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NEW JERSEY

Court of Errors and Appeals

NOTICE OF APPEAL

(*Filed Oct. 14, 1927*)

NEW JERSEY SUPREME COURT

WALTER F. SHERIDAN,
Plaintiff,
v.
NEW JERSEY & NEW YORK RAILROAD COMPANY, a corporation,
Defendant.
} Action at Law.

10

To Alex. Simpson, Esq.,
Attorney of Plaintiff.

SIR:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

20

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

Dated, October 11th, 1927.

Service acknowledged October 12, 1927.

ALEX. SIMPSON,
Attorney of Plaintiff.

GROUNDS OF APPEAL

(*Filed Oct. 24, 1927*)

The appellant states the following grounds of appeal:

10 1. The trial court erroneously refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted on the following grounds urged in support thereof:

(a) Undisputed testimony in the case showed that the plaintiff was riding upon a half fare ticket at the time of the accident, which contained a provision that in consid-
20 eration of the ticket being sold at a reduced fare, the person accepting and using it expressly agrees to and does thereby assume all risk of accident and damage to his person or property, whether caused by negligence of the company, or that of its agents or employees or otherwise, and therefore, the plaintiff by the terms of his contract of carriage with the defendant had stipulated that the defendant should not be held for negli-
30 gence on the part of its agents or employees, which stipulation was binding upon him and barred his recovery.

2. The trial court erroneously charged the jury as follows:

"On the back of that ticket this wording appears: 'In consideration of this ticket being sold at a reduced rate, the person accepting
40 and using it expressly agrees to and does

hereby assume all risk of accident and damage to person or property whether causea by negligence of the company or that of its agents or employees or otherwise and as a condition precedent to the issuing and use thereof each person represents that he or she 10 is legally entitled to use such reduced rate ticket under all the laws governing the same and agrees that he or she shall not use this ticket in violation of any law.'

"Now, gentlemen, the court charges you that whether that provision was on the ticket used by Mr. Sheridan or not, is immaterial in this case because the court assumes the responsibility of telling you that the law is that where a person rides upon a railroad in 20 a situation similar to this, at a reduced fare, paying the railroad company something for the transportation, and where he, himself, does nothing in connection with the railroad or where the company for whom he is working is not exacting of him services which require him to perform service on the railroad, that it is against public policy for the railroad company to insert a provision limiting 30 liability as to itself on a ticket that may be thus issued."

3. The trial court erroneously charged the jury as follows:

"It is not for you to dispute whether or not it is wise that the State should have laid down the law that the railroad company where it takes a passenger at a reduced fare can or can not limit its liability. The court 40

tells you that the State has determined that that is against public policy in a case such as this, and the reason that it is laid down as the law is because the State does not believe that it is good policy to allow a common carrier of passengers to say to a passenger: We will issue this ticket to you, but in issuing this ticket to you at a reduced fare you must give up your rights to hold us if we are negligent. It is true that in this State they have gone so far as to say that where a free pass is given, where the user of it pays nothing for his transportation, it is a mere gratuity to the person who rides, that it is not against public policy for the railroad company to secure itself from all liability for negligence, but the courts of this State have not yet gone so far as to say that where the person who uses the ticket, he not being an employee of the company or not doing duties on the railroad train for another company and it not appearing in this case what agreement there may have been as between the railroad company and the express company for which this plaintiff worked—that is, the details and terms under which he was to ride on this railroad—the courts have not yet gone to the extent of saying that under such circumstances the person who accepts a reduced rate commutation ticket such as this may not hold the railroad company to liability for negligence if there is a provision in the ticket releasing from liability. In other words they have not yet liberalized this rule regarding public policy to this ex-

tent, so that, so far as you are concerned, gentlemen, is out of the case."

Dated, October 21, 1927.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service of a copy of the within acknowledged October 22, 1927.

ALEX. SIMPSON,
Attorney of Plaintiff-Respondent.

COMPLAINT

(*Filed Oct. 18, 1926*)

NEW JERSEY SUPREME COURT

HUDSON COUNTY

WALTER F. SHERIDAN,
Plaintiff,
v.
ERIE RAILROAD COMPANY and NEW JERSEY & NEW YORK RAILROAD COMPANY, corporations.
Defendants.

Action at Law.

Plaintiff residing at No. 505 9th Street, in the Town of Carlstadt, in the County of Bergen, State of New Jersey, says that:

1. Defendant, Erie Railroad Company, a corporation of the State of New York, and defendant, New Jersey & New York Railroad Company, a corporation of the State of New Jersey, are now and were at all times hereinafter mentioned, engaged
10 in the operation of steam railroads at Jersey City, in the County of Hudson, and common carriers of passengers for hire.

2. Plaintiff, on the 16th day of August, 1926, was a passenger on a train of the defendant, New Jersey & New York Railroad Company, at Jersey City aforesaid.

3. Plaintiff, at the time and place aforesaid, was injured through the negligence of the defendants.
20

4. The negligence of the defendants consisted in this: Defendants failed to use reasonable care in the operation of their said trains, in the yards of the defendants at Jersey City, and failed to use reasonable care to have their said engines in proper condition and to operate same at safe rate of speed; and failed to use reasonable care to give proper signals and warning of the movement of said trains, and to have the switches, rails and other appli-
30 ances in proper condition, but on the contrary, so negligently and carelessly operated and controlled said trains, signals, switches and other appliances, that the train upon which the plaintiff was a passenger and another train came into head-on collision.

5. By reason of said collision, the plaintiff was injured in and about his head, face, cut over right eye, right jaw bone fractured, ear injured, affect-
40 ing hearing; sustained internal injuries and suffered severe nervous shock.

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

7. Plaintiff, by reason of his said injuries, has been compelled to expend money for medical attendance and has lost earnings he otherwise would 10
have made.

Plaintiff demands $50,000.

ALEX. SIMPSON,
Attorney for Plaintiff.

20

ANSWER OF DEFENDANT ERIE RAILROAD COMPANY

(Filed Nov. 3, 1926)

The defendant Erie Railroad Company, a corporation of the State of New York, having its principal place of business in New Jersey at the foot of Pavonia Avenue, Jersey City, for answer to the within complaint says that:

10

First Defense

1. It admits paragraph 1.
2. It denies paragraph 2.
3. It denies paragraph 3.
4. It denies paragraph 4.
5. It denies paragraph 5.
6. It denies paragraph 6.
7. It denies paragraph 7.

20

Second Defense

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff.

30

Third Defense

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety.

Fourth Defense

1. The plaintiff at all the times mentioned was an employee of the American Railway Express Company and as such was entitled to ride as a pas-

40

senger upon the trains of this defendant by using a reduced fare ticket.

2. At the time of the alleged accident the said plaintiff had in his possession and was using said reduced fare ticket with full knowledge that it was a reduced fare ticket and of the provisions upon said ticket.

10

3. Said ticket provided:

> "In consideration of this ticket being sold at a reduced rate, a person accepting and using it expressly agrees to and does thereby assume all risk of accidents and damage to person or property, whether caused by negligence of the company or that of its agents or employees or otherwise. As a condition precedent to the issuing and using thereof, each person represents that he or she is legally entitled to use such reduced rate ticket under all the laws governing the same and agrees that he or she will not use this ticket in violation of any law."

20

4. The plaintiff was legally bound by the provisions of said ticket and assumed all risk of the accident and damage to his personal property as alleged in the complaint, whether caused by the negligence of this defendant or its agents or employees or otherwise, and he, therefore cannot recover against this defendant for said accident or damages.

30

COLLINS & CORBIN,
Attorneys of Defendant Erie
Railroad Company.

40

ANSWER OF DEFENDANT NEW JERSEY AND NEW YORK RAILROAD COMPANY

(*Filed Nov. 3, 1926*)

The defendant New Jersey & New York Railroad
10 Company, a corporation of the State of New Jersey, having its principal place of business in New Jersey at the foot of Pavonia Avenue, Jersey City, for answer to the within complaint says that:

First Defense

1. It admits paragraph 1.
2. It denies paragraph 2.
3. It denies paragraph 3.
4. It denies paragraph 4. 20
5. It denies paragraph 5.
6. It denies paragraph 6.
7. It denies paragraph 7.

Second Defense

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff.

30

Third Defense

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety.

Fourth Defense

1. The plaintiff at all times mentioned was an
40 employee of the American Railway Express Com-

pany and as such was entitled to ride as a passenger upon the trains of this defendant by using a reduced fare ticket.

2. At the time of the alleged accident the said plaintiff had in his possession and was using said 10 reduced fare ticket with full knowledge that it was a reduced fare ticket and of the provisions upon said ticket.

3. Said ticket provided:

> "1. In consideration of this ticket being sold at a reduced rate, a person accepting and using it expressly agrees to and does thereby assume all risk of accidents and damage to person or property, whether 20 caused by negligence of the company or that of its agents or employees or otherwise. As a condition precedent to the issuing and using thereof, each person represents that he or she is legally entitled to use such reduced rate ticket under all the laws governing the same and agrees that he or she will not use this ticket in violation of any law."

4. The plaintiff was legally bound by the provisions of said ticket and assumed all risk of the 30 accident and damage to his person and property as alleged in the complaint, whether caused by the negligence of this defendant or its agents or employees or otherwise, and he therefore cannot recover against this defendant for said accident or damages.

COLLINS & CORBIN,
Attorneys of Defendant New Jersey &
New York Railroad Company. 40

REPLY

(Filed Nov. 15, 1926)

Plaintiff admits he was employee of the American Railway Express Company, but denies the 10 other allegations set up in the "Fourth Defense" in the answers of the defendants.

ALEX. SIMPSON,
Attorney for Plaintiff.

20

TESTIMONY

HUDSON COUNTY SUPREME COURT

WALTER F. SHERIDAN,
v.
ERIE RAILROAD COMPANY, and NEW JERSEY and NEW YORK RAILROAD COMPANY. 10

Before: HENRY E. ACKERSON, JR., J. and a Jury.

Jersey City, N. J., October 3, 1927.

Appearances:

Alexander Simpson, Esq., (by Mr. Elkins), for the Plaintiff. 20

Collins & Corbin, Esqs., (by Mr. Broadhurst) for the Defendants.

