolition of the jury system, let such advocacy be made openly and frankly; and if such a change is to be made, let it be done in the same manner. But so long as the guaranty of this method of settling disputes remains a part of our Constitution, the Courts of this State certainly are not going to listen to such arguments.

It is true that Judge Lawrence denied the request above referred to, but he did not do so in such a manner as to form any basis for an appeal, for he did not indicate that he did in fact believe the weight of the evidence was with the defendant. What he said was:

“I am not prepared to say at the moment that even though the trial Judge *may* have been impressed with the fact that the weight of the evidence *may* rest with the defendant in this case, that he has a right to withdraw the question from the jury, who are judges of the facts.” Case, p. 125, ll. 14-19, inc. (Italics ours.)

Appellant then proceeds, under the same heading, to argue Point 2. As we have stated above, this Court has said upon innumerable occasions that the weight of evidence will not be considered upon appeal. It has been said so many times that it seems like carrying coals to Newcastle to remind the Court of its long line of decisions in that regard. A few only, are cited, as follows:

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- Bolles v. Beach*, 22 N. J. L. 680;
Alexander Dye Works v. Roufosse, 57 N. J.
 L. 700;
Churchill v. Stephens, 91 N. J. L. 195;
Osburn v. DeYoung, 99 N. J. L. 204;
A. Makray, Inc., v. McCullough, 103 N. J.
 L. 346;
Ratz v. Hillside Bus Owners' Ass'n, 103
 N. J. L. 502;
Bennett v. Pillion, 105 N. J. L. 359;
Burket v. Ellis, 105 N. J. L. 560;
Caporaso v. Schechner, 108 N. J. L. 540.

Mr. Justice Kalisch, speaking for this Court in *Osburn v. DeYoung*, *supra*, said:

“Much space is devoted in appellant’s brief in support of its contention that the jury’s verdict was against the weight of the evidence.

“There can be no good excuse offered why an elementary legal rule should be so often disregarded by counsel in arguing on the weight of the evidence in a civil case at law, on appeal, before this Court, which is only concerned with correcting errors in law. *With the credibility of the witnesses or the weight of the evidence we have no concern.*” (Italics ours.)

Appellant says that the weight of the evidence has not been passed upon, because its applications to the trial Judge and the Supreme Court for a rule to show cause were denied. Obviously, this is not so, at least so far as concerns the trial Judge, for he heard every word of testimony produced, and could not possibly have passed upon appellant’s

application without considering that which he had so recently heard. And naturally the Supreme Court would not disturb the trial Judge's exercise of his discretion.

Appellant's brief then proceeds with an extended review and discussion of that testimony which it considers favorable to its position. In view of what has been said above, we do not believe it either necessary or appropriate to enter into a lengthy examination and analysis of the whole body of testimony. As a matter of information for the Court, we will, however, briefly indicate what we believe, and what the jury apparently believed, was a perfectly reasonable and logical manner to so treat, consider and interpret the testimony as to result in the verdict which was rendered in this case.

FIRST, the backbone of the defense in this case was the alleged intoxicated condition of plaintiff-respondent. This first appears in the Second Special Defense of the Answer (Case 13), and recurred again and again during the trial. All of defendant-appellant's witnesses who testified as to the manner in which Potter's injuries were sustained, emphasized this point.

The brakeman, Scales, testified that Potter's group was noisy and used profane language; that the passengers complained; that he had to stop them (the Potters), three times (Case 68, ll. 18-25); that they had three bottles on the window marked "Gin," from which they were drinking; that he had to assist two of them down the steps because they were staggering; that there was very much of an

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odor of gin in the car (Case 69, ll. 3-27); that the bottles were of the size known as "Fifths," containing nearly a quart (Case 74, l. 35).

Maxon, an engineman on the Pennsylvania Railroad, who was deadheading back to his home in Point Pleasant, testified (Case 80, ll. 27-31), that they caused a lot of noise; that there was a commotion around where they were sitting and that one or two of them was out in the aisle dancing; and (Case 81, ll. 15, 16), that they were very noisy "and what anyone might say, feeling good."

Barton, a Pennsylvania Railroad fireman, testified that he heard a commotion; that he saw the brakeman talk to them, after which the noise stopped; that he later saw the brakeman helping one of them off; that they were staggering around and appeared drunk to him (Case 88, ll. 13-27).

Briers, a Central Railroad yard clerk, testified that they had a bottle of gin sitting on the window sill; that he knew it was gin because he could smell it; that every now and then Scales had to quiet them down; that they were hollering and raising the mischief; that they were "cutting up at the end of the car"; and that "they looked as though they were about steamed." (Case 94, ll. 13-35.)

All of these witnesses testified that after the train left Asbury Park, one of this particular group of three men (without identifying Potter as the one), came back into the car, walked through it and out onto the rear platform and was not seen again.

It is to be observed that every one of these witnesses who testified as to the drunkenness is a rail-

road employee. While it is true that they are not, by reason of that fact, persons with an "interest" in the case, nevertheless their testimony will bear close scrutiny when compared with that to which we will now refer.

The first persons to see Potter after he fell from the train were George Joves, a police officer of Neptune Township, and Wilton L. Moore, a garage attendant. Joves testified that he was right over Potter and that there was no alcohol on his breath (Case 45, ll. 1-8). Moore testified that there was no alcohol on Potter's breath and that he was just as close to him as he could get (Case 47, ll. 6-10).

Dr. Oliver K. Parry, who was attending surgeon at the Ann May Hospital, and who treated Potter that night soon after his arrival at the hospital, testified there was *no* evidence of Potter's having alcohol (Case 55, ll. 27-33).

No one could possibly assail the testimony of these three men. They were absolutely unbiased; certainly were not related to or interested in Potter in any way (they were white and Potter was black); their testimony was that of three unprejudiced men whose testimony must be accepted as true. Now, the railroad men could not all have made the same mistake as to the drinking, and made it honestly. If Joves, Moore and Dr. Parry told the truth, then Scales, Maxson, Barton and Briers were wrong, and deliberately so. That being the case, the jury was perfectly justified in disregarding their testimony *in its entirety* and in accepting Potter's version of the occurrence as the true one, for the wilful false-

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ness of the former was on a material fact. *State v. Samuels*, 92 N. J. L. 131.

Appellant makes much of the testimony of Dr. Hill, who was an interne at the hospital and who testified that Potter told him, between 9 and 11 A. M. on December 5, that he jumped off the train (Case 62, ll. 18, 19; p. 63, ll. 22-23). On cross-examination he said that "The whole picture was that *he had regained the lost overshoes* and was anxious to leave the train, and he jumped off." (Case 65, ll. 22-24). All this happened before Dr. Parry's return to the hospital (Case 61, ll. 19-22). (Dr. Parry being the "Chief" there referred to.) And Dr. Parry testified that Potter's wound was not cleaned out until that morning, when he returned and took 25 or 30 stitches in the scalp and put in drains (Case 54, ll. 22-35); that Potter was still semi-conscious Sunday morning, and at times delirious (Case 58, ll. 22-23).

Obviously, then, Potter was in no condition to have been questioned and examined in the fashion described by Dr. Hill, suffering from a wound such as has been described, full of cinders and dirt; and being in a semi-conscious and delirious state.

Then, too, Dr. Hill remembered that Potter had "regained the lost overshoes." This does not fit in with the rest of the testimony. The four railroad men told about Potter looking for something, but none said he picked up a package. In fact, Maxon testified to the contrary (Case 84, ll. 18-23). And Officer Joves, in listing the articles which he found along the tracks where Potter fell out, mentioned a

pencil, diary and stamp book, but no package (Case 45, ll. 14-15).

A pertinent observation here is that Potter's injuries were to his head, and not to his legs or feet, as would have been the case had he jumped from the train.

Another point which makes it clear that Potter could not have left the train in the manner asserted by the appellant is this: The place where the bloodstains appeared on the track was 550 or 600 feet south of the Asbury Park station (Case 45, ll. 16-18). Each car of this train was 80 feet in length (Case 116, ll. 13-15). There were six cars on the train (Case 66, l. 35; p. 101, ll. 33-35). Yet this appellant would have us believe that Potter walked through five cars of a six-car train, looked in the compartment at each end of the rear car, went out on the rear platform, opened the side door, raised the platform and jumped off, in the same time that the train traversed a distance of 550 or 600 feet!

That counsel for appellant realizes the weakness of his case is made apparent by the fact that he resorts to an attempt, on pages 12 and 13 of his brief, to have this Court infer something in his favor to have existed in certain matter which the trial Judge properly refused to admit in evidence, and asks this Court to base its decision upon such an inference. Such an argument is not worthy of comment.

III.

Appellant has abandoned its third ground of appeal.

IV (a).

Subsection (a) of the fourth ground of appeal makes the point that the Court should have directed a verdict for the defendant because, as defendant alleged, there was no evidence of negligence.

On the contrary, the proof was ample on this phase of the case. Interrogatories were served upon the defendant, and its answers thereto admitted that the cars of this train were vestibule cars and that the doors and trap-doors of the vestibules were open on the right-hand side and were last in a closed position at Long Branch (Case 48, ll. 18-35). The defendant was permitted to put in testimony that the person who swore to these answers knew nothing of the condition of the rear platform of the last car of the train, and that the platform was, in fact, closed. Even so, a jury question as to that particular was raised, and the jury was justified in accepting the answers to the interrogatories. *Benson v. Lippman*, 7 N. J. Misc. 1001. And in any event, that variance is not relevant here, for plaintiff's testimony was that he fell off between the second and third cars.

The negligence of the railroad consisted in its failure to have the doors and trap-doors of the vestibuled cars in a closed position while the train was

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running between stations. A carrier is bound to keep the passageway between cars, which passengers are expressly or impliedly invited to use, in a safe condition. A railroad company is under no legal obligation to provide vestibules between its cars for its passengers, and a failure to do so is not of itself negligence; but when it provides such vestibules, it is its duty to use a high degree of care to maintain them in a safe condition; and if the doors of the vestibule are left open between stations, while the train is moving, the company will be liable for its negligence.