THEODORE BERNHARD, sworn:

Direct-examination by Mr. Elkins:

Q. Where do you live? A. 111 Third Avenue, Westwood, New Jersey.

Q. On the 16th of August, 1926, can you tell us 30 whether or not you were riding on a train of the New Jersey and New York Railroad Company? A. Yes, sir.

Q. Where did you board that train? A. At Westwood.

Q. Did anything occur from the time you got on the train until Jersey City was reached? A. Shortly before I reached the terminal we had an accident.

40

Q. Will you tell us, as far as you can recall, what was the first thing that you heard and saw. A. I felt the cars come to a sudden stop. I hit my head on the door and went down and I know no more than that.

10 Q. What car were you riding in? A. The last car.

Q. Will you tell us whether or not you heard a crash or a loud noise? A. When I came to I heard glass fall.

Q. And from the sound did it appear to you that there was a contact or collision of some kind? A. I asked the question—

Mr. Broadhurst: I object.

The Court: Sustain the objection. What
20 was your experience?

The Witness: I figured that there was an accident of some kind, but I could not tell what it was.

Q. As a result of that accident were you injured? A. I was.

Q. Were you taken to the hospital? A. No, I went to my own home doctor.

Q. What time of day did the accident occur? A. About six o'clock.

30 Q. What day of the week was it? A. Monday morning.

Q. Will you tell us whether or not this was a clear day or whether it was raining? A. No, it was not raining that I know of, that I am sure of.

Q. Could you see out from your car? A. I did.

Mr. Elkins: That is all.

CROSS-EXAMINATION by Mr. Broadhurst:

Q. It was daylight? A. Yes, sir.

40 Mr. Broadhurst: No further questions.

JOHN ROLC, sworn:

Direct-examination by Mr. Elkins:

Q. Where do you live? A. Oradell, Elizabeth Street. 10

Q. Will you tell us whether or not you were riding on a New Jersey and New York car on the morning of the 16th of August, 1926? A. Yes.

Q. And were you in the car at the time of an accident? A. Yes, sir.

Q. What car were you riding in? A. The last car, the smoking car.

Q. What if anything unusual happened that day before you got to Jersey City? A. I fell down and after I got to the office the doctor gave me a bandage. 20

Q. Do you know what made you fall? A. I fell down and my head hit the—

Q. Do you know what caused it? A. Yes.

Q. Did the train stop or hit something? A. There was a collision.

Mr. Elkins: That is all.

Mr. Broadhurst: No questions.

30

DR. GEORGE JOSEPH BRICK, sworn:

Direct-examination by Mr. Elkins:

Q. Doctor, you are a practicing physician of this state?

Mr. Broadhurst: I admit Dr. Brick's qualifications as a general physician and surgeon.

40

Q. How long have you practiced, Doctor? A. 16 years.

Q. Are you connected with any institutions in this city? A. St. Francis' Hospital.

Q. And were you connected with St. Francis'
10 Hospital the 16th of August, 1926? A. I was.

Q. And while connected with St. Francis' Hospital did you have occasion to examine Mr. Sheridan, the plaintiff in this case? A. He came in while I was on service, yes.

Q. When was the first time you saw him? A. From August, practically the day he came in, that was August 16th.

Q. Referring to your records, can you tell us what your diagnosis was as a result of your exam-
20 ination? A. We found that he had a contused lacerated wound over the right eye and had a contusion which was very tender over the right side of the lower jaw and contusions of the abdomen.

Q. This jaw condition, will you tell us whether or not the jaw was fractured? A. Being tender we expected it might be, but upon x-ray examination it showed he had no fracture.

Q. You thought he had it but the x-ray showed
30 he had no fracture? A. Yes, sir.

Q. Did you treat him after you first saw him? A. He remained there according to the record—he left the 21st of August and I saw him every day while he was there.

Q. He was there from the 16th to the 23d? A. Yes.

Q. After he left the hospital do you know whether he was discharged or did he leave voluntarily? A. He was discharged, yes.

40 Q. After he was discharged from the hospital

did you see him again? A. Yes, he was to my office at different times I think four or five times, maybe more, but at least that many.

Q. Have you seen him recently? A. About a week ago.

Q. And what was he there for, for treatment? 10
A. Well, he came in, he was complaining about being very nervous.

Q. Did you prescribe for him? A. I did, I gave him a tonic.

Q. For his nervousness? A. Yes.

Q. What about his eye, the lacerated eye? A. That was above the eye. It required one suture.

Q. That is, one stitch? A. Yes.

Q. And was his ear injured?

Mr. Broadhurst: Do you mean his inner 20
ear?

A. That I could not say because he was complaining of pain due to this injury to the jaw, and we had him examined by the ear man. I don't remember whether he had any trouble there or not, to tell the truth. I didn't treat him for the ear.

Q. He did complain of his ear? A. He had pain on the entire right side of the face.

Q. Were there any charges for your service, Doctor? A. No. 30

Q. Have you got any bill for services rendered to him? A. Why, he paid me for the visits he made to me in the office.

Q. How much, about, was that? A. It is three dollars a visit, I think he made either four or five visits to me.

Q. About fifteen dollars? A. Yes.

Q. And that is a reasonable charge? A. Yes, sir.
40

Q. Did you prescribe medicine for him, Doctor? A. I did when he came to the office.

Q. How often did he have to use these medicines? A. I believe they are mostly on the order of a tonic, to quiet down his nerves, about three times a day, 10 a teaspoonful after each meal.

Q. Does he require further treatment, Doctor? A. I don't think so, not for his injuries, no.

Q. For his nervousness? A. Well, of course I should not say he would need any great amount of treatment for that, no.

Q. Well, some treatment is required, isn't it, Doctor? A. He may need something in the line of a tonic for his nervous condition. He evidently did have and suffer from some shock after the accident 20 and it has left him more or less nervous since.

Mr. Elkins: That is all.

CROSS-EXAMINATION by Mr. Broadhurst:

Q. Can you fix about when these first visits were to your office with reference to the time you left the hospital on August 23rd? A. Well, they were within a week after they left the hospital.

Q. Then did they run say, a week apart? A. 30 About ten days to two weeks.

Q. That would be you say then about four or five visits? A. Yes.

Q. And then you did not see anything of him after that until about a week ago when he came to you? A. Yes.

Q. And when he came to your office after leaving the hospital were you then treating him for nervousness or not? A. For his nervous condition.

Q. Giving him some tonic? A. Yes.

40 Q. He was working at the time, wasn't he? A.

I don't remember whether he was back to work or not, I don't think he was working the first few visits.

Q. That would be some time in the latter part of August or the early part of September? A. Yes.

Q. Doctor, when he left the hospital on the 23d, 10 in your opinion was he able to report for work? A. I would not say he was at that time, no.

Q. When would you say he was able to report for his usual work which was that of an express driver? A. Not for at least a month after.

By the Court: Q. Was there anything of a permanent character about any of these injuries?

The Witness: There were no permanent injuries to any of these lacerations or contusions, because the x-rays were negative, but I believe the man had 20 some trouble with his ear, which Doctor Connolly treated him for.

Q. So that from your observation he had no permanent injury? A. No.

Q. And these last few treatments in your office were for his nervous condition? A. Yes.

Mr. Broadhurst: That is all.

RE-DIRECT-EXAMINATION by Mr. Elkins:

30 Q. The injury to his abdomen, did that in any wise affect his ability to eat?

Mr. Broadhurst: When?

Mr. Elkins: Right after the accident.

The Witness: Of course right after the accident we would not feed him any way; we kept him on a restricted diet until we had him x-rayed, then when we found he had no injuries to the intestines or stomach, he was fed ordinary food.

Q. Did he complain to you about his inability to 40

eat properly after he came to your office? A. Well, he complained of a certain amount of indigestion and gas.

Q. And would that be due to an injury? A. His nervousness would do that, yes.

Q. Now, this condition which you found, Doctor, and for which you treated him in the hospital and the subsequent treatment in your office, do you regard that as due to a trauma or some blow? A. Yes, it was due to the injury.

Mr. Elkins: That is all.

RE-CROSS-EXAMINATION by Mr. Broadhurst:

Q. You say x-rays were taken of his abdomen? A. Yes.

Q. And they were all negative to any internal injury? A. Yes, sir.

Mr. Broadhurst: That is all.

WALTER F. SHERIDAN, sworn:

Direct-examination by Mr. Elkins:

Q. Where do you live? A. 505 Ninth Street, Carlstadt, New Jersey.

Q. How long have you lived in Carlstadt, New Jersey? A. The last six years.

Q. And you lived there with your family? A. Yes.

Q. For whom have you worked while you were living there? A. The American Railway Express Company.

Q. How long have you worked for the American Railway Express Company? A. The last 14 years.

Q. Will you tell us whether or not you were in the train of the New Jersey and New York Railroad Company on August 16, 1926, when an accident occurred in Jersey City? A. Yes, sir.

Q. Now, what car were you in with reference to the engine? A. I was in the first car.

Q. That is the car immediately behind the engine, is that correct? A. Yes.

Q. Now, you boarded that car at what place? A. I got on at Carlstadt.

Q. And when you got in the car did you give the conductor a ticket of any kind? A. Yes, I gave him a commutation ticket.

Q. What did you pay for that? A. I paid $3.65.

Q. And where did you buy that ticket? A. At the Erie Terminal, Jersey City.

Q. At the railroad office? A. Yes, sir.

Q. Who fixed the price for the ticket? A. They did.

Q. And you paid the amount they asked? A. I paid the amount they asked.

Q. And on this ticket you were riding? A. Yes.

Q. For which you paid $3.65? A. Yes.

Q. While you were riding in the car what was the first thing that occurred which was unusual to you? A. I was riding to work from Carlstadt to Jersey City and we came to the yard in Jersey City. After the train collided and threw me over a bunch of seats injuring my eye and my jaw, my ear and my stomach.

Q. Two cars collided, is that correct, the car in which you were riding or the engine pulling your

car collided with another car? A. No, one engine was coming out and our engine was going in.

Mr. Broadhurst: I think your Honor should caution the witness to testify to what he knows himself.

10 The Court: Yes, you must tell us what you know from your own observations, and not what someone else told you.

Q. Tell us what you observed. A. Well, after the collision, I don't remember any more, I was brought into the waiting room and from there taken to St. Francis' Hospital.

Q. This engine, was it an engine on the New Jersey and New York Railroad Company? A. Yes.

20 Q. What was the number, if you know?

Mr. Broadhurst: I object unless it is first demonstrated that the witness is in a position to know.

By the Court: Q. Have you any recollection of your own, from what you observed, as to what company the engine belonged, the name or number of the engine, or anything of that kind?

The Witness: No, sir.

By the Court: Q. You do not know what it was

30 ran into your train?

The Witness: No, sir, I don't remember that. There was a large sound, and that is all I remember.

Q. But you do know there was a crash between two engines, that you know? A. Yes.

Q. And was that crash a loud crash or a small one? A. Yes, it was a loud crash.

Q. Just before the crash did you hear any warning of any kind by either engine? A. No, sir.

40

Q. And when the crash came you were thrown forward? A. Forward on the floor.

Q. And as a result of coming in contact with something you were stunned, is that correct? A. Yes.

Q. You were taken afterwards to St. Francis' Hospital? A. Yes. 10

By the Court: Q. At the place where this collision occurred were you familiar with this location?

The Witness: Well, I know the yards, I go in there every day.

By the Court: Q. Can you tell whether at the place of this collision there were more than one track or only one track?

The Witness: Yes, sir, more than one track.

By the Court: Q. How many tracks? 20

The Witness: I guess there are over 100 tracks there.

By the Court: Q. And do you know whether or not they cross over on to one another, or are there switches at that point?

The Witness: Yes, sir, they do cross.

Q. You were taken to St. Francis' Hospital? A. Yes, sir.

Q. And you remained in there how long? A. Nine days. 30

Q. While you were there what were you suffering from, where were your injuries? A. Well, I had a fractured jaw.

Mr. Broadhurst: I object to that.

Q. That is, your jaw was injured? A. Yes, sir.

By Mr. Broadhurst: Q. Which side did it pain you, Mr. Sheridan?

The Witness: The right side.

Q. And anything else? A. My hearing was

40

affected.

Mr. Broadhurst: I object, being based upon a conclusion. I don't mind the witness saying he could not hear as well after the accident.

10 By the Court: Q. Could you hear as well after the accident as you could before?

The Witness: No, sir.

Q. That is, since your accident you cannot hear so well? A. I cannot hear so well since I have been hurt.

Q. Now, was anything the matter with your eyes? A. Yes, sir, I had three stitches put in my eye, my right eye.

By the Court: Q. Do you mean the eyelid or the 20 eyeball or where?

The Witness: Right on top of the eye here.

Q. There were some stitches put in there? A. Yes, sir.

Q. The doctor at the hospital stitched it up? A. Yes, sir.

Q. Anything wrong with your—A. And my stomach.

Q. Did your stomach hit anything when you were thrown forward? A. They were minor blows, but 30 those were the worst ones.

Q. You had other small injuries? A. Yes, sir.

Q. Now, while you were in the hospital did you suffer any pain? A. Yes, sir, I had quite a few pains, vomiting spells and earaches, I complained of it all the time, my ear.

Q. Did you spit up any blood, or anything like that? A. Yes, sir, I did when I first went in there, and my nose and eye was bleeding.

40 Q. How long did you spit blood after the accident? A. I guess for that day.

Q. Then that cleared up? A. Yes, sir, the day I was brought in there.

Q. And these earaches, do they continue after the accident? A. Yes, sir.

Q. How long, if you know? A. Well, they 10 bother me right up to the present time.

Q. That is, you have these aches off and on? A. Yes, and I have headaches from them.

Q. Your head was injured, mostly? A. Yes. sir.

Q. After you came out of the hospital, Mr. Sheridan, did you get further medical attention, were you treated by any doctor? A. Yes, sir, I used to attend the clinic in St. Francis' Hospital.

Q. How often did you attend the clinic? A. 20 Well, every week, every second week, sometimes I might skip a week because my job could not let me off.

Q. That is, you were there on an average of about once a week? A. Once a week.

Q. What did you go to the clinic for? A. For my ears and eye.

Q. Who treated you for it, Dr. Connolly? A. And Dr. Nicholson.

Q. When was the last time you attended at the 30 clinic of St. Francis' Hospital? A. Last Tuesday being a holiday, I made it.

Q. Last Tuesday was the last visit you made at the clinic, is that correct? A. Yes.

Q. Who treated you last Tuesday? A. Dr. Nicholson.

Q. Do you have to go to the clinic for further treatment?

Mr. Broadhurst: I object, being a con- 40

clusion and based upon hearsay.

Q. Well, after you left there were you informed to come back? A. I am still under treatment.

Mr. Broadhurst: I suppose Dr. Nicholson and Dr. Connolly are both available?

10 Q. Do you expect to go this week? A. I certainly do.

Q. Do you know how long you have to go? A. Until I am discharged.

Q. Did they say anything about when you were going to be discharged?

Mr. Broadhurst: I object as hearsay.

The Court: Sustain the objection.

Q. Did you go to any other place for treatment? A. I went to Dr. Brick.

20 Q. When was the last time you saw Dr. Brick? A. Last Tuesday.

Q. And was that for treatment? A. For treatment.

Q. Now, as a result of going to Dr. Brick and to the clinic, did they prescribe any medicines for you? A. Dr. Brick always prescribed a prescription for me, medicine.

Q. What was the medicine for?

Mr. Broadhurst: I object.

30 Q. How do you use it, how often do you use it? A. A teaspoonful after each meal, three times a day.

Q. And you take it after each meal? A. Yes, sir.

Q. From when did you start to take this medicine? A. From the week after I left the hospital up to the present time.

Q. And you take it after each meal? A. I am taking the same medicine, even stronger than I

40

started off. It comes stronger.

Q. What about the eye and ear, what medicines were given? A. Well, Dr. Connolly prescribed drops for my eyes and Dr. Nicholson prescribed drops for my ears, taken internally.

Q. Taken internally? A. Yes, sir. 10

Q. And how often during the day? A. Three times a day.

Q. Now, after you came from the hospital did you stay home for any time? A. Yes, sir, I was off nine weeks.

Q. During that time were you paid for the time you were off? A. No, sir, I was not paid for the time I was off.

Q. You only got paid for the time you worked? A. Only the time I worked. 20

Q. So that you lost nine weeks? A. Yes, sir.

Q. And how much a week were you earning? A. At the rate of fifty-five dollars a week.

Q. Now, these medicines, did you have to pay for the medicines? A. Yes, I paid for the medicines.

Q. Can you tell us about how much you paid for medicines from the time of the accident to the present time? A. Well, Dr. Brick's prescription was for the eyes and it amounted to two dollars every time it was prescribed. 30

By the Court: Q. How much generally?

The Witness: The total bill for medicines?

Q. Yes. A. About forty dollars.

Q. Now, did you pay Dr. Brick? A. I paid Dr. Brick every time I visited him.

Q. He said three dollars a visit? A. Right.

Q. Now, after you came from the hospital Mr. Sheridan, did you feel any different than you felt before the accident? Did you experience any 40

sensations or any pains that you had not had before?

Mr. Broadhurst: I will object unless counsel expects to connect up any sensations or any pains.

10 Q. Were you in any wise changed after the accident, were you able to eat? A. I have lost weight and I cannot eat.

Q. What was your eating condition, what trouble did you have with that?

Mr. Broadhurst: I object unless counsel expects to connect it up with some medical evidence. Dr. Brick has already testified that when he first came in they had him on a diet until they took the x-rays, then they

20 let him eat.

By the Court: Q. When did you first notice the falling off of your appetite?

The Witness: That was after I was hurt.

By the Court: Q. How long after the accident?

The Witness: Well, say about a month after.

By the Court: Q. And was that the condition which you say affects you now? Has it continued or did it start up again?

The Witness: Yes, I cannot eat as good as I used

30 to.

By the Court: Q. Is that the same condition which you speak of that began right after the accident?

The Witness: What is that?

By the Court: Q. I understood you to say you experienced a falling off of your appetite about a month after the accident?

The Witness: Yes, sir.

40 By the Court: Q. Is that the condition which

you a moment ago said you experienced now, that you did not care to eat, or is that something new?

The Witness: It is continuous.

By the Court: Q. When you were in the hospital did you have any pain from these injuries you

10 have sustained?

The Witness: Yes, your Honor.

By the Court: Q. When did they clear up?

The Witness: They came on—

By the Court: Q. How long did they last?

The Witness: They lasted maybe 15 or 20 minutes.

By the Court: Q. But when were you free of those pains?

The Witness: They would come on and go away.

20 By the Court: Q. You do not have them now?

The Witness: Well, I have light ones, not bad.

By the Court: Q. The same kind?

The Witness: Yes, sir, the same pain.

Q. Now, you told Dr. Brick about having trouble with your stomach, is that correct? A. Yes, sir.

Q. And he gave you these medicines? A. Yes, sir.

Q. And after the accident did you have any ner-

30 vousness that you did not have before the accident? A. Yes, sir, I was very nervous, never had it before, just since I have had the accident.

Q. This crash which caused you to go forward, was it a severe one—did you go forward slowly or did you go with force? A. I went ahead with force.

Q. And this crash came suddenly, without any warning? A. Without any warning.

Mr. Elkins: That is all.

40 By the Court: Q. From what you observed—not from what you heard—do you know whether or not

there was any damage done to the cars or engines or any unusual condition about the tracks as a result of this accident?

The Witness: At the time?

The Court: Yes.

10 The Witness: No, sir, I do not.

CROSS-EXAMINATION by Mr. Broadhurst:

Q. How old are you? A. Thirty-five.

Q. And how tall are you? A. Five foot nine inches.

Q. And what is your weight now? A. My weight now is 160 pounds I think.

Q. And how long ago is it that you have been weighed? A. Well, quite some time ago.

20 Q. Recently? A. Say about a week or so ago.

Q. You are employed as a chauffeur by the American Railway Express Company? A. As a driver.

Q. Do you say you have lost weight since this accident? A. Yes, sir.

Q. And have you lost any weight since May 10, 1927, when Dr. Feury examined you? A. Well, I don't know, I don't know what I weighed then.