Rivers v. P. R. R., 83 N. J. L. 513;

McBride v. P. R. R., 99 N. J. L. 464;

Rogers v. N. Y. C. R. R., 106 N. J. L. 394;

St. Louis, etc., R. Co. v. Oliver, 92 Ark. 432;

Augusta R. Co. v. Glover, 92 Ga. 132;

Crandall v. Minn. St. P. & S. S. M. R. Co.,

96 Minn. 434;

Wagoner v. Wabash R. Co., 118 Mo. App. 239;

Johnston v. St. Louis, etc., R. Co., 150 Mo. App. 304;

Kearney v. Oregon R. Co., 59 Ore. 12;

Bronson v. Oakes, 76 Fed. 434.

And if upon such proofs as to negligence, a jury should find that there was negligence, no Court could disturb their finding.

Bronson v. Oakes, supra.

As was said in *Palen v. Wheelock*, 13 Fed. 2nd 34:

“One of the purposes of a vestibule at the

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end of a coach is to afford safety to the passengers and employees while the train is in motion. To perform such function, the vestibule doors must be closed. It was the duty of the trainmen to close the vestibule doors immediately upon the train leaving the station."

(b)

Under subsection (b) of the fourth ground of appeal, it is alleged that the Court erred in not directing a verdict for the defendant because of a statutory provision that anyone jumping on or off a car while in motion shall be deemed to have contributed to the injuries thereby sustained. Obviously the Court could not have directed a verdict upon any such ground, for there was clearly a jury question presented as to the manner in which Potter took leave of the train. Potter's testimony on this point is summarized in the factual statement of this brief.

(c)

Appellant here relies upon Section 39 of the General Railroad Law (P. L. 1903, p. 666), which provides as follows:

"In case any passenger on any railroad shall be injured by reason of his going or remaining on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury; provided said company at the time

furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers.”

What did the Legislature mean by this statute, which was enacted before vestibuled cars were heard of? It simply meant to keep passengers from standing or riding upon the open platforms. The words “going or remaining on the platform” clearly meant just that. They did not mean to penalize passengers who might have some legitimate reason to *pass through* from one car to another, but only those who went onto a platform for the purpose of riding there.

Appellant makes much of the fact that Potter was not seeking a seat, and seeks to make a left-handed application of the holding of this Court in *Rivers v. P. R. R.*, *supra*, simply because that was a situation where the passenger was passing through in search of a seat. This Court did not say that no plaintiff could recover unless he was looking for a seat; it simply decided that case upon the facts as they there existed, and by no means announced a rule precluding recovery upon the part of one injured while passing from one car to another for any other legitimate reason. The Supreme Court in its opinion (80 N. J. L. 217), said that it would not be presumed from the use of vestibuled cars, that a passenger is impliedly invited to pass at will from car to car of a moving train. That pronouncement, however, failed to receive the approval of this Court on the appeal, which resulted in a reversal of the Supreme Court.

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In arguing this point, appellant says, on pages 28 and 29 of his brief, that the distances between the stations in the vicinity of Asbury Park are so short that to close the vestibules

“would cause very material difference in the running of the trains, in the time they could make, and result in a service to passengers and patrons that would be most annoying, and cause them to lose considerable time, and that with these short distances, it is not necessary for the trap doors and vestibules to be closed, if proper service, as required by the Statute of the State, and the Utility Commission is to be rendered by the Company.”

We submit that there is no rule of statute or commission that requires any utility to sacrifice safety to speed. Some individuals may resort to such practices in this day and age, but surely we have not yet reached the state where a governmental agency will require a railroad to risk the lives of its passengers in order to gain a minute's running time.

(d)

The issue here presented has already been discussed in the first two paragraphs of Point II of this brief, and needs no further comment.

V.

The fifth ground of appeal alleges that the Court erred in charging the seventh request of the plaintiff. However, a close examination of the charge

of the Court fails to reveal that the exact language of this request was, in fact, charged. The following excerpt from the Court's charge is the nearest approach to the language of this request:

“* * * it may be fairly said that vestibuled trains are provided for the safety of passengers particularly in passing from one car to another, but, whether that be so or not, if the company provided such a train, no matter what the motive may have been, then it was under the duty of exercising a high degree of care to see that such train was kept in proper condition for the safety of its passengers.” Case 136, ll. 34, 35; p. 137, ll. 3-9.

While appellant has noted the charging of our seventh request as its fifth ground of appeal, and while appellant's brief states (page 31) that Point 5 is argued along with several others, as a matter of fact, we have been unable to discover anywhere in appellant's brief any attack upon or criticism of the request or of that portion of the charge above quoted. In effect, therefore, this ground of appeal has been abandoned, as well it might be. The charge quoted is sound law and appellant has presented no authority to the contrary.

VI.

The sixth ground of appeal alleges that the Court erred in charging the eighth request of the plaintiff. The Court did not charge the jury in the language of this request, but did say that

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“where the company provides a vestibuled train it is under a duty to use that appliance, as it were, for the purpose for which it was evidently intended, namely, to keep the doors closed while the train is in motion, that is to say, the vestibule part of the train.” Case 137, ll. 15-21.

There can be no quarrel with that altogether sound statement of the law, which finds ample support in the cases cited under Point IV (a) of this brief.

VII.

The seventh ground of appeal alleges error by the Court in refusing to charge defendant's fifth request, as follows:

“That if plaintiff went on the platform of the car in violation of the printed regulations of the defendant, posted up in a conspicuous place inside of said car, and in consequence received the injuries complained of, he cannot recover, and your verdict must be for the defendant.”

Respondent's argument under Point IV (c) applies with equal efficacy here, and the Court is respectfully referred to that portion of this brief.

VIII and IX.

Appellant's argument upon the eighth and ninth grounds of appeal does not follow in order, but ap-

pears on page 40 of the brief. These deal with the refusal to charge the sixth and seventh requests of the defendant. The refusal to so charge was clearly not error, for the requests were predicated upon a non-existent state of facts. Under the defendant's own testimony the vestibule door by which Potter left the train was closed; and under ours, there was no attempt to alight.

X.

The tenth ground of appeal is not argued, and apparently has been abandoned for the reason that the Court did, in fact, charge the substance of the request there referred to. Case 143, ll. 6-8.

XI.

This ground of appeal has been answered by our argument at the conclusion of Point IV (c) hereof, to which the attention of the Court is respectfully directed.

XII.

We find no argument in appellant's brief on this point, and assume that it has been abandoned.

XIII and XIV.

Appellant argues these points together, as they both deal with the refusal of the Court to charge

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defendant's requests concerning Section 39 of the General Railroad Law. In commenting upon this section of the Act, the Court said (Case 136, ll. 32-35; p. 137, ll. 3-9):

"I am not able to say to you that that statute applies to this suit, for the reason that the train in question was a vestibuled one, and it may be fairly said that vestibuled trains are provided for the safety of passengers particularly in passing from one car to another, but, whether that be so or not, if the company provided such a train, no matter what the motive may have been, then it was under the duty of exercising a high degree of care to see that such train was kept in proper condition for the safety of its passengers."

We submit that the foregoing is a clear and plain statement of perfectly sound law. When a railroad invests in this expensive equipment it does so for a purpose, and not just to spend money. It does so to provide a safe means of passage from one car to another, and certainly a passenger is entitled to use that equipment for any legitimate purpose and to rely upon its being kept in proper condition.

Respondent also wishes to incorporate in this argument that which was said under Point IV (c) hereof.

Counsel for appellant quotes from the dissenting opinion of Mr. Justice Swayze in the Rivers case as an argument that it is not negligence to have the vestibules open when the distances between stations are short. Suffice it to say that the majority opinion represents the law in this State. And if the railroad

did not deem it necessary to make use of this equipment under such circumstances, why were the doors and trap-doors closed on the east, or left-hand side of the train? (Case 48, ll. 23-29). If there was reason to keep one side closed, there was equal reason to do the same with the other. And the train stood at the Asbury Park station from 4 to 6 minutes, so that there was ample time to close the vestibules on the right-hand side, which would be the side opposite the station platform (Case 98, ll. 12-17).

XV.

This deals with the Court's refusal to charge appellant's fifteenth request, which was in the following language:

"If you find the plaintiff's testimony is false in one or more particulars, you have the legal right to reject it all, and apply the legal maxim, 'False in one—false in all,' and should so do in this case."

The Court quite properly refused to charge the jury in the language of this request, for the reason that it did not accurately state the law. A correct statement of the principle to which counsel apparently had reference in framing this request is that the maxim *falsus in uno, falsus in omnibus* is not a mandatory rule of evidence, but is rather a permissible inference that the jury may or may not draw when convinced that an attempt has been made by a witness to *mislead them in some material aspect*.

Addis v. Rushmore, 74 N. J. L. 649.

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The rule "*falsus in uno, falsus in omnibus*," can only be invoked when the false testimony or statement is *willfully* or *knowingly* or *intentionally* given or made concerning a *material* fact in the case.

State v. Samuels, 92 N. J. L. 131.

No such qualifications appearing in defendant's request, the Court was justified in refusing to charge the request; in fact, it would have committed error had it charged as requested.

State v. Samuels, supra.

XVI.

Appellant's final ground of appeal is set forth as follows:

"The plaintiff, LESLIE POTTER, was a trespasser. The undisputed testimony is that he had not paid any railroad fare. That, therefore, there being no proof of wanton or wilful negligence, the defendant company owed him no duty that it has not performed, and hence, he can not recover."

We submit that the foregoing language presents nothing calling for consideration by this Court. It sets forth no ruling of the trial Court to which exception was taken, challenges no ruling of the trial Court and merely states certain propositions now advanced by appellant. A minute examination of the entire record will fail to reveal an exception to any ruling of the Court based upon those propositions, or that any ruling on such propositions was, in fact, made.