Q. You said before you lost weight. A. I lost
30 weight from the time I was hurt.

Q. You have been losing it right along? A. It would stay at that, 160 pounds.

Q. And your weight has been 160 pounds since last May, 1927, has it? A. 160 pounds, yes.

Q. You are employed as a chauffeur for the American Railway Express, are you not? A. As a driver.

Q. And what do you drive? A. A team.

40 Q. And where is the route that you drive this

team? A. 41st, 42d and 43d Street.

Q. In the City of New York? A. Yes, sir.

Q. And you said you were out of work after this accident for nine weeks. Isn't it a fact that you only lost 39 days before you started to go back to work and that after that you took four days out in 10 the month of October to go to the clinic or to the doctor? A. No, I was a week in the hospital and eight weeks—

Q. You were in the hospital until August 23d, 1926? A. Yes, sir.

Q. Now then what date was it when you returned back to work for the American Railway Express? A. I don't remember the date.

Q. Wasn't it during the month of September or the first part of October? A. Around October I 20 think.

Q. That would be the early part of October that you went back to work, isn't that so? A. The early part I guess, yes.

Q. So that you are mistaken about being out nine weeks, which would be two months and a week, aren't you? A. I figured nine weeks.

Q. You remember now that you went back to work about the early part of October? A. I would 30 not say I am not quite sure on that. I didn't make any memorandum along of the time I lost.

Q. Then you are not quite sure about the nine weeks either? A. I know I was nine weeks off because I didn't get nine weeks pay.

Q. Then you are certain you did not go back to work for the express company until seven weeks after August 16, 1926, that would bring you into the middle of October or the early part of November. A. I think it is the early part of October I 40

went back to work.

Q. You said your rate of pay was five dollars and eighty-nine cents a day, that was for regular time? A. Regular time, yes.

Q. How many hours a day did that cover? A.
10 Eight hours.

Q. So that your weekly rate of pay for regular time was thirty-five dollars a week? A. Yes, but I always worked overtime.

Q. And for overtime you got extra time? A. Extra time, always got extra time.

Q. Now, when you went back to work in the early part of October did you get the same kind of a job? A. I went back as a driver, yes, sir.

Q. And resumed the same kind of work for the
20 express company? A. Yes, sir.

Q. And you are still a driver, are you? A. Yes, sir.

Q. Still driving in the City of New York? A. Yes, sir.

By the Court: Q. Your duties in connection with your employment with this express company, had they anything to do with your presence on this train? A. No, sir, I was not working on the train.

30 By the Court: Q. You mean that after you came to the City you drove an express wagon for the company?

The Witness: Yes, sir.

By the Court: Q. And you were coming into Jersey City for the purpose of doing that at the time of the accident?

The Witness: Yes, sir.

Q. As a driver of this truck, did you have any help to load and unload the stuff? A. Yes, sir.

40

Q. The same as before the accident? A. Yes, sir.

Q. And you have been working steadily ever since you went back to work with the exception of three or four days when you went to the clinic, have you not? A. I didn't go to the clinic those four 10
days, I was home sick.

Q. After you got out of the hospital you went to the clinic first, then you returned to work the early part of October, is that so? A. Yes, sir.

Q. Now then, did you lose any time after you went back, the early part of October? A. Yes, I lost four days.

Q. And those were the four days you were home sick? A. Yes, sir.

Q. When did you go to the clinic? A. Well, I 20
go on a Tuesday.

Q. What time on Tuesday? A. Well, say one or two o'clock.

Q. Is that during your lunch hour? A. No.

Q. Did you get excused from work? A. I got excused from work.

Q. Did you go to the clinic after you started back to work in October? A. Yes.

Q. And you said you went to the clinic about once a week and sometimes once every two weeks 30
when your work would prevent you from going? A. Yes, sir.

Q. Have you been working regularly since you went back to work right up to the present time? A. Once a week or every two weeks, yes, sir.

Q. And who has been taking care of you at the clinic, Dr. Nicholson? A. Dr. Connolly and Dr. Nicholson.

Q. Now, Mr. Sheridan, previous to this acci- 40

dent, you had been riding on the trains between Carlstadt and New York for about how many years? A. For about five or six years, going on six now.

Q. And during that time you had been working
10 for the American Railway Express Company, just as you are working now? A. Yes, sir.

Q. And in order to get the ticket that you were riding on, on the day of this accident, it had been your practice during that period of time to make a requisition to the American Railway Express Company to get you a ticket?

Mr. Elkins: I object, incompetent, irrelevant and immaterial and not proper cross-examination, what the practice was
20 previous to the date of the accident. The problem for the jury, and the important point is to determine what he was riding on at the time of the accident, whether he was riding on a free pass or a paid ticket, and I therefore object.

The Court: I think that is true, what he did before would have no bearing unless it became material after the production of
30 some ticket or some provision in the ticket.

Mr. Broadhurst: Exception.

Q. In order to obtain the ticket that you were riding on in August 1926, you made a requisition to the express company to obtain for you that month a ticket on the New Jersey and New York Railroad Company, did you not?

Mr. Elkins: I press my objection on the same grounds, not proper cross-examination and incompetent, irrelevant and immaterial.

40 The Court: Why isn't it relevant?

Mr. Elkins: On the ground that if what he requested the Railway Express Company to do in the matter of requisitioning a ticket is not material.

The Court: Sustain the objection.

Mr. Broadhurst: Exception. 10

Q. I show you a stub for a commutation ticket, August 1926, together with a sample ticket for August, 1926, and ask you whether or not that is the type of ticket that you were using at the time you were on this train?

Mr. Elkins: I object on the ground it is incompetent, irrelevant and immaterial, as to the type. The question is what was the ticket that was given to the conductor.

The Court: Sustain the objection. 20

Mr. Broadhurst: Exception.

Q. Have you got the ticket you were using on this line in the month of August, 1926? A. No, I lost that ticket; I lost my pocketbook with the stuff in it on that day.

Q. Well, have you got the ticket? A. No, sir.

Q. You do not know where it is? A. No, sir.

Q. Now, I show you a sample ticket and ask you whether or not that is a like or similar ticket to the one you were using on the day this accident hap- 30 pened? A. Something like it.

Mr. Broadhurst: I would like to have this marked for identification.

Ticket marked Exhibit D-1 for identification.

Mr. Elkins: I make the same objection to the last question.

The Court: Sustain the objection.

Mr. Broadhurst: Exception. 40

The Court: The reason being the use of the words in the question "similar or like."

Q. I show you this sample ticket marked Exhibit D-1 for identification and ask you whether or not that is not identical with the ticket you were using on the day that the accident happened except for the fact that your station, Carlstadt, is blank on this ticket?

Mr. Elkins: Same objection.

The Court: Objection overruled.

A. It is the same.

Q. Now, how did you come to get this ticket for the month of August, 1926—where did you buy it? A. I bought it at the Erie station, Jersey City.

Q. And you paid $3.65? A. Yes, sir.

Q. Do you know whether or not that is the full fare for such a ticket, or a reduced fare for such a ticket? A. I don't know, I think it is the full fare.

Q. You think that is the full fare for such a ticket? A. That is what they asked me $3.65.

Q. That is not what I asked you. I asked you whether or not you know whether that is the full price charged a passenger using a commutation ticket or is it a reduced price charged to American Railway Express employees? A. Oh, it is a reduced price.

Q. And you paid the reduced price, did you not, by reason of your employment in the American Railway Express Company?

Mr. Elkins: I object, it is incompetent, irrelevant and immaterial. If there was an agreement between the Railway Express Company and their employees he is not bound by it, unless it is brought to his at-

tention.

Mr. Broadhurst: I am not contending any agreement between the Railway Express Company and the Railroad Company, I am trying to find out whether he knew he got it by virtue of being so employed.

The Court: Objection overruled.

(Question repeated by the stenographer.)

A. Reduced fare.

Q. Do you know how much reduction there was allowed you on this ticket that was not allowed to people other than those employed by the Express Company?

Mr Elkins: I object

Mr. Broadhurst: Strike out the question.

Q. Do you know what the full price of that ticket was if you purchased it as a passenger or commuter on the train not employed by a company such as the one you work for?

Mr. Elkins: I object on the ground it is incompetent, irrelevant and immaterial whether he knew or not. He admits he bought the ticket and he says he bought a reduced rate ticket.

The Court: Overrule the objection; that is a very important element in this case.

(Question repeated by the stenographer.)

A. Well, I never priced them.

By the Court: Q. More or less than that?

The Witness: Well, I imagine it is more.

By the Court: Q. Do you know that as a fact?

The Witness: No, I didn't.

Q. You do not know how much was charged for these tickets to people when they were bought as regular commutation tickets? A. Well I never—

Q. Do you know? A. No, I do not.

Q. Do you remember being examined at my office? A. Yes.

Q. On March 12th of this year? A. Around that time.

10 Q. And do you remember being asked what was the amount that you paid during August, 1926, and you answered $3.65? A. $3.65.

Q. Do you remember being asked: "Do you know whether or not you got any special rate by reason of your being employed by the American Railway Express at a station in Jersey City," and you answered, "Yes". Do you remember that? A. I do not remember that.

Q. Do you deny that you said it? A. Well, I 20 don't remember making the statement.

Q. Do you deny that you told me in my office in March when you were examined under oath before a Supreme Court Commissioner, pursuant to an order of this Court, that you knew? Don't you recall that you were asked: "Don't you know whether or not you got any special rate by reason of being an employee of the American Railway Express?" And you answered, "Yes"? A. I might have answered yes.

30 Q. Did you say so? A. Yes.

The Court: Is that a fact?

The Witness: I guess it is a fact if I said so.

Q. Well, isn't it a fact?

Mr Elkins: He is not denying it.

The Court: We don't want to guess about that.

The Witness: Well, I don't remember back since March.

40 The Court: We are not asking you about that.

What I want to know is whether you knew, when you got the ticket, that it was at a reduced price?

The Witness: Yes, sir, I did.

Q. Didn't you know also that the price was exactly one half of that charged to regular commuters? A. No, I didn't know it was half; I knew it 10 was a cheap ticket, cheaper than the others.

Q. As a matter of fact, don't you remember being asked in my office in March: "How much was the difference, do you know, between the amount of the ticket that you had to pay, being an employee of the American Railway Express Company and the amount that other commuters would have to pay for the same kind of a ticket?" And you said "Just half"? A. Well, I must have said it if it is there. 20

Q. That is the truth, is it? A. Yes.

Q. Now, in order to get this ticket for the month of August, 1926, is it not a fact that you made to your employer, the American Railway Express Company, some kind of a requisition? A. Yes.