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In order to review alleged trial errors, the grounds of appeal must set out the judicial action complained of, and a mere statement of a proposition of law or of fact is of no value as a ground of appeal.

Van Sciver v. Public Service R. Co., 96 N. J. L. 14;

Abbe v. Erie Railroad Co., 97 N. J. L. 212;

Burgess v. Noteboon, 100 N. J. L. 116;

Ratz v. Hillside Bus Owners' Ass'n., 103 N. J. L. 502;

Grossman v. Lincoln Trust Co., 106 N. J. L. 567.

“It is strange that counsel should so often disregard this elementary legal rule.”

Meyer v. Lagervelt, 9 N. J. Misc. 503 (Sup. Ct.).

In arguing Point XVI, appellant says that the testimony of CHARLES POTTER proves that LESLIE POTTER, the plaintiff, did not have any money to pay his fare from Asbury Park to Bradley Beach. That is not true. CHARLES POTTER did not testify that his brother had no money. He said that he (CHARLES) paid the fare from New York to Asbury Park, but surely counsel would not have this Court accept that as proof that LESLIE did not have the money. Further, LESLIE POTTER testified without contradiction that he had money with him to pay his fare to Bradley Beach (Case 22, ll. 12, 13). According to his testimony, and he frankly admitted that he did not pay any fare beyond Asbury Park, he did intend to pay his fare, and the reason he did not was because there was no

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member of the train crew in the coach through which he walked before he fell out (Case 22, ll. 5-13).

We submit that Potter's testimony, which was not weakened in any way on cross-examination, under the decisions constituted sufficient proof to justify the jury's determination that he was a passenger at the time of the accident.

Whether a passenger who remains aboard a train to go to a station beyond that to which he has a ticket sustains the relation of passenger after the train leaves the latter station does not depend on the knowledge of the conductor that he is on the train, or whether he could discover his presence by extraordinary care; but if he remains on the train with a bona fide intention and present ability to pay cash fare to the station to which he intends going, he is a passenger.

Southern R. Co. v. Skinner, 133 Ga. 33.

Where a person enters a car for the purpose of becoming a passenger, and with the means and intention of paying his fare, it will ordinarily be presumed that he intends to pay his fare on demand. 10 *C. J.*, 620.

After all, this question was again one for the jury, and appellant is here attempting to argue the weight of the evidence. Both the futility of such an attempt on an appeal and a résumé of the logical course which might have been pursued by the jury in deciding that issue, are set forth under Point II hereof.

Counsel for appellant concludes his argument by telling this Court his impression of our argument

to the jury and alleges that nowhere in the two trials did the defendant accuse LESLIE POTTER of being drunk. We wish to again draw attention to the second special defense set forth in defendant-appellant's answer (Case 13); to the testimony of Scales, Maxon, Barton and Briers, and, since counsel has referred to our remarks to the jury, to say that counsel himself used the word "soused" in describing LESLIE POTTER'S condition, in his summation to the jury.

CONCLUSION.

The Court may have observed references in this brief to matters which are not strictly a part of the record, and arguments upon points not proper subjects of appeal. We have hesitated to incorporate such items in our brief, and it has been done only because of the improper statements and arguments in appellant's brief, and as a matter of self-defense against obvious attempts in that brief to persuade the Court by means of arguments improper both as to form and subject-matter.

For the reasons set forth above, we respectfully submit that the judgment of the Supreme Court ought to be affirmed.

Respectfully submitted,

HOWARD EWART and
FRANKLIN H. BERRY,
*Attorneys for Plaintiff-
Respondent.*
FRANKLIN H. BERRY,
Of Counsel.

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NEW JERSEY COURT OF ERRORS
AND APPEALS.

I desire to call to the attention of the Court the fact that on this day, May 18, 1934, I have had no copy whatever of the Brief of the Plaintiff-Respondent, served upon me, and have, therefore, had no opportunity whatever of making any reply, should I have so desired. As to whether his Brief should be considered, he not having conformed to the rule, I submit to the Court.

LESLIE POTTER
Plaintiff-Respondent
W. Holt Apgar.
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF W. HOLT APGAR, ATTORNEY OF
DEFENDANT-APPELLANT.

As appears on page 15 of the State of the Case, under the title "Statement of First Trial, etc.," the record in the Supreme Court, showing the facts therein, this case was first tried in the Ocean County Circuit Court, before Judge Lawrence, May 16, 1933, and a verdict was rendered in favor of the plaintiff for \$5000.00. A rule to show cause having been allowed by Judge Lawrence, after argument he granted a new trial, saying, p. 16:

"A review of the evidence leads to the conclusion that the verdict was contrary to the weight of the credible evidence, not only as to the issue of negligence and contributory negli-

I desire to call to the attention of the Court
the fact that on the 25th day of June, 1904,
I was appointed to the position of
Judge of the Court of Sessions for the
County of ... and I have since that
time been acting as such Judge.
I have also acted as such Judge
for the County of ... and I have
acted as such Judge for the County of ...
I have also acted as such Judge for the
County of ... and I have acted as such
Judge for the County of ...

NEW JERSEY COURT OF ERRORS
AND APPEALS.

LESLIE POTTER,
Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY, a
corporation of the State of Pennsylvania,
Defendant-Appellant.

ACTION AT LAW.

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Brief of Defendant-Appellant

gence, but in particular as to his relation to the train as a passenger at the time of the accident. The rule to show cause will be made absolute, to the end that a new trial may be had."

At the new trial held January 15, 16 and 17, 1934, before Judge Lawrence, a general verdict was rendered for \$3000.00. Upon an application to set aside that verdict, Judge Lawrence refused the rule, but without prejudice to an application to the Supreme Court for the same, and upon application being made there, the Supreme Court refused to grant the same.

This appeal, therefore, comes before your Honors with this peculiar status:

On the second trial the evidence given by the plaintiff was the same as that given on the first trial, the same number of witnesses, and practically the same statement of facts. On behalf of the defendant, the same witnesses as testified on the first trial, gave their testimony practically the same on the second trial as on the first trial, and an additional witness was offered, to wit, Dr. E. M. Hill, page 59, who was a physician or intern at the Ann May Memorial Hospital, to which place the plaintiff was taken the morning he was hurt, and who took statements from the plaintiff, and which testimony given by Dr. Hill, he being in Wilkes-Barre, Pennsylvania, and not being available at the first trial, was new, and as we claim, of much additional force on behalf of the defendant. The peculiar status, therefore, as we view it, is that on the second trial, with no stronger additional testimony on the part of the

Brief of Defendant-Appellant

plaintiff, from that on the first trial, but with an additional witness testifying to an admission of the plaintiff, and which was very strongly corroborative and supporting the testimony given on the first trial by the defendant, a review of such testimony, consideration of its weight and credibility, has not been permitted.

I also believe that as your Honors read the charge of Judge Lawrence, you will be convinced that from the viewpoint of the trial Judge, a verdict of no cause of action, upon the evidence, should have been rendered. I, therefore, have, in my notice of appeal, in my second point, claimed:

“2. Because the judgment of the Supreme Court is contrary to the credible evidence given in the cause.”

It will further be noted that in my requests to direct a verdict in favor of the defendant, page 125, commencing on line 4, I said to the Court:

“I ask you to consider the question as to the weight of the evidence, and if in your judgment the proponderance or weight of the evidence is with the defendant to so direct the jury to consider and find a verdict accordingly.”

to which the Court said, p. 125, l. 13:

“I am not prepared to say at the moment that even though the trial Judge may have been impressed with the fact that the weight of the evidence may rest with the defendant in this case, that he has a right to withdraw that question from the jury, who are judges of the facts.

Brief of Defendant-Appellant

Whether on a rule, in the event of an adverse verdict, the trial Judge, who now hears such rules, would set aside such a verdict, would seem to be a *post facto* right rather than one involving the disposition of a motion for a direction on such a ground."

Now I submit to this Honorable Court, and I think your Honors ought to consider the question thus raised in the light of the absurdity that it would seem to the ordinary layman, and how contrary to common sense it must be for the trial Judge to be in a position where he cannot direct a verdict from a jury upon the evidence that has been submitted, when he feels satisfied, in his own mind, that should a verdict be given against the weight of evidence, he will set it aside. It is common rumor that some of the niceties that the law seems to be tied fast to, are those which set aside some of the rules of common sense.

Take this particular case. The Court felt satisfied on the first trial that the credible evidence did not support the verdict, and promptly set it aside. On the second trial, with a stronger case for the defendant, he felt impelled not for a second time, to set aside the verdict, although if he were correct in granting a new trial after the first trial, he certainly should have been confirmed in a belief that upon additional evidence against the plaintiff on the second trial, he would be justified in setting that verdict aside. We were not given even the privilege of arguing the question of a new trial before him, the rule being refused. We, therefore, believe that we

Brief of Defendant-Appellant

have a right to have some court pass upon the question of the weight of the credible evidence in this case, and I do not believe any hard and fast rule prevents this Honorable Court from considering that question upon this appeal, and I am, therefore, presenting upon

MY SECOND POINT

the argument which we presented to Judge Lawrence on the rule to show cause in the first trial, as well as that which we believe applies on the second trial, and in order that *justice may be done*, the testimony given in this case be considered carefully, and being so considered, we cannot help but feel that your Honors will agree that insofar as the weight of credible evidence is concerned, this plaintiff is not entitled to a verdict.

The testimony of Dr. Hill, page 61, commencing at line 3, shows that there was a daily record kept at the hospital, and this record kept by Dr. Hill, states several things concerning the patient, the plaintiff, Potter, in this case. The testimony of Dr. Hill shows that on the morning of December 5, 1931, between 9 and 11 A. M., he, Dr. Hill, had a talk with the plaintiff, and his mind was clear, and he took certain statements from the plaintiff, and using this record to refresh his memory, the record was not offered in evidence, objection being made thereto, Dr. Hill said, p. 63, ll. 23 and 24:

“He said he went back to get his rubbers, and he left the train while it was in motion, jumped off.”

This, on cross-examination, was repeated as follows, p. 65, l. 22:

“He said he jumped off. The whole picture was that he had regained the lost overshoes and was anxious to leave the train, and he jumped off.”

The statements thus made by Dr. Hill were corroboratory of the theory upon which the first trial was had, and the testimony of the witnesses on that first trial similar to that on the second trial by all the other witnesses, made that story the most probable one, and the story which the plaintiff told improbable, and when this confirmatory testimony of Dr. Hill was given, in confirmation of the defendant's insistence that he jumped off the train, it would seem as if the theory upon which the plaintiff claimed that because of negligence of the railroad in having a vestibule open in the second and third car, through which he fell, is entirely shattered. I briefly, therefore, review the testimony of the various witnesses, found in the printed book, and upon which we based our contention, as to the manner in which this man jumped off the train, and by his so doing, caused the injuries, which we do not dispute, that he suffered.

Leslie Potter says, printed book, p. 20, that they took the train for Asbury Park; rode in the smoker all the way, which was the last coach in the last car. On p. 20, l. 21, they were playing cards. When the car pulled up at Asbury Park they got off. Then there is some conversation as to his brother leaving

Brief of Defendant-Appellant

a package, and he said he would get on the train and get it. On p. 21, ll. 8, 9, 10, he says he

“got on the front of the first car—the front of the second car, right behind the baggage car.”

and l. 12:

“I walked through that car into the second car. I went through the joint of the train where they join together. I stepped over that and I reached for the doorknob of the second car. I didn't open the door, and the rocking of the train caused me to lose my balance,”

and what happened next he did not know. Line 22:

“I fell off on the right-hand side going south.”

On cross-examination there was practically no change in that statement, p. 30, l. 10 and thereafter, where he says:

“I didn't open the door; I reached for the doorknob; did not get hold of it, and the rocking of the train caused me to lose my balance and I was ditched out, tossed out by the rocking of the train.”

This is all that was given by the plaintiff as to the accident—how it happened—how it occurred. By it he most definitely states that he did not get beyond the door of the third car of the train, and his case must stand or fall upon whether that was true or not. As we have contradictions thereof from witnesses, one of which shows that he made a different

statement in the hospital, and from other witnesses who saw him in the rear car of the train, or going thereto, the credibility of the plaintiff's statement should be carefully considered, and we start criticising his evidence and its truthfulness by calling attention to the fact that he says, on p. 26, l. 31, and on p. 27, to l. 21, in answer to questions:

“Q. Did you see any of the men that were on the train, that were running the train that day?

A. I saw them when they came up and got our tickets.

Q. You didn't have tickets, did you?

A. When they came up to take up the tickets which they had, and my fare.

Q. You saw a railroad man?

A. Yes, sir.

Q. You don't know whether it was a conductor or a brakeman?

A. I didn't pay any attention. It was a workman on the train, with his uniform on.

Q. You paid him in cash?

A. Yes, sir.

Q. How much did you pay?

A. I think it was \$1 even.

Q. Are you sure of that?

A. \$2 and some cents; I don't know what the fare was.

Q. Do you know whether you got any change or not?

A. I think it was \$2, maybe \$2.10, but I don't think there was no change coming back.”

Brief of Defendant-Appellant

Nothing can be more explicit than that—that he says he paid his railroad fare in cash; that he paid \$1.00, or \$2.00, or \$2.10. He likewise says that his brother, Charles, who was sworn as a witness, p. 35, was with him coming from New York, and on p. 39, l. 2, Charles says:

“Q. You had a ticket already that paid your fare to where?

A. I had a return ticket.

Q. Your brother had no ticket?

A. No.

Q. Did he pay his fare?

A. I paid his fare.

Q. From where to where?

A. New York to Asbury Park.

Q. To whom did you pay the fare?

A. The conductor.

Q. Are you sure it was the conductor?

A. It wasn't nobody else.

Q. Do you know the conductor?

A. I do not.”

Now, if Charles paid his fare, Leslie did not. Which will you believe? Leslie seems to state something about money, but his brother says that he, Charles, paid the fare. Whether this is deliberate on the part of Charles, or on the part of Leslie, we do not know, but certainly Leslie, in his statement, is flatly contradicted by his brother, and then he is also somewhat uncertain about the amount he paid to him. We thus start with a decided uncertainty as to whether he is telling the truth when he states differently from what his brother does, or whether

he is so careless of the truth that he does not remember, and gives only what he thinks he remembers, and it seems to me that that, as a forerunner of the consideration to be given to his testimony, as to the manner in which he got off the train, ought to have considerable weight in causing it to be classed as doubtful, when other witnesses are clear and convincing in what they state, which is contrary to the statement he makes as to the manner in which he got off that train. We thus have all of the testimony that has been given to support the verdict rendered by the jury.

What is there to the contrary in the evidence given by the defendant? We will take it in the order in which it appears in the printed book.

Dr. E. M. Hill was called as a witness for the defense, and on p. 60, he gives a brief review of his services as an intern and as a physician, and shows conclusively that on December 5, 1931, he was in internship at the Ann May Hospital from June 15, 1931, to June 15, 1932 (ll. 10 and thereafter). Some further testimony followed, in which he practically recognized the plaintiff as the patient. He further tells the condition of his mind was clear, p. 61, l. 30, and that he questioned him between 9:00 and 11:00 in the morning of December 5, and that his mind was clear at that time. The record of the hospital, showing the personal history taken by the intern from the patient, p. 61, ll. 7, etc., was used to refresh his memory, and on p. 63, ll. 22 and 23, Dr. Hill says:

“He said he went back to get his rubbers,

Brief of Defendant-Appellant

and he left the train while it was in motion, jumped off.”

Further questions, including two pages of the record, were shown to the witness, all of which seem to agree with the facts as to the time of discharge, and all show that the identification of the plaintiff, as the patient that Dr. Hill attended, was not, for a moment, questioned. On cross-examination, and which is on p. 65, and very short, in answer to Mr. Berry, the witness said, ll. 22, 23, 24:

“He said he jumped off. The whole picture was that he had regained the lost overshoes and was anxious to leave the train, and he jumped off.”

As to this testimony, on p. 124, in rebuttal, the plaintiff said, in answer to the question:

“Q. Well, did you have such a conversation with Dr. Hill?”

A. No, sir.”

I might right here call the Court's attention, and which I ask it to observe, to what is under the title of “Discussion,” on pp. 112, 113, 114 and 115, when Exhibit P1 was produced and offered in evidence. It will be noted that Dr. Hill had testified that that was his record, and Dr. Parry, their own witness, on p. 56, was shown the same, and on p. 57 of this record, he recognized Dr. Pietre's signature to that record. The discussion shows what effort had been made, and the reliance we placed upon Dr. Pietre's word, that he would appear as a witness that after-

noon, and the Court felt undoubtedly that we were not in laches, because we took the doctor's word, and gave a continuance until the next morning, in order that we might produce him by subpoena. It will be further noted that what was in that record, under which appeared the signature of Dr. Pietre, counsel for the other side refused to allow to go in, with the statement that if Dr. Pietre was here, he would so testify as to the matter that was there over his signature. The next morning Dr. Pietre was there by subpoena, and on p. 117, when shown the record, he acknowledged his handwriting and name, and then said, l. 32:

“A. This is clear to me, what I have written, but I don't recall just how I got the information.

Q. Did you get it from Potter?

A. I don't remember, your Honor.”

Of course, after being forced to come in court, because he had broken his promise to be there the day before, the hostility of the witness, as the answers given by him clearly indicates, shows that he was doing everything possible to keep from giving us the important information that was there over his signature, and the assiduity of plaintiff's counsel, in keeping that out, shows that he considered it very important, and did not want the jury to know what it was. A clear inference from that can easily be drawn as to what the statement was, and whether it did, or did not corroborate that which Dr. Hill said was the fact, and to which he testified.

I believe it perfectly proper to say that the inference is unquestionable; that the record made by the

Brief of Defendant-Appellant

two doctors, Hill and Pietre, was exactly similar. Of course, if Dr. Pietre's record had contradicted Dr. Hill's, my learned opponent would have been very glad to have had it given. He had seen it, and he knew what it was. So much for what happened at the hospital, where this man was confined for a number of days, and the testimony given by Dr. Hill as a disinterested witness, one who, without any reason whatever for making a false record, entered in the record what he has testified to, and got it from the plaintiff.

On p. 66 commences the testimony of Hulet R. Scales, passenger brakeman on this train No. 701, running from New York at 12:10 midnight, on December 4, 1931, or rather the morning of the 5th, l. 27. He collected the transportation on the last two coaches, p. 66, l. 31, etc., and he saw the colored man sitting in the smoking compartment, in the rear of the car, p. 67, ll. 6 and 7. Two had tickets—one paid a cash fare. He does not know which one paid the fare. He got them cards and a card table, p. 68. He had on a brakeman's cap, with the word "Brakeman" thereon. Then he gave his testimony as to the three being noisy, using profane language and that they had bottles marked "Gin," and that they got off of the train at Asbury Park, and that he (p. 69, l. 21):

"Assisted two of them down the steps at the head end of the smoker."

After the train had left Asbury Park, p. 69, l. 30, and following, he said a colored man brushed by him. He would not say whether it was one of the

three or not. In asking him for transportation, p. 70, l. 2, this man said:

“You have my ticket.”

and Mr. Scales was then in the 5th car, next to the rear, and he saw this man go into the 6th car, which was the last car on the train, p. 70, l. 9. Mr. Scales was to go back and get his transportation, he then working from the rear forward. He then went back in the rear car, p. 70, l. 17, and the colored man who brushed by him was not there.