Q. And that requisition you make is in writing, in written form, is it not? A On one side.

Q. On a form, one side of which has writing filled in? A. Yes. 30

Q. And it says something like this: "I am still residing at Carlstadt and would request a commutation ticket between Carlstadt and New York for the month of August, 1926, on the New Jersey and New York Railroad Company." Is that the way it read? A. Yes, sir.

Q. And you would sign it? A. Yes, sir.

Q. Then later you would go to the American Railway Express Company's office when the commutation tickets came out and pay your reduced 40

fare and get this ticket? A. I would pay my fare and get this ticket, yes.

Q. Now then, how long before this accident happened had you been making these requisitions to the American Railway Express Company and later 10 in the month getting the ticket?

Mr. Elkins: I object, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. How long had you been doing that, Mr. Sheridan? A. For the last four years.

Q. And then you would use it on the train how many times a day? A. Twice a day, going and coming.

Q. And on the day that the accident happened, 20 this was the kind of a ticket that you gave the conductor to punch, isn't that right? A. Yes, sir.

Q. I show you a number of stubs running from January 1926 to December 1926 and ask you whether or not you can tell me if they are the stubs for the tickets you used of this type on the railroad?

Mr. Elkins: Objected to as incompetent, irrelevant and immaterial.

30 Mr. Broadhurst: I withdraw it.

Q. I presume in the course of the four years you used this ticket you read those provisions, have you not? A. No, sir.

Q. You never read them? A. No, sir.

Q. And did you ever read the front of it? A. No, sir, I never bothered with the ticket.

Q. You have read neither the front nor the back of the ticket, is that the idea? A. No, just glanced at it to see if it was my ticket with my name on it.

40 Q. You never read any of the provisions on the

front of the ticket then, did you? A. Yes, I have read the front, looking for my name.

Q. Then I understand you read the front of the ticket, but you say you never read the back of the ticket? A. No.

Q. You say you observed by looking on the back 10 of the ticket that there was printed matter there but you never actually read what was there, is that the idea? A. I never looked at the back of the ticket.

Q. So that you do not know whether the back of the ticket had any printing on it or writing on it of any kind? A. No.

Q. But you have read the front, you say? A. Yes.

Q. Now then when you read the front of the 20 ticket you observed, did you not, that it said right on the front, "Mr. T. F. Sheridan, August, 1926, Carlstadt, New Jersey and New York, in accordance with the conditions of the contract on the back of the ticket." You read that, didn't you? A. No.

Q. Didn't you tell me a minute ago that you read the front of the ticket? A. I looked for my name.

Q. And you mean to tell us then that in the four 30 years you have been looking at the ticket and looking at the front of it, you never observed that it said, "In accordance with the condition of the contract on the back of the ticket" is that right? A. Yes, sir.

Q. And you mean also to tell us that during the four years you used this ticket you never knew that there was anything printed on the back? A. No.

Q. A perfect blank, so far as you were concerned? A. Yes, sir. 40

Q. And you used it twice a day for a period of over four years? A. Yes, sir.

Q. Now Mr. Sheridan, these tickets were issued to you during this period of time you have been using them as Mr T. F. Sheridan, is that right?
10 A. Yes, sir, they were coming through with "T. F," for a long while.

Q. That was merely a clerical error? A. Yes, sir.

Q. Your name is Walter F. Sheridan? A. Yes, sir.

Q. And you are the Walter F. Sheridan that got these from the American Railway Express Company? A. Yes, sir.

Q. And they came to you marked T. F. Sheri-
20 dan? A. Yes, sir.

Q. And that was merely a clerical error? A. Yes, sir.

Q. You do not deny using the ticket issued to T. F. Sheridan? A. That is the way the ticket came through.

Q. And that is the way it came through in August? A. Yes.

Q. T. F. Sheridan? A. Yes.

30 Q. As a matter of fact, you did not change it until after the suit was brought? A. No, sir; I was after them right straight along, but they never corrected it.

Mr. Broadhurst: That is all.

RE-DIRECT-EXAMINATION by Mr. Elkins:

Q. You were notified that the ticket was ready and you went there to the railroad office, is that correct? A. Yes.

40 Q. And you got the ticket and rode on the train?

A. Yes.

Q. And that was the only concern you had about the ticket?

Mr. Broadhurst: I object.

The Court: Sustain the objection.

Q. But they never refused you passage on that 10
ticket? A. No.

Q. You handed it to the conductor and he punched it? A. Yes, and I shoved it back in my pocket and went to work.

Mr. Elkins: That is all.

By the Court: Q. I show you Exhibit D-1 for identification and ask you if you noticed—I don't ask you if you read it, but ask you if there was some writing of some kind on the back?

The Witness: I never noticed on the back. 20

THOMAS W. CONNOLLY, sworn:

Direct-examination by Mr. Elkins:

Q. Are you a practicing physician of this state? A. I am.

Q. And how long have you been practicing your 30
profession? A. Sixteen years.

Q. And have you specialized in any branch of the profession? A. I have.

Q. In what branch? A. Diseases of the ear.

Q. And were you connected with any institution in August, 1926? A. I was.

Q. St. Francis' Hospital? A. Yes.

Q. And did you have occasion to treat Mr. Sheridan for any injury to his ear? A. I did. I treated him possibly four or five times. He visited me 40

at my office. I had a record of this but I must have misplaced it.

Q. He came to you for treatment for his ear? A. Yes.

Q. Which one, the right ear? A. I do not re-
10 call.

Q. But it was in connection with an injury to his ear that he came to see you? A. Yes.

Mr. Elkins: That is all.

Mr. Broadhurst: No questions.

FREDERICK P. NICHOLSON, sworn:

20 Direct-examination by Mr. Elkins:

Q. Are you a practicing physician of this state? A. Yes, sir.

Q. And how long have you practiced your profession? A. Since 1916.

Q. And have you specialized in any branch of the profession? A. Eye, ear, nose and throat.

Q. And were you connected with the St. Francis' Hospital, in August, 1926? A. Yes, sir.

30 Q. While there did you have occasion to treat Mr. Sheridan for some injury to his eye or ear while he was there? A. Yes, I recall seeing Mr. Sheridan there. Just what he was treated for it was impossible to say. I saw him at the clinic with others.

Q. Have you any record of the case with you? A. No, I have not.

Q. But you saw him at the clinic? A. Yes.

Mr. Elkins: That is all.

40

CROSS-EXAMINATION by Mr. Broadhurst:

Q. But you have no recollection of what was the matter with him, Doctor? A. No.

Q. Or the nature or extent of the injury? A. No, sir, he was just one of many. 10

Mr. Broadhurst: That is all.

RE-DIRECT-EXAMINATION by Mr. Elkins:

Q. Do you know whether it was for his eye or ear? A. I cannot recall.

Q. So far as your treatment of him is concerned, it may have been for the eye, ear, nose or throat? A. Any one of the four.

Mr. Elkins: That is all.

Mr. Elkins: That is our case. 20

DEFENSE

NICHOLAS FEURY, sworn:

Direct-examination by Mr. Broadhurst:

10 Q. You are a practicing physician of this state?

Mr. Elkins: I will admit the Doctor's qualifications.

Q. Did you examine Mr. Sheridan for me? A. I did.

Q. When? A. The 10th day of May, 1927.

Q. How old a man was he? A. He gave me his age as 35.

Q. And his height, about? A. Height five feet nine inches.

20 Q. Weight? A. 160 pounds.

Q. Will you tell us what your examination disclosed? A. Yes. I found that he had a small scar on the right upper eyelid, outer side, and I found the scar to be a flat scar. I found it non-adherent. I mean by that it was free and movable, in other words just a scar in the superficial skin. I found it was not a cosmetic defect.

Q. By that you mean what? A. I mean by that that it was not a defect which is noticeable or 30 which would detract from his looks in any way.

By the Court: Q. Was it a permanent scar?

The Witness: The scar is permanent, yes. This does not in any way interfere with the function of the eyelid. The eyelid was not drawn up or shrivelled in any way. He had full motion and function of the eyelid. He claimed to me that he had an injury on the right lower jawbone. I found no objective symptoms, that is, symptoms which I myself could appreciate such as swelling or contus- 40

ions, or anything like that. There were no objective evidences at the time to indicate that there was any serious injury to the jawbone. There was no loss of function, no deformity there. He claimed he had pain in his stomach at eleven o'clock in the morning and before going to bed and that he had 10 to get up during the night for a drink of water. Of course these conditions were subjective.

Q. By that you mean what? A. Which he himself knew about, and I had to rely upon him.

Q. Did you find anything further? A. Yes. He claimed he was struck on the head. I found no objective evidences, that is, evidences which I myself could appreciate, to indicate any pathological condition, that is, a diseased condition.

I found his reflexes—by that I mean the nerves 20 going from one part to the brain and back again, were normal, in other words the wire was clear, there was no interference at all. I mean by that that the brain was able to send messages to the different parts of the body, and the body to act according to the message from the brain. That is the test we use to see if there is any nerve involvement from the part we examine to the brain.

I also found his equilibrium was normal, that is, 30 he was not dizzy in any way, showing there was no brain condition.

Q. Did you find any disturbance to his nervous system? A. I found there was no organic disturbance in the nervous system.

Q. What would you say as to his physical appearance? A. He appeared to be a strong healthy man; he did not give the appearance of one who had had any serious trouble of any kind.

Mr. Broadhurst: That is all. 40

CROSS-EXAMINATION by Mr. Elkins:

Q. How long did this examination take? A. I never time myself on an examination; not very long.

Q. About twenty minutes? A. Not over that.

10 Q. During that time you examined his body, head, feet and everything? A. Just as I have given it here.

Q. And he did complain of the eye condition, the stomach condition and the head condition? A. There was no eye condition.

Q. Well, you saw the scar and you said it was permanent? A. On the eyelid, yes.

Q. Did he complain to you about hearing? A. Why, I did not examine him on that, as I say in 20 my report here to Mr. Broadhurst. His alleged ear condition was examined by Dr. Molloy. Dr. Molloy is here present. I didn't go into that at all.

Q. Of course there was some amount of nervousness which follows after an accident of this sort? A. Yes, I believe anybody having an accident will suffer some transitory nervous condition.

Q. Is nervousness resulting from an accident in any way likely to affect the man's appetite? A. 30 Why, I think any derangement of any function of the body will interfere with other functions of the body.

Q. His nervous condition is an indefinite condition, that is, as far as time is concerned, that is so, isn't it, Doctor, that you never can tell how long a man is going to suffer from nervousness even though there may not be any visible signs of injury, that is so, isn't it? For instance, a man may 40 have a blow in the stomach and complain of indigestion, or may be nervous and may suffer for a month or a year after, yet you cannot see any injury?

Mr. Broadhurst: I don't know if the Doctor is able to follow the question.

Mr. Elkins: I will withdraw it. 10

Q. What I want to know is Doctor, assuming that this man had an injury to his abdomen and in spite of the fact that you found no objective symptoms, he still might suffer internal injury, that is so, isn't it? A. If he had something which I did not find, he might have something else?

Q. Assuming he had a blow on the abdomen— A. Yes.

Q. And he suffered nervousness, would that affect his appetite or his digestion? 20

By the Court: Q. Will nervousness affect digestion?

The Witness: Nervousness will affect digestion, yes, sir.

Mr. Elkins: That is all.

AUGUSTUS J. MOLLOY, sworn: 30

Direct-examination by Mr. Broadhurst:

Q. You specialize in the eye, ear and nose? A. I do.

Q. How long have you been specializing along those lines? A. Over ten years.

Q. You practice in Bayonne? A. Yes, sir.

Q. Did you make an examination of Mr. Sheridan for me? A. I did.

Q. I show you a report; is that your original re- 40

port? A. It is.

Q. Referring to that, Doctor, will you tell us when and where the examination was made and what you found? A. May 10, 1927, at the Union Trust Building, Bergen Avenue. He claimed that
10 his eye was injured but at the time of this examination it was pretty nearly all right. I found a scar on his right eyelid, the upper part. The scar did not interfere with the function or movement of the eyelid. Both eyes, or both pupils contracted to light, showing a good optic nerve, that is, a good eye nerve. The structures of the eye showed no evidence of injury or disease. His vision in both eyes was normal. He complained of his right ear, that his hearing was not as good as prior to the
20 accident. Examination of the external portion of the ear showed no evidence of injury. An examination of the canals and drums of the ear showed no evidence of scar on the drums or the ear canals. The drums were slightly flat due to colds. There was a catarrhal inflammation of the middle ear. His hearing for low tones was slightly impaired, but in both ears equally the same. He heard the ticking of a watch held close to his ears, perfectly. When it was held further out, it was not quite so
30 appreciable.

Q. The fact that the low tones were not heard so well on both sides, did not in your opinion indicate that his impairment of hearing was due to a catarrhal condition or to a blow on the right side of the face? A. That is due to the closing up of the eustacian tube that leads to the nose and throat. A catarrhal condition closes the tube, which in turn prevents a free vibration of the ear drum.
40

Q. In other words it is your explanation that in a normal individual the air goes through the eustacian tube, forcing the drums out? A. Yes.

Q. And it is your opinion that in this case the impairment of his hearing was due to catarrh? A. Yes. 10

Q. Was there any injury to the bones or membranes of the right ear? A. No, sir, the small bones back of the drum were normal.

Mr. Broadhurst: That is all.

CROSS-EXAMINATION by Mr. Elkins:

Q. How long did your examination take? A. Twenty or thirty minutes.

Q. And do you definitely state that from your examination his impairment of hearing is due to 20 a catarrhal condition? A. The audioscope revealed a condition of both drums.

Q. Both drums were affected? A. Both drums were slightly flat.

Q. Could this condition of impaired hearing be due to a blow, an injury? A. There was no evidence of it.

Q. Could it? A. No.

Q. Never? A. Oh, with sufficient trauma or 30 blow, the drum would rupture and sometimes the small bones are fractured, the malleus, the anchor and the anvil and hammer, the stirrup bones.

Q. When did you make your examination? A. On May 10th.

Q. So that if there was an injury it is probable that it has healed up? A. No, the scar would be present on the drum.

Q. Assuming there is no break of the skin, supposing a blow had caused a rupture of the ear 40

fore it is sold? A. At the time we sell it.

Q. And that is kept as a record in your office? A. Yes.

Q. This sample ticket has a second section which has a perforated line, is that the part which is detached by the conductor on the first trip? A. Yes.

Q. Now, can you tell us whether or not this Exhibit D-1 for identification which I show you is identical with the ticket that was sold out of your office as shown by your stub Exhibit D-3?

Mr. Elkins: I object on the ground that it is incompetent, irrelevant and immaterial and not binding upon the plaintiff.

By the Court: Q. Is this identical with the ticket which was sold to the plaintiff for August, 1926?

The Witness: Yes.

Mr. Elkins: I further object on the ground that unless he knows of his own knowledge that the plaintiff received the ticket which he used or was using at the time of the accident—

Mr. Broadhurst: The plaintiff himself has admitted that the ticket was the same as this.

By the Court: Q. Do you know of your own knowledge from what has been shown you whether or not such a ticket was given to this plaintiff for August, 1926?

The Witness: The balance of this ticket was given him in August, 1926. This is the identical stub of the ticket.

Q. Now, Exhibit D-3 for identification is the first section of the ticket that was surrendered to him when he bought it? A. Yes, sir.

Q. Can you tell by looking at Exhibit D-3 which

is for August, 1926, whether the balance of that ticket would be identical with Exhibit D-1 for identification? A. Yes, sir.

Q. And as far as the provisions on the back are concerned? A. Yes, sir.

Q. And on the front? A. Yes, sir.

Q. The price paid for this ticket was how much? A. $3.65.

Q. And what is the regular price paid for the regular commutation ticket between Carlstadt and New York, do you know? A. $7.60.

Q. So that it would be approximately one-half price? A. Yes, sir.

Mr. Broadhurst: I offer in evidence the sample ticket marked for identification Exhibit D-1. I offer the requisition which is marked for identification Exhibit D-2 and I offer the stub in evidence which is now marked Exhibit D-3 for identification.

Mr. Elkins: I object on the ground it is incompetent, irrelevant and immaterial.

(Argued.)

Mr. Elkins: I withdraw the objection.

The Court: They may be marked in evidence.

Exhibit D-1, D-2 and D-3 for identification marked in evidence Exhibit D-1, D-2 and D-3 in evidence.

Mr. Broadhurst: Cross-examine.

CROSS-EXAMINATION by Mr. Elkins:

Q. Where do you live? A. Clifton, New Jersey, 160 Arlington Avenue.

Q. You are employed as assistant ticket agent at Jersey City? A. Yes, sir.

Q. And by the New Jersey and New York Railroad Company and the Erie Railroad? A. Yes, sir.

Q. Both one concern?

Mr. Broadhurst: I object to that. He sells tickets for both.

Q. That is, they have one office, both companies? A. Yes, sir.

Q. And have you got sole charge of the tickets sold to the employees of the American Express Office? A. No, sir.

Q. You sell tickets to the general public? A. Yes.

Q. And as far as you know, all that you know about this ticket issued to Mr. Sheridan is that he appeared at the window and bought the ticket? A. Yes.

Q. Did you personally give him the ticket for the month of August? A. No, sir.

Q. So that you do not know what ticket he got at all, that is, as far as your own knowledge is concerned, you do not know whether he got a reduced rate ticket or whether he got a full rate ticket? A. The ticket was made out for him and sold to him.

Q. I ask you whether or not you personally issued the ticket to him for August? A. No.

Q. Therefore you do not know what ticket he got? A. No.

Mr. Elkins: That is all.

RE-DIRECT-EXAMINATION by Mr. Broadhurst:

Q. Does it appear in your handwriting on this requisition of the American Railway Express that

you checked this ticket for Mr. Sheridan? A. Yes.

Q. What is that 45? A. That indicates it.

Q. Is that the ticket that was prepared at the time? A. Yes, five days before he bought it.

Q. When you checked it was the ticket prepared? A. Yes, sir.

Q. When you checked it was this top part of Exhibit D-3 still attached to it? A. Yes.

Q. And did this top part have stamped upon it the price? A. Yes, sir.

Q. And that price was how much? A. $3.65.

Q. And do your figures on this requisition indicate $3.65? A. That is put there by the general passenger agent.

Q. Now, when the ticket is sold by whoever is on duty at the window, is Exhibit D-3 detached and kept in the office? A. Yes, sir.

Q. And the production of that stub Exhibit D-3 which was kept in your office, with the original stamping on the back and with the price stamped on the front, does that indicate that the ticket was sold by the office at the price of $3.65?

Mr. Elkins: I object.

The Court: Sustain the objection. What does it indicate according to the practice of your office.

The Witness: That indicates we sold it to him for $3.65.

Q. And does it indicate to whom it was sold? A. Yes, if Sheridan didn't come for it, the man that did come for it would have to be identified before we would give it to him.

Q. Is that the practice of your office? A. Yes.

Q. You personally did not sell to anyone? A. No, sir.

Mr. Broadhurst: That is all.

RE-CROSS-EXAMINATION by Mr. Elkins:

Q. Now, you stamped the price of the ticket on it, that is correct? A. Yes.

10 Q. And is it your practice to stamp the full price in there? A. No, sir, that is a half rate ticket.

Q. Why do you stamp the price in there, is it because that is the special rate for this ticket? A. No, that is for the record.

Q. Do you sell this same ticket for more than \$3.65? A. We do, to a different station.

Q. That is, you can print in any price? A. We do not have Carlstadt printed in there.

20 Q. Well, if I wanted to go from Oradell to Jersey City, you would print Oradell on it and print the price, is that right? A. Yes.

Q. So that the ticket is the same? A. All our half rate tickets.

Q. I mean the form of the ticket is the same for all rides excepting with this one you would print in the special rate, is that so? A. Yes.

Mr. Elkins: That is all.

30

ARTHUR C. OPPERMAN, sworn:

Direct-examination by Mr. Broadhurst:

Q. What is your position with the railroad company? A. Rate Department.

Q. Do you know the legal tariff rate for commutation tickets between Carlstadt and New York on the New Jersey and New York Railroad

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Company? A. \$7.26.