Bradley Beach was the next stop after Asbury Park. The plaintiff got off at Asbury Park, but then got on and walked through the length of one full car, car No. 2, to car No. 3, and when reaching for that doorknob, as he says, he fell off. He, therefore, according to his story, did not get in either the third, fourth, fifth or sixth cars. Scales says that a colored man went by him in the fifth car, saying:

“You have my ticket.”

and went on into the sixth car, where he saw him go, and when he, Scales, at Bradley Beach, went back into the sixth car, he was not there. In the rear car were three passengers, p. 70, ll. 27, 28, 29, Mr. Barton, Mr. Maxon and Mr. Briers. The conductor was working from the head end of the train, back to meet Mr. Scales, and Mr. Scales met him in the third car from the rear, which would have been the fourth car of the train, p. 71, ll. 1 to 8.

There arose in this testimony of Mr. Scales the question as to whether the rear vestibule and trap-

Brief of Defendant-Appellant

door on the sixth car was open or not. The conductor, in interrogatories, had said that all the trap-doors on the west side of the train were open, but it appears later on from Mr. McChesney's testimony, that he had nothing to do with, and should not have given any information as to the rear end of the rear coach, that being exclusively Mr. Scales' duty. The Court permitted Mr. Scales to tell what was the condition of that rear vestibule and trap-door, although counsel objecting and insisting that the defendant company was bound by the answer of Mr. McChesney, who said that he did not know about that vestibule, and had no intention of having his answers to the interrogatories apply thereto. Mr. Scales testifies positively, and it is not contradicted by any witness at all, p. 73, ll. 21 to 31:

“Q. When you got on the train and started from Manhattan Transfer did you get on the rear end?

A. Yes, sir.

Q. You had both trap-doors and vestibules closed?

A. Yes, sir.

Q. Were they opened at any time from there to Asbury Park?

A. They were not.

Q. Were they opened at Asbury Park?

A. They were not.”

and I believe thus we can say, without contradiction from any one who knew, that the vestibules and trap-doors on the rear car of that train were closed. It is also to be observed that Mr. Scales says on

pp. 73 and 74, that the vestibule lights in cars five and six were lighted. There were plenty of vacant seats in both cars, he says, and that there was no excuse for the plaintiff, insofar as want of light or want of a seat were concerned, for him to go anywhere on the platform of that train, while it was in motion. In fact, the testimony of Potter is conclusive to the effect that he was not looking for vacant seats; that he was not embarrassed by any want of light, but that he was going through the train, from car to car, for the purpose of finding the package, or rubbers, which had been left in the compartment of the rear car, as he supposed. Mr. Scales likewise testified, p. 77, as to the plate which was on the door of the car, and which was on the inside thereof, marked D4 for identification, saying:

“Passengers are not allowed to stand on the platform.”

The next witness of the defendant was Ralph Maxon, who was an engineman on the Pennsylvania Railroad, and on p. 78 he says he was on this particular train No. 701, and was in the rear end of the car, two or three seats from the rear. On p. 79 he says it was a steel car; that Mr. Barton and Mr. Briers were with him, Mr. Barton being a fireman on the Pennsylvania Railroad, and Mr. Briers a clerk on the Central Railroad. They had been on service, and were returning to their homes. On p. 80 he says he saw the three colored men. He did identify the plaintiff as being one of the three, p. 82, ll. 10 to 14. He says there was at different times, a lot of noise; that they were very noisy—feeling

Brief of Defendant-Appellant

good, p. 81, l. 15. On pp. 81 and 82, Mr. Maxon says he saw a colored man after the train left Asbury Park, in the car that he was in, which was the last car of the train, which was only a matter of seconds after leaving Asbury Park, and he there says, p. 82, l. 10 and following:

“Q. Do you know whether he was one of the three or not?

A. Yes, I do.

Q. Are you positive or not as to that?

A. I am positive.

Q. Why are you positive?

A. Because my attention had been attracted so much, and I noticed the fellows; I knew it was one of the three.”

He then, on p. 82, l. 23, says:

“A. He came in the car in a hurry and looked in the place where they had been sitting, and then he came through the car to my end, and—well, he wasn’t walking or running, but he was in a hurry, and he looked in the other compartment, and then he went out the back door.

Q. Did you see him after that?

A. No, sir.”

Following this testimony of Mr. Maxon on p. 82, and running to pp. 83 and 84, he further says:

“Q. After he had gone out there did you get up out of your seat and do anything?

A. Yes, I got up and went out and looked on the back platform.

Q. What did you observe out there, if anything?

Brief of Defendant-Appellant

A. I didn't see any man.

Q. What did you observe as to the vestibule?

A. The trap-doors were open.

Q. Which one?

A. The ones on the right side.

Q. Going towards Bradley Beach?

A. Yes, considering the engine ahead.

Q. Did anybody else go out on the platform with you?

A. Mr. Barton.

Q. He was with you when you opened the door?

A. Yes, sir.

Q. On the rear platform did you notice whether the lights were lighted or not?

A. They were, because I could see the steps plainly.

Q. How about seats in that car you were sitting in, were there any vacant or not?

A. All vacant but three.

Q. Describe the condition of that rear platform when you and Barton went out there?

A. Well, there was nothing wrong with it outside of the platform being up, that is, the little drop platform, and the door open.

Q. On the right side?

A. Yes, sir.

Q. How about the left side?

A. Closed.

Q. The platform down and the door closed?

A. Yes, sir.

Brief of Defendant-Appellant

Q. Was the train running normally or otherwise as it started out?

A. Normally."

On cross-examination (p. 85, l. 22 and thereafter), he says that a few seconds after the man went past him, he looked at the rear platform, and the train was in motion.

We next have the testimony of Mr. Barton, p. 86, a locomotive fireman for the Pennsylvania Railroad, who says that Mr. Briers, Mr. Scales and he were in the rear of the hind car; that he knew there was some trouble and commotion, and he thought the men were drunk, because (p. 88, ll. 26 and 27):

"They were staggering around."

They got off the train at Asbury Park, and then he saw one of these three men afterwards (p. 88, ll. 33 to 35), and on p. 89, he says, indicating the plaintiff:

"It was one of the party."

that he saw go in the smoker. That after the train started out of Asbury Park, a colored man re-entered the car, p. 89, commencing with l. 12, and then he walked to the hind compartment and looked in it on the left side. He did not appear to find what he was looking for, and walked out on the platform. On ll. 23, 24 and 25, he again identified the man as one of the three. Mr. Barton then says, pp. 89 and 90:

"Q. After he had gone out on the rear platform, what did you do?

Brief of Defendant-Appellant

A. Mr. Maxon walked out after him, and I walked out after Mr. Maxon.

Q. What did you find on the rear platform?

A. I didn't find anything outside of Mr. Maxon.

Q. Was the vestibule lighted?

A. Yes, sir.

Q. What was the condition of the trap-doors and vestibules?

A. The trap-door on the right side was open; the left side was closed."

On p. 90 he also says there were vacant seats in the coach, and the train was in motion when he went through, and that the vestibule and trap-door that ~~was~~ ^{were} open when he and Mr. Maxon went out there ~~was~~ ^{were} on the right-hand side, heading south, ll. 22, 23, and 24.

Mr. Briers, the next witness, was a night yard clerk in the employ of the Central Railroad of New Jersey, p. 93. He was taking this same train; saw Mr. Scales, Mr. Maxon and Mr. Barton, and sat in the fifth seat from the hind end of the hind car, which was a steel vestibule car, p. 94, and that he saw three colored man in the compartment, who were playing cards. He says they were playing poker, and had a bottle of gin sitting on the window-sill, and he could smell it, p. 94, ll. 14, 15 and 16. That Brakeman Scales had to quiet them; that he saw them going out of the door at Asbury Park; that after the train had started from Asbury Park, p. 95, l. 8:

"I seen one of the three men come back

Brief of Defendant-Appellant

through the hind door of the car I was sitting in."

and he then, ll. 12, 13, 14 and 15, positively identifies Potter as one of the three. He came in the sixth car, or the smoker:

"Looked in the compartment where they had been sitting, came right straight on through, opened the back door and went out."

and l. 31, etc.:

"I saw him go out of the door."

and he further says that this man did not come back in the car after he had seen him go back, or through the rear door.

Next we have Mr. Smith, the baggage master of the train, who says, p. 98, ll. 14 and 15, that they stopped at Asbury Park probably four or five minutes. He then says, on pp. 98 and 99, that he saw a man get on the train, a colored man, and one of the three that he had seen standing alongside of the train talking. Positively, one of the three, he says, got on the train at the head end of the second car, or the rear end of the car next to him, p. 99, and that was the last he saw of him.

Mr. McChesney, the conductor on that train, was the next witness. He did not go back as far as the fifth and sixth cars, because Scales was working the rear end of the train, p. 101. When the train started from Asbury Park, there was nobody in the combined or first car, baggage and passengers, and nobody in the second coach. There was somebody in

the third coach, p. 102, l. 33, and he got on and started to work the train toward the rear, p. 103, l. 2. While in there

“A colored man brushed by me in the third car.”

This was the third car of the train, second coach, counting the baggage and combined as a baggage car, and not as a coach, and is the car which Potter says he did not go into, because he was reaching for the doorknob when he went off the train. Mr. McChesney says he went by him hurriedly; he did not have a chance to get him, and he went toward the rear end of the train, and p. 103, l. 27:

“I knew he went out of that car.”

He knew nothing of the accident until they arrived at the terminal at Bay Head. Mr. McChesney then, having given the answers in the interrogatories, the Court permitting him to answer, said that he understood it referred to the train, and said that he had reason to believe that the rear platform was closed; that being his instructions, he had no occasion to open it, and having in charge of it a reliable employee, he believed that it was closed, pp. 105 and 106, and that it was the duty of Brakeman Scales to inspect that rear platform. He further, on p. 107, says it is not customary to use the rear end vestibule on the rear of the train. He further says, when he made the answer as to the condition of the trap-doors and vestibule, p. 107, ll. 21 and 22:

“I didn't have in mind the rear trap-door, because of the fact we don't use it.”

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This review of the testimony, it would seem to me, clearly sustains the contention of the defendant that the overwhelming weight of credible evidence is with it, and that a verdict founded upon the statement of the plaintiff, and which is somewhat impeached by one of his own witnesses, as well as by all those of the defendant, should carry with it the conviction that a judgment obtained upon the plaintiff's evidence should not be sustained. There ought not to be, really, a doubt in the minds of reasonable men, as you read the evidence to what all the witnesses of the defendant say, as to the manner in which the accident occurred, together with the strong intimation that pervades the charge of the Court to the jury, as to where the weight of such credible evidence rested; that to sustain such a judgment would be a miscarriage of justice. We, therefore, ask the Court to give due consideration to the question, as to whether a review of the evidence, and in this second trial it has not been passed upon by any Court at all, as to where the weight thereof lies, and that it should be determined that the defendant was entitled, at least, to a new trial, if, as is hereinafter presented in this brief, the Court should not decide that upon the evidence that had been given, the application of the statute hereinafter referred to did not make it obligatory to direct a verdict for the defendant.

In making the request, and which we believe is our right, we desire to call attention to two of the late cases in your Honorable Court, and which clearly intimates that it is only in those cases in which a rule to show cause why a new trial should

not be granted, as we have argued, before whatever Court has granted the same, reasons for the new trial presented, etc., and then by that Court denied, that we are barred from presenting that question to this Honorable Court, as the suitor has not had his day in court upon that question, and we think that the dicta in

Catterall v. Otis Elevator Co., 103 N. J. L. 381, 135 Atl. 865.

and

Boniewsky v. Polish Home of Lodi, 103 N. J. L. 323, 136 Atl. 741.

sustain our contention, and while we shall argue that we were entitled, under the evidence, to have a direction of a verdict, which motion was made at the close of the trial, we think we are entitled to have, for both reasons, this weight of the evidence given proper consideration by this Honorable Court.

POINT 3.

Point 3 is abandoned.

POINT 4.

This point is divided into four sections, (a), (b), (c) and (d):

Section (a).

This I have presented in my argument on my second point.

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Section (b).

Page 2, ll. 27 to 35:

“(b) Because under Section 55 of the Compiled Statutes, page 4245:

‘Anyone jumping on or off a car while in motion * * * shall be deemed to have contributed to the injuries sustained, and shall not recover therefor any damages from the company owning or operating said railroad.’ and the credible testimony shows that the said plaintiff did so jump off a car while in motion.”

This likewise is a question that I believe the argument that we have made under Point 2 covers, and the recital of Section 55, if, by credible evidence, the plaintiff did not sustain the burden of proof required of him, should be held applicable, and certainly should prevent recovery for damages.

Section (c).

This requires the citation of Section 39, page 4240, Vol. 3, of the Compiled Statutes:

“39. Liability for injuries to passengers; when not incurred; seats in cars. In case any passenger on any railroad shall be injured by reason of his going or remaining on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury;

provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers. (P. L. 1903, p. 666).”

Now, to bring the defendant company and its car under the terms of that statute, we must show, first, printed regulations of the company posted in a conspicuous place inside of its passenger cars on the train. The testimony of Mr. Scales, p. 77, shows that a plate was offered in evidence, marked D4 for identification, on which was written the words:

“Passengers are not allowed to stand on platform.”

and which was on the door of each car. This is also shown clearly in Exhibit D2, and you can even read the words in the reproduction of the photograph. It is also shown in Exhibits D3 and D4, but not so plainly. Attaching that plate where it has been, shows on the inside of the car door, when the door is open, and on the outside when the door is closed, thus giving notice plainly to the passengers, whether entering or passing out of the car. Mr. McChesney, p. 108, also refers to this same plate, l. 30, and it is offered in evidence, and so marked, p. 109, he testifying also that plate D1 was on the door of each of the cars, as shown in the photograph. His attention, p. 108, was also directed to Exhibits D3 and D4, and the notices that were in the end, near the ceiling, on the right-hand side of each car, and thereon, as you can very easily read in

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Exhibit D3, and also can read in D4, although the printing is not so clear there, are the words:

“Passengers must keep off the platform until the train stops.”

We, therefore, seem to have conformed, according to the uncontradicted evidence, to the requirements of the printed regulations which are to be posted up in a conspicuous place inside of the passenger cars.

Now, these injunctions on these notices are not to be violated:

“Provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers.”

and if violated by a passenger, he cannot recover damages.

There can be no question about that. The plaintiff says, p. 29, l. 26:

“All the seats wasn't occupied.

Q. There were plenty of seats for anybody to sit down?

A. Yes, sir.”

So, insofar as his going through that coach was concerned, there were plenty of seats, and he did not have to go in the platform and into another car for that purpose.

We likewise, in the testimony of Mr. Scales, pp. 73 and 74, find that the vestibules in cars five and six, through which he says this colored man passed,

were lighted, so there were lots of vacant seats, and he had no need, when he reached the rear, where he was looking for his package, to go out on the rear platform.

Mr. Maxon, p. 83, likewise says that all seats in the car were vacant but three.

Mr. McChesney, on p. 102, says there was nobody in the second coach, the car which Potter says he went through, and in which he agrees with Mr. McChesney, that there were plenty of vacant seats.

Mr. McChesney testifies as to Exhibits D3 and D4, as to the notices that were posted on the door, and in the end of the car, near the ceiling, and that these notices, as evidenced by these exhibits, were on this train.

While reviewing the testimony of Mr. McChesney, it might be well for us to have your Honors observe this testimony on his part, which is not used here for the purpose of contradicting Potter, but for the purpose of showing that there is a rule that the vestibules and trap-doors between Long Branch and Bradley Beach are to remain open, and the delay that would result, if they were closed, p. 111, l. 20 and thereafter; then commencing on p. 109, l. 10, through all that page, and p. 110, wherein is given the distances between the stations from Long Branch to Bradley Beach, and also which are shown on the left margin of Exhibit D5, confirming the statement that the distances between those stations are so short that it would cause very material difference in the running of the trains, in the time they could make, and result in a service to passengers and patrons that would be most annoying and cause them to lose

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considerable time, and that with those short distances, it is not necessary for the trap-doors and vestibules to be closed, if proper service, as required by the statute of the State, and the Utility Commission, is to be rendered by the company.

Clearly, therefore, when Potter got on the second coach, and walked through it, and then out upon the platform, where he says he fell off, he violated the notices that were posted in the car, as per the requirements of the statute, and he also did not have the excuse that he was going on the platform and to the next car for the purpose of getting a seat. Of course, he says frankly that that was not his purpose of getting on the train; that it was to find the package.

It would seem to me, therefore, that clearly, if this statute has any application to the case in question, that upon that ground the verdict should have been directed, and it was error not so to do. I shall make further argument as to this statute, and the construction that had been placed thereon by this Honorable Court after I have referred to some of the requests to charge, and which were refused, and will make my legal argument upon all of the points I have alleged as grounds for appeal, after I have enumerated them.

Section (d).

The trial Judge, possibly, felt bound by the belief-to-be all embracing dictum, that if there be a scintilla of evidence to sustain either a plaintiff or a defendant, that the Court has no right to ignore

such scintilla and direct a verdict, but is at perfect liberty on a rule to show cause why a verdict, if founded upon such scintilla of evidence, should not be set aside.

It is not the comment of a lawyer, although I am making it now, but of many, many suitors, many clients, and many laymen, and I have heard it from all, that for a suitor to feel that the evidence is overwhelmingly in his favor, and yet a witness who you could absolutely judge was practically telling an untruth, or was so overwhelmingly out-weighted by the testimony of other very credible witnesses, that he cannot have the benefit of the doubt at the time of trial, but if the verdict is against him, must spend his money to prepare an appeal, incur large stenographic and printing fees, pay additional to his counsel to get on a rule to show cause, the Judge to say that which he could just as well have said, and would have been just as absolutely sure of its being correct at the trial, if this harsh and hard fast rule was not applied. Mr. Justice Swayze once said when a motion was made before him, and he was presiding in the Mercer County Circuit Court, that he never understood why, when he felt that a verdict, upon the evidence submitted, would have to be set aside by him, he could not direct the verdict, and that is a most common sense remark, and should find a place in the decisions of our court, and should be made the rule by which the trial Court could thus exercise his judgment before a verdict, and thus save time, labor, cost and expense to the suitor who is trying to secure justice.

In this case, when you consider Judge Lawrence's

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action in the first trial, in setting aside a verdict, with lesser evidence than there is in this one, and when you read his charge to the jury in this case, can you have any doubt but that in his own mind he was satisfied that the manner in which this accident happened was not so testified to, by the plaintiff, but was absolutely caused by the manner in which the other witnesses told it had happened, and then when you add to that the addition made by Dr. Hill, together with the proper inference I claim you can draw from the manner in which Dr. Pietre testified, and which was undoubtedly corroborative of the testimony of Dr. Hill, and so appeared in the record, can it be doubted for a minute but that the Judge who saw the witnesses, conducted the trial, went through it twice, had the proper conception and the truth in the matter?

Closely connected with Point 4, which we are now arguing, are Points 13 and 14, and I desire the legal citations that I now use, to be applied to the three points thus named.

This statute has been construed by our Court of Errors and Appeals.

Points 5, 6, 7, 11, 13, 14 all relate to the question as to whether the statute, Section 39, of the Act Relating to Railroads and Canals, p. 4240, Compiled Statutes, applies to this case, and the different ways in which it is applicable, in our opinion, are presented in those requests to charge, all of which the Court denied.

Not only that, but the Court said distinctly, p. 136, from l. 32, and p. 137, ll. 1 to 9, in his charge, that

he was not able to say that this statute applied to this suit, and distinctly took a vestibuled car and train out of the application of the statute. We think he erred, and ask the Court to review what the Court of Errors and Appeals has said in the leading case on this question, and see whether, under the circumstances and uncontradicted evidence in this case, such ruling was incorrect, and as we believe, contrary to the true intent of the statute, and of the decision of this Honorable Court, in the case of

Rivers v. Pennsylvania Railroad Co., 83 Atl. 883, 83 N. J. L. 513,

(80 N. J. L. 217, and 76 Atl. 455, was case in Supreme Court, C. J. Gummere—Justices Bergen and Voorhees).