Q. And do you know the rate that is given to employees of the American Railway Express Company when requisition is made for tickets for them by the American Railway Express Company? A. Yes, sir. 10

Q. What is it? A. Half fare; half of the quoted tariff fare, to end in a nought or a five.

Q. In other words half fare? A. Yes, but if it ends in a nine it is made into a nought.

Q. Tickets for American Railway Express Company employees are sold to them at half the regular commutation ticket price except that the amount is brought up to make it end with either a nought or a five? A. Yes, sir.

Q. For instance, if half fare figures out at \$3.63 it would be brought up to \$3.65? A. Yes, sir. 20

Q. Now then, do you know by virtue of what act, these tickets are issued to employees of the American Railway Express Company? A. The Hepburn Act.

Q. Have you brought a pamphlet of it with you? A. No, sir; we have followed that so long—I think it is Ruling 74.

Mr. Broadhurst: That is all.

30

CROSS-EXAMINATION by Mr. Elkins:

Q. What is your capacity in the Rate Department? A. Rate Clerk.

Q. Are you head of the department? A. No, sir.

Q. Somebody over you? A. Yes, sir.

Q. And what are your duties, to make up the tickets as requisitions come in? A. No, sir, I do not make up the tickets.

40

Q. Will you tell us who made the arrangements between the company and the express company for the tickets—did Mr. Sheridan have anything to do with the arrangement? A. No.

Mr. Broadhurst: I will consent that he didn't, if that is what counsel wants to know.

10

Q. All he went there for was for a ticket, and he got the ticket which was issued to him? A. On the authority of the American Railway Express.

Q. That is, the American Express Company was not giving the ticket to Mr. Sheridan, he was getting it through them? A. He got it through them.

Q. What company do you work for? A. The Erie Railroad Company. They control the New Jersey and New York, practically the same company.

20

Q. Where did you get the requisition, from the American Express Company office?

Mr. Broadhurst: He didn't say anything about the requisition.

Q. Well, what arrangement has your company with the American Express Company for the reduced rate?

Mr. Broadhurst: I object as not proper cross-examination.

30

Mr. Elkins: Withdraw the question.

Q. Does your company give special rates to any other companies in Jersey City? A. No; the Erie will give a reduction to any company which is entitled to it.

Q. I am not talking about the Erie alone—A. I work for both companies.

Q. Those are one company?

Mr. Broadhurst: I object.

40

The Court: Sustain the objection.

Q. Now, you did not issue the ticket directly to Mr. Sheridan? A. No, sir.

Q. Do you know what is on the ticket? A. Practically, yes.

Mr. Elkins: That is all.

10

JAMES J. MORRISON, sworn:

Direct-examination by Mr. Broadhurst:

Q. Mr. Morrison, you are employed by the Erie Railroad Company? A. Yes.

Q. And you were on August 16, 1926? A. Yes.

Q. As a locomotive engineer? A. Yes.

20

Q. Now, your Erie railroad train came in collision with a train of the New Jersey and New York Railroad Company at the terminal in Jersey City, did it not that morning? A. Yes. I was on the stationary train.

Q. The two trains came together? A. Yes.

Q. I want you to tell us what your train was doing there as the accident happened. A. I was operating Erie train number 103.

Q. Going which way, east or west? A. Why, I was on the westbound train just pulling out from the terminal I stopped at the dwarf signal.

30

Q. Why? A. Well, my signal was against me.

Q. That is, you had no clear signal? A. No.

Q. And was your train at a complete standstill when this collision occurred? A. It stood there about a minute, at a standstill.

Q. Did you see the train of the New Jersey and New York Railroad come along? A. Yes.

40

Q. And did you hear the emergency whistle blown for all trains to stop? A. Yes, sir.

Q. Did the New Jersey and New York train stop before he hit you? A. No.

Q. How far away was he from your train when 10 you heard the emergency whistle? A. About 150 feet.

Q. Did the New Jersey and New York train collide with your train head-on? A. Yes, sir.

Q. And your train was at a standstill? A. Yes, sir.

Q. For more than a minute before the accident happened? A. Yes, sir.

Mr. Broadhurst: That is all.

20 CROSS-EXAMINATION by Mr. Elkins:

Q. Where do you live? A. 3 Bleecker Street, Jersey City.

Q. And you say you work for the Erie Railroad Company? A. Yes, sir.

Q. And you have been working for them for how long? A. About twenty years altogether.

Q. Now on this day of the accident you were piloting what kind of a train, passenger or freight? A. Mixed.

30 Q. And you were going westbound, is that correct? A. Yes.

Q. Where were you going? A. To Suffern, New York.

Q. You were pulling out of the terminal, going west? A. I was waiting to go west.

Q. Had you pulled out of the station? A. Not out of the station, up to the first signal.

Q. That is, had you moved out of the station at 40 all? A. About a car length out.

Q. And when the accident happened your train had just about come to a stop? A. No, sir, it was stopped for about a minute.

Q. And then this other engine coming along collided with you? A. Yes.

Q. Was it an engine without any train? A. He 10 had a car on I think.

By the Court: Q. Do you know whether or not this New Jersey and New York train was moving on a schedule or not, running on the same track you were on?

The Witness: He came in on the same track, but I do not know whether he came in on his regular track.

By the Court: Q. You had a stop signal against you? 20

The Witness: Yes, sir.

By the Court: Q. Do you know whether or not there was any signal against the other train?

The Witness: I didn't watch that.

By the Court: Q. Did you hear the emergency signal for all trains to stop?

The Witness: Yes, sir.

Q. And you saw this train approaching you? A. Yes, sir.

Q. On the same track? A. Yes, sir. 30

Q. And when it came toward you did you think he was going to run into you? A. I saw he was coming down on my track.

Q. Did you blow any signal? A. No.

Q. You did not do anything to avoid him coming toward you? A. I could not stop him.

Q. You heard the whistle? A. Yes, sir.

Q. And you did not blow your own signal? A. No, sir. 40

Mr. Elkins: That is all.

Recess until two p. m.

After Recess:

10

RICHARD I. POST, sworn:

Direct-examination by Mr. Broadhurst:

Q. Mr. Post, where are you employed? A. By the Erie Railroad Company.

Q. In August, 1926? A. Yes, sir.

Q. And what was your position then? A. Train director.

Q. At the terminal, Jersey City? A. Yes, sir.

20 Q. Were you located in the terminal? A. Right in the house at the head of the shed.

Q. By that you mean in the signal house, I suppose? A. Yes.

Q. That would be 300 feet from the passenger shed, is that what you mean? A. Yes.

Q. Now then, do you recall a collision occurring between a train of the New Jersey and New York Railroad Company and a train of the Erie Railroad Company on August 16th? A. I do.

30 Q. And were you on duty in the tower? A. I was.

Q. Will you tell us did you have anything to do with the setting of signals for the train movements of those two trains? A. I called the movements.

Q. And when you called the movements who set the signals for you? A. The operator.

Q. Do you watch the operators as they set the various signals? A. No, I do not watch the operators but—

40

Q. How do you determine yourself whether the signal is set? A. Why, I know by the indicators what trains are approaching.

Q. That is, there are various indicators? A. Various indicators telling where the trains are.

Q. Now, was the block set against the movement of the New Jersey and New York train or the Erie trains, or both, on this occasion? A. Set against both. 10

Q. And did the Erie train obey the block? A. It did.

Q. And did the New Jersey and New York train obey the block? A. It disregarded it.

Q. Did you see it pass the block? A. I did.

Q. And after it passed the block what did you do? A. I pulled the emergency whistle. 20

Q. And what do the rules of the company require when you pull the emergency whistle? A. Everything within hearing distance come to a stop at once.

Q. And could you see the engineer of the New Jersey and New York train when you blew the emergency whistle? A. I did.

Q. What was the name, do you remember? A. Snow.

Q. Did you observe whether or not he applied his air or tried to stop his train? A. I didn't see him make any move to apply the air until he hit. 30

Q. You could see him if he had? A. I could.

Mr. Broadhurst: That is all.

CROSS-EXAMINATION by Mr. Elkins:

Q. Do you say the Erie Railroad Company controlled the signals in the yard? A. Yes, sir.

Q. And your signals in the yard were for the 40

New Jersey and New York trains, is that correct? A. The signals in the yard control the New Jersey and New York and the Erie both. The New Jersey and New York train disregarded the signals.

Q. And you were the man that controlled the signals? A. Yes, sir.

Q. And you had set the signals against both trains? A. Set the signals against both trains.

Q. And by reason of the fact that the New Jersey and New York train disregarded the signal it crashed into the Erie train, is that correct? A. Yes.

Q. Now, the track on which the Erie train was, was that the track on which the New Jersey and New York train was going, pulling in? A. No, sir.

Q. What track was it scheduled to pull in on? A. It should have come in on track three in the house?

Q. And where was the Erie train at the time of the collision? A. The Erie train was down at the terminal, in the house.

Q. On track three? A. On track five.

Q. And was track three south or north of track five? A. Track three is south.

Q. Now, why did you signal the Erie train to stop at that time? A. Why, we pulled trains from signal to signal.

Q. Why did you stop it, to allow the New Jersey and New York train to pull in? A. No; we could not allow him to pull in over the same block; both had to stop.

Q. And both having stopped, which train should have proceeded first?

Mr. Broadhurst: I object, immaterial.

The Court: Sustain the objection.

Mr. Elkins: Withdraw the question.

Q. Now, at the time of the collision how fast was the Erie train moving? A. About four or five miles an hour.

Q. And had it decreased its speed at the time of the collision? A. Oh yes, he had stopped, practically.

Q. But it was still in motion when the collision occurred? A. Well, if he was, it was so that you could hardly notice; I could not say whether he was or not.

Q. Now, when the collision occurred, or just before it occurred, how far was the New Jersey and New York train away from the Erie train when you gave the signal to stop? A. I gave no signal to stop, I blew the whistle.

Q. Well, when you blew the whistle, how far were the trains apart? A. I should judge about 150 feet.

Q. And is that sufficient time to allow these trains to come to a stop without colliding with one another? A. He should have stopped when he came to the signal.