I believe I am correct in stating, up to the present time, the *Rivers* case, *supra*, is the leading and controlling one in this State, that deals with the question of the statute, to wit: Section 39 of our General Railroad Law, *supra*. The doctrine therein promulgated by this Honorable Court, is one that is well established and to which we take no exception when it says:

“A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate.”

He further says that

“when such company has assumed to safeguard passengers using such vestibule, while the train is running between stations, by providing a trap-door to cover the space over the steps, it

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is bound to use reasonable care to maintain it in proper position.”

We contend that in this case we had used proper care to protect passengers from danger, as far as foresight can determine, and that reasonable care to maintain a trap-door in proper position was exercised.

The conditions on the New York and Long Branch Railroad, especially between Long Branch and Bay Head, where the great amount of traffic is carried, I have elsewhere referred to, and as shown by Exhibit D5, and the testimony of Mr. McChesney, it has been found necessary for the railroad company, because of its patrons' desire, without question, to make the best possible time, to establish a rule that the delay that would be occasioned by opening and closing the vestibule and trap-doors at each of these stations, so close together, would very much affect the quality and speed of service that those passengers require, and that, therefore, the rule was promulgated, as stated by witness McChesney, on p. 111, ll. 31 to 35, that on local trains of the type that was carrying the plaintiff, the doors are all to remain open. I do not think that for a moment it can be claimed that the railroad company did this in defiance of the best service it could render to its patrons, but that as a matter that would serve those patrons best, it was required to make that rule, and when the short distances between the stations are considered, it does not require practically any consideration to determine that if the brakemen are to be all the time concerned in opening and closing trap-doors,

they would not have any time, practically, to devote to passengers; that, therefore, it is a sensible, reasonable, and under all the circumstances, we claim a rule which is in direct consonance with the statute under consideration. Vestibuled cars have been in existence for more than twenty-five years, during all of which time this statute has remained upon our statute book, and is the law of the State. If, because of vestibuled cars, this statute was not to be applied to trains so vestibuled, it would have been the easiest thing in the world to have amended it by adding a proviso exempting vestibuled cars from its provisions. That not being done, let's carefully look at the basis for the decision in the very able opinion written by Justice Trenchard, upon the question, in the Rivers case. It will be noted in the first part of the opinion that the Justice says:

“He was *unable to obtain a seat* because they were all occupied, and so, with several other passengers, stood in the aisle.”

Following that are the words:

“Rivers started to go into the next car for the purpose of obtaining a seat,”

and a jerk of the train threw him through the trap-door. Further on the Justice says:

“The jury was at liberty to find from the evidence that the plaintiff *was not furnished a seat in the car which he boarded.*”

We could hardly find words that would more strongly indicate that this Court felt it was because

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he could not find a seat, which under the language of the statute, then gave him permission to go from one car to the other, and that the jury did so find that he went from one car to another because he was not furnished the seat. Right in the same sentence the Court says:

“passing through the unlighted vestibule in quest of a seat,”

and it might have been, although the Court did not say so, that because the vestibule was unlighted while open, was another ground upon which the jury could have inferred negligence, but it is very significant to note that these words are connected

“the unlighted vestibule in quest of a seat,”

and since the Court did not say, as it did in the forepart of this same paragraph or sentence, that the jury was at liberty to find from the evidence that the unlighted vestibule was a proper inference of negligence that could be drawn, it does connect the unlighted vestibule and use it only in connection with the quest of a seat. Further on, in the same opinion, after quoting the section, his Honor says:

“But this section does not preclude recovery by a passenger who uses the platform for the purpose of *going to the next car to obtain a seat* which the company has failed to furnish in the car which he originally entered.”

Following that his Honor further says:

“that the plaintiff and others were unable to obtain seats in the car which they boarded.”

Reference is again made to the opinion of the Supreme Court, which this opinion reversed, in speaking of "looking for a seat." The concluding paragraph of the opinion reads:

"We think the question whether in the exercise of the high degree of care required the defendant should have anticipated that a passenger would pass from one car to another for the purpose of *looking for a seat* when within four-fifths of a mile from the end of his journey was not for the Court, but for the jury, and was properly submitted to them."

If, therefore, you can say one fact has been emphasized more than another in this opinion, it is the fact that Rivers was "*looking for a seat.*" That was what gave to him immunity from the statute, and we insist that there is nothing in this case that takes it out of the statute, which distinctly prohibits a passenger going or remaining on the platform of a car, in violation of the printed regulations, etc., as the testimony uncontradicted and unqualified shows that the regulations were there and were posted; that there were vacant seats; that the cars were well lighted; the vestibules well lighted, and that the plaintiff, himself, admits that he was going from one car to another—*not for a seat*—but to get a package which, through his or his companion's carelessness or negligence, was left in the rear car of the train.

It will be observed that in this opinion of the Court of Errors and Appeals, Messrs. Gummere, C. J., Bergen and Voorhees, Justices, were excluded

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from sitting, as they sat in the Supreme Court, 76 Atl. 455, and 80 N. J. L. 217, and held that in the same case there was no negligence, which opinion was reversed by this Honorable Court, and that Justices Swayze and Parker, and Judges Vroom and White, both lawyers, dissented, thus making seven of the sixteen Judges who, even though the opinion by Justice Trenchard was based entirely, as we claim, upon the fact that Rivers was not furnished with a seat, and was thus justified in going on the platform, they could not see in the same light the negligence that, by such a small majority of this court was thus determined, and it is most pertinent to quote what Justice Swayze said, and which we claim was such good reasoning that it called for the promulgation of the rule that the witness, McChesney, has testified to, and although it is the opinion of the minority of the court, still, when you consider the eminent Jurists, to wit: Gummere, Bergen, Voorhees, Swayze and Parker, five of the nine Supreme Court Judges so holding, and two lawyers, Vroom and White, it is very strong grounds for believing that it is only in an emergency such as Mr. Justice Trenchard so frequently emphasizes, *about finding a seat*, that such decision would have been rendered by our court of last resort.

It certainly seems to me that it was decided error for the Court, in the trial of this case, to refuse to allow the jury to consider whether there was a want of negligence, because the plaintiff was not seeking a seat in this particular case, and that the statute had no application thereto.

Mr. Justice Trenchard very clearly states, again quoting:

“We have pointed out that, in the present case, the jury was at liberty to find from the evidence that the plaintiff was not furnished a seat in the car which he boarded.”

and that the jury could have had no opportunity to pass upon the effect of that statute in this particular case, where the terms of the statute did not at all apply as to whether or not it was negligence for this plaintiff to pass on the platform of a car, when he had no excuse, such as provided by the statute, for him to so do.

Mr. Justice Swayze says in his dissenter:

“It was necessary for the servants of the railroad company to open the vestibuled platform before the train arrived at the terminal or to discommode passengers by delaying them while the vestibule was opened after the train had come to a stop. It seems to me going too far to hold that the railroad company was guilty of negligence because they chose to open the vestibule when the train was less than a mile from the terminal; that is to say, probably within a minute in time of reaching its destination. To me it seems one of those questions of good judgment which may fairly be left to the servants of the company in actual charge of the train.”

We ask this Court, therefore, to say that as the statute stands without any modifications, that under

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certain conditions such as were apparent in the running and management of this train, between stations so close together, it was negligence such as the statute described; would prevent liability for injury to the plaintiff, who, in search of a package that had been left upon the train, without searching for a seat, was precipitated, even as he claims, from the train. Of course, there is no doubt that if the testimony of the defendant's witnesses state the true occurrence, then he was not, in any wise, entitled to recover for the injury received, because if they are believed, he jumped from a moving train in direct conflict with Section 55 of the General Railroad Act.

There have been a few cases in our court, in which this question of the trap and vestibule doors figure in an accident, and I cite all, I think, which have been passed upon by the Court, and what led to the particular judgments therein stated:

McBride v. P. R. R. Co., 123 Atl. 765, 99
N. J. L. 464 (E. & A.).

Trap-door of vestibule was in a defective condition and flew up and hit passenger.

Holtzman v. H. & M. R. Co., 128 Atl. 623,
101 N. J. L. 255 (Sup.).

Applies to station construction.

Egner v. H. & M. R. Co., 162 Atl. 554, 109
N. J. L. 367 (E. & A.).

Defective appliances on trap or vestibule door.

Brief of Defendant-Appellant

Rogers v. N. Y. C. R. Co., 150 Atl. 357, 106
N. J. L. 394 (E. & A.).

Trap-door went down when passenger stepped thereon.

Great No. Ry. Co. v. Shellenberger, 54 Fed.
2d 606 (9 Cir. C. of A.).

Train going 50 miles per hour on railroad tracks under construction, gave sudden lurch and plaintiff was thrown through trap-door of vestibule. Held negligent.

We also feel that the refusal to charge requests 6 and 7 was error on the part of the trial Court.

“The mere opening of the exit door of a public conveyance of whatever character following a request by a passenger to be let off at the next stop does not constitute an invitation to him to alight when the vehicle is in motion if he knows, or in the exercise of the care of a prudent person ought to have known, that fact.”

Paginini v. North Jersey St. Ry. Co., 69
N. J. L. 60, 54 Atl. 218;

Amidon v. Twin State Gas & Electric Co.,
147 Atl. 694 (Vermont);

Elger v. Boston Elevated Railway, 226
Mass. 84, 115 N. E. 242;

Busack v. Chicago City Ry. Co., 283 Ill. 117,
118 N. E. 1041, L. R. A. 1918D, 416;

Kirby v. United Rys. Co., etc. (Mo. Sup.),
242 S. W. 79.

POINT 15.

We feel the Court erred in failing to charge that request, because had it been done, and the jury had given careful consideration to the fact that the plaintiff was contradicted by his own brother, Charles, a witness, as to the payment of fare, as hereinbefore referred to, together with the contradictions of his testimony by many other witnesses, the falsity of his testimony would have appeared in one of those contradictions, and they could have applied then, the test of contradiction to all of his testimony, and the jury not understanding and knowing that maxim, could not, of course, apply it, and it was of material interest to the defendant company, that it should so understand the legal rule, and apply it, if they felt it was applicable in this case.

POINT 16.

As to Point 16, if you believe his brother, then Leslie Potter did not have money with which to pay his fare. He could have had no intent of paying it, if that were so, and as he did not establish by a preponderance of the evidence, as against his own witness, and his own brother, that he did have that fare, the statement that he made, that he intended to pay his fare, was false. That being so, he was a trespasser, and as the Court charged, if he was a trespasser, there was no wanton and wilful negligence, and hence he could not recover. The fact

is that he did not pay his fare, and it seems to me the intent is wiped out, if you take and place his testimony against that of his brother, because he had nothing with which to fulfill that intent.

My learned opponent, in the argument that he made before the jury in both trials, before Judge Lawrence on the rule to show cause, and I presume, in his argument before your Honors, will contend that because two of our witnesses testified that some of these colored men were under the influence of liquor, and that the men to whom the plaintiff appealed, after he was hurt, at the garage, where they found him, and the doctor, found no smell of liquor about him, that, therefore, all of our men who so stated, were untruthful.

The fact is, it appears nowhere in the two trials that our witnesses designated whether all of the colored men were under the influence of liquor or not, or had been drinking. What they did say was that there was gin there in a bottle, and that some of them had been drinking, and they detected the odor, but nowhere have they said the plaintiff was drunk, or had been drinking, and nowhere is it denied that the other two men had been drinking. The denial that was made applied only to the plaintiff.

Therefore, such restriction upon our testimony is entirely unwarranted.

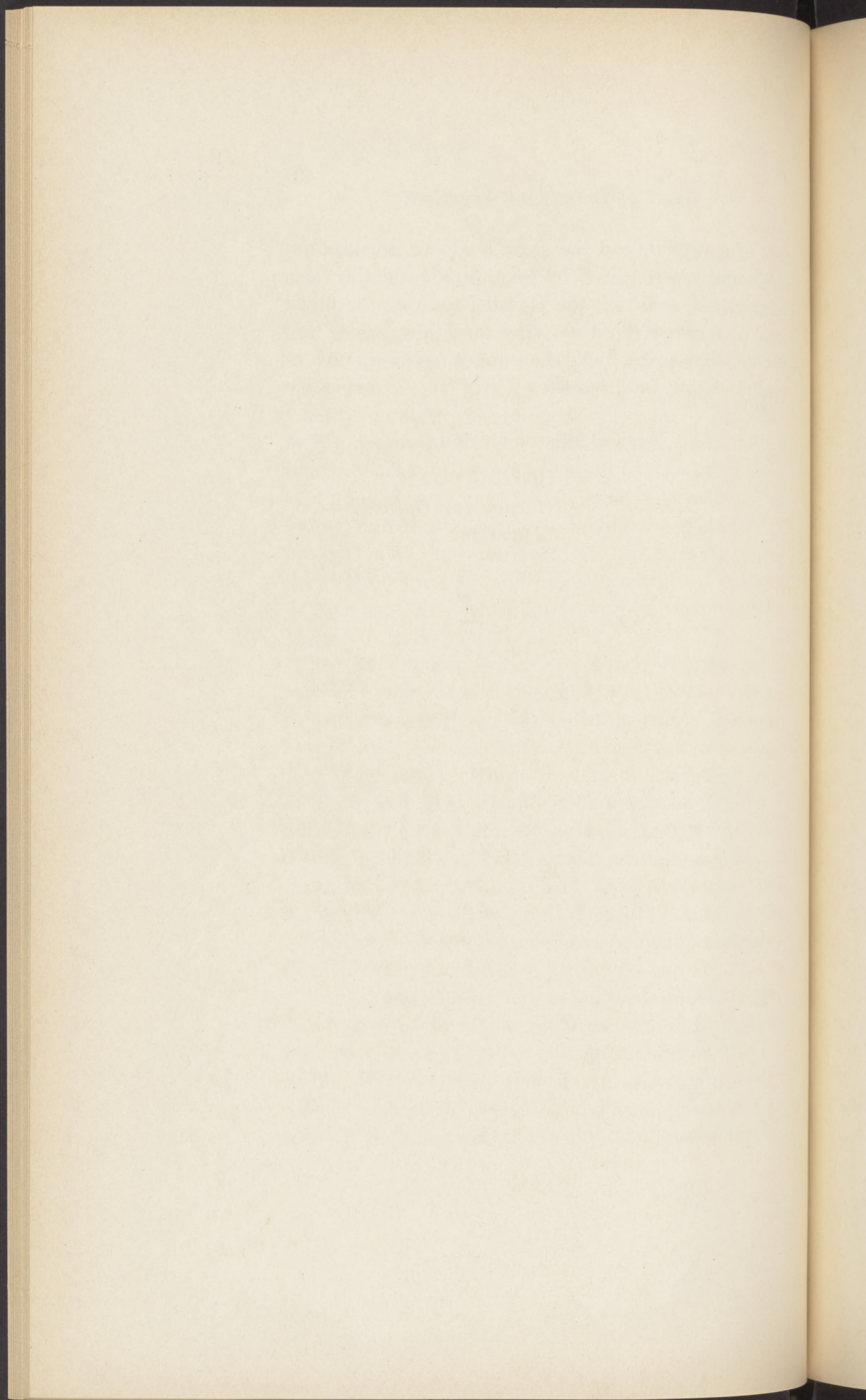
For all the reasons thus submitted we believe that the justice of this case requires that the judgment that has been entered in the Supreme Court be set aside. We also feel that if we are right, insofar as our contention regarding the application of Section 39 is concerned, this Court should say that in

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case of a retrial, and the same evidence appears as to the notices required by Section 39, and the fact being established that the plaintiff went on the platform of a car without desiring to obtain a seat, the statute does apply, and he cannot recover, and a verdict should be directed.

Respectfully submitted,

W. HOLT APGAR,
*Attorney for Defendant-
Appellant.*



ADDENDA.

LESLIE POTTER,
Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation of the State of Pennsylvania,
Defendant-Appellant.

ACTION AT LAW.

ADDENDA.

In addition to what I have cited on page 24, as to Point 2, I desire to add the following, which was overlooked at time brief was printed;

McNabb v. Virginian Ry. Co., 55 Fed. 2d.
137, 4th Circuit, C. C. of A.:

“1. Injured person who, had he looked, could have seen locomotive timely, held contributorily negligent.”

“2. Plaintiff’s evidence that he looked but saw no locomotive held without probative force; physical conditions showing he could have seen locomotive.”

“Under such circumstances, plaintiff’s testimony that he looked, but failed to see locomotive approaching, was without probative force and entirely insufficient to form basis of verdict in his behalf.”

In this case we have the following:

“3. Had the jury returned a verdict for the plaintiff, it would have been the duty of the trial Judge in the exercise of a sound judicial discretion to set it aside.

It was, therefore, proper for him to direct a verdict for the defendant. *South Carolina Asparagus Growers' Association v. Southern Railway Co.* (C. C. A.), 46 F. (2d) 452, 453, and cases there cited; *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041; *Hetzl v. Kemper*, 102 W. Va. 567, 135 S. E. 667.

This rule applies not only in cases where the evidence is undisputed, but also in cases where the evidence is so conclusive in character that reasonable men would not reach different conclusions in regard thereto. In *Ellerson v. Grove*, 44 F. (2d) 493, 496, this Court holds as follows:

‘The general rule as to direction of verdicts is set out in the case of *Marion County Commissioners v. Clark*, 94 U. S. 284, 24 L. Ed. 59, as follows: “Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the Judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit: that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a

Addenda

verdict for the party producing it, upon whom the burden of proof is imposed." * * *

'See also Coughran v. Bigelow, 164 U. S. 307, 17 S. Ct. 117, 41 L. Ed. 442; Patton v. Southern Ry. Co. (C. C. A.), 111 F. 712; Woodward, *et al.*, v. Chicago, M. & St. P. Ry. Co. (C. C. A.), 145 F. 577. In the last-mentioned case it is said that it is the duty of a Court to direct a verdict at the close of the evidence in two classes of cases: (1) That class in which the evidence is undisputed; and (2) that class in which the evidence is conflicting but is of so conclusive a character that the Court in the exercise of a sound judicial discretion will set aside the verdict in opposition to it. See also numerous cases cited in that opinion.' "

I also call attention to:

Strider v. P. R. R. Co., 60 Fed. (2d) 237,
Sixth Circuit, C. C. of A. Decided in
1932,

in which Judge Hickenlooper says:

"We do not think that this case calls for an application of the doctrine of *Begert v. Payne*, 274 F. 784 (C. C. A. 6), that, if substantial evidence be introduced by plaintiff, which is sufficient to take the case to the jury, no amount of contradictory evidence will authorize the trial Court to direct a verdict, for this assumes the very question here to be decided, viz: the substantial character of the evidence. The instant case seems quite as clearly to require a directed verdict as *Southern Railway Co. v.*

Addenda

Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239, even were we not to apply the doctrine, apparently favorably regarded by the Supreme Court, that a verdict should be directed whenever the evidence is 'of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion.' *Small Co. v. Lamborn*, 267 U. S. 248, 254, 45 S. Ct. 300, 303, 69 L. Ed. 597. Compare, also, *Baltimore & O. R. Co. v. Groeger*, 266 U. S. 521, 524, 45 S. Ct. 169, 69 L. Ed. 419; *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; *Chesapeake & O. Ry. Co. v. Martin*, 283 U. S. 209, 214, 51 S. Ct. 453, 75 L. Ed. 983; *Gulf, M. & N. R. Co. v. Wells*, 275 U. S. 455, 459, 48 S. Ct. 151, 72 L. Ed. 370; *Atchison, etc., Ry. Co. v. Toops*, 281 U. S. 351, 354, 355, 50 S. Ct. 281, 74 L. Ed. 896; and *Gunning v. Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720."