Q. How far beyond the signal did he proceed? A. I should judge about 100 feet; I never measured it.

Q. Well, the Erie train, did that stop right at the signal? A. The minute the whistle was blown he stopped immediately.

Q. Did the Erie operator do anything by way of warning to the New Jersey and New York train operator to indicate that the trains were coming together, or give any warning to the New Jersey and New York operator?

Mr. Broadhurst: I object as immaterial.

The Court: It would bear on the question of negligence I suppose.

Mr. Broadhurst: Whether he blew a whistle?

10 The Witness: I pulled the whistle and that governed both the New Jersey and New York and the Erie train.

Q. This whistle you gave, what kind of a whistle was it, was it a whistle out in the yard? A. It is a different whistle, it is an emergency whistle we use only in case of emergency and when that is blown everything in the terminal stops.

Q. And you gave that whistle after the collision? A. Oh no, I gave it before, 150 feet before the col-

20 lision I should judge.

Q. Now, how far away was the New Jersey and New York train from the Erie train when you first saw it? A. About 150 feet. The minute I saw it I reached up and pulled the whistle.

Q. And how soon before had the signal been given to stop? A. Neither one of them had a signal. He disregarded the signal, he went by the signal.

Q. When did you give the signal to stop? You

30 gave that before you blew the whistle? A. He never had it, I am telling you.

Q. Oh, then they never got a signal? A. Neither one of them had a signal.

Q. So that without any warning to stop they came together, is that right? A. He had all the warning in the world; he went by his signal.

Q. That is, after you realized that an accident was going to happen—A. I then pulled the whistle, yes.

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Q. And that was the only warning you gave? A. I gave him the signal warning, it was against the man. He had no signal, he disregarded that and when I seen he was going to disregard the signal I pulled the emergency whistle.

Q. This signal, is that the arm in the yard? A. 10 That is the one on the bridge, right in front of the tower.

Q. And how far is that away from the terminal proper, before the engine gets into the terminal? A. Well, I should judge from the head of the shed it is about 300 feet, from the tower.

Q. Well, this accident happened practically right in the yard? A. Right in front of my tower.

Q. And in the yard there are a number of whistles blown all the time, is that correct? A. Yes, 20 but not in the same tone; the emergency whistle is a much larger whistle; we have the tone of it changed for that purpose.

Q. And this signal whistle is much different than the others? A. Yes.

Q. And if both operators had listened they would have heard it and known what it was about?

Mr. Broadhurst: I object.

The Court: Sustain the objection.

Mr. Elkins: That is all. 30

RE-DIRECT-EXAMINATION by Mr. Broadhurst:

Q. There is some little confusion about these signals and blocks. Until the engineer has a clear signal to proceed, on your system, has he any right to proceed? A. Not at all.

Mr. Broadhurst: That is all.

40

Mr. Broadhurst: That is the defendant's case if your Honor please.

Mr. Elkins: No rebuttal.

Mr. Broadhurst: In reference to the defendant, the Erie Railroad Company, I ask for a direction of a verdict on the ground that by the undisputed evidence in the case it clearly appears that this collision between the two trains was due solely to the negligence of the engineer of the New Jersey and New York Railroad Company in proceeding into the terminal without a proper signal and in failing to exercise care on his part in applying the air even after the emergency whistle had been given to him to stop.

It seems to me therefore that the plaintiff has failed to establish any negligence on the part of the Erie Railroad Company which was the proximate cause of this collision, therefore so far as that defendant is concerned, a verdict should be directed for that defendant.

(Argued.)

The Court: I think it is for the jury to say. I deny the motion.

Mr. Broadhurst: Exception.

Mr. Broadhurst: As to the defendant, the New Jersey and New York Railroad Company, I move for a direction of a verdict in favor of that defendant upon the ground that it appears by the undisputed evidence in the case that the plaintiff Walter Sheridan was riding upon a half-fare commutation ticket at the time the accident happened, which ticket he had been using for a period of four or five years previous to the accident, that is, using one similar to it and identical so far as terms are con-

cerned, and which ticket he was using at the time the accident occurred contained this provision: That in consideration of this ticket being sold at a reduced fare, the person accepting and using it expressly agrees to and does hereby assume all risk of accident and damage to person or property, whether caused by negligence of the company or that of its agents or employees, or otherwise, and as a condition precedent to the issuing and use thereof such person represents that he or she is legally entitled to use such reduced rate ticket under all the laws governing the same and agrees that he or she shall not use this ticket in violation of any law.

(Reading.)

On the face of this ticket it is issued to a Mr. T. F. Sheridan, whom the undisputed evidence shows is the plaintiff in this case although there is a mistake as to the initial, on the New Jersey and New York Railroad Company between Carlstadt and New York, fare three dollars and sixty-five cents.

My motion is, therefore, for a direction of a verdict on the ground that the plaintiff by the terms of this contract has stipulated that the defendant should not be held for negligence on the part of its agents or employees, and that that stipulation is binding upon him and bars a recovery in this case.

As to the defendant Erie Railroad Company, I move for a direction of a verdict on the further ground than the one I stated previously, involving all the elements that are contained in my motion as to the New Jersey and New York, my theory being that even as to the Erie Railroad Company, the use of this ticket over the same lines that the New Jer-

sey and New York Railroad Company operated, then inured to the benefit of the Erie Railroad Company and released them from liability for negligence on the part of their agents and servants.

10 (Argued.)

The Court: The Court is going to deny your motion. In order that this may go squarely before the Court of Errors and Appeals and so that there may be no doubt about it, I feel that the Court of Appeals in New York was wrong when it decided the case of Anderson v. The Erie Railroad Company which is reported in 109 Northeastern Reporter, 557, for the reason that it was reasoned out on the ground of logic which is sound, but it left
20 out the question of public policy which is all paramount, and so long as the question of public policy is involved here and we have seen fit to say that it applies in this state except insofar as it has been modified in the instance of free passes by the cases of Kinney v. The Railroad and Morris v. the Railroad, and the weight of authority elsewhere is in support of the view I now take, this motion should be denied, for in view of this weight of authority it would be folly for me, in the absence of an ex-
30 press ruling of our highest court, to hold otherwise.

My reason is this: There is a distinction between a person riding on a pass and a person paying a reduced rate, and that distinction is that the person holding the pass is nothing but a trespasser save through the generosity of the railroad company, but the man paying a fare has a right to be called a passenger whether working for another concern or not. I call the attention of the Court
40 of Errors and Appeals, if this case goes up, to the

fact that the undisputed testimony in this case is that this man, although he worked for an express company nevertheless had no duties pertaining to the operation of or in connection with the railroad; he was not employed upon a railroad train, he was not an express messenger, and the 10
most that could be said of him was that he was driving a truck in New York City for this express company. That distinguishes it from some cases that have held that express messengers, mail carriers, and so forth, cannot say that it is against public policy for the railroad company to limit liability. I say that, because it might at first blush seem that there was a reasonable ground for a distinction, but this man is in the same position, practically, as a stock drover who rides with cattle 20
on the train who has paid something for the privilege of being transported, but is not in any way connected with the railroad company.

Mr. Broadhurst: I would like to note my exception to your Honor's refusal to direct on behalf of each defendant, on each ground I have urged.

Due to the numerous issues we have involved here, perhaps your Honor could state what issues you expect to leave to the jury so that in summing up I may be in a position to cover them. 30

The Court: I am going to leave to the jury the question of negligence. I am going to tell them that there is no evidence of contributory negligence. The question of whether or not this man saw what was on the back of the ticket is immaterial in the case in view of the ruling which the Court has now made.

Mr. Broadhurst: That it is against public policy?
40

The Court: Yes.

Mr. Broadhurst: In other words the only issue then left the jury will be the question of damages?

The Court: If you admit negligence.

Mr. Broadhurst: I don't admit it so far as the Erie Railroad is concerned. In other words, you are going to leave to the jury to determine which one of the two defendants is responsible, or whether they both are responsible?

The Court: Yes.

Mr. Broadhurst: Then the question of the provisions on the ticket, I take it, you are going to rule are a matter of law.

The Court: Yes. The only issue now is as to whether one of these companies was negligent or both of them were negligent or neither one of them negligent.

Mr. Broadhurst: And the damages.

The Court: And the damages.

Mr. Broadhurst: And the other points your Honor is going to cover as a matter of law?

The Court: Yes.

(Both sides summed up to the jury.)

The Court thereupon charged the jury as follows:

CHARGE

The Court: Gentlemen of the Jury: On August 16, 1926, Walter F. Sheridan was riding on a railway train of the New Jersey and New York Railroad Company somewhere here in Jersey City and while so riding that train came in collision with a

train of the Erie Railroad Company and there was what is generally termed a head-on collision.

Mr. Sheridan claims that he was injured as a result of that collision and has brought this suit against both the New Jersey and New York Railroad Company and the Erie Railroad Company to recover the damages for the injuries he says he sustained in this collision.

You will note at the outset that there are two defendants here. He was riding on a train of the New Jersey and New York Railroad Company. He has made that company a defendant here, but he has also made a defendant here the Erie Railroad Company stating that although he was not riding upon a train of that company, that nevertheless the accident was either in whole or in part due to the negligence of that company.

Mr. Sheridan admits that he was riding on a reduced fare commutation ticket. The ticket has been offered in evidence here, that is, not the one that he actually used because that he says has been lost, but the railroad companies say that the one now in evidence here is the same as the one used by Mr. Sheridan on this occasion, in other words, that they were duplicates.

On the back of that ticket this wording appears:

> "In consideration of this ticket being sold at a reduced rate, the person accepting and using it expressly agrees to and does hereby assume all risk of accident and damage to person or property whether caused by negligence of the company or that of its agents or employees or otherwise and as a condition precedent to the issuing and use thereof each person represents that he or she is

legally entitled to use such reduced rate ticket under all the laws governing the same and agrees that he or she shall not use this ticket in violation of any law."

10 Now gentlemen, the Court charges you that whether that provision was on the ticket used by Mr. Sheridan or not is immaterial in this case because the Court assumes the responsibility of telling you that the law is that where a person rides upon a railroad in a situation similar to this, at a reduced fare, paying the railroad company something for the transportation, and where he himself does nothing in connection with the railroad or where the Company for whom he is working is not ex-
20 acting of him services which require him to perform service on the railroad, that it is against public policy for the railroad company to insert a provision limiting liability as to itself on a ticket that may be thus issued.

So the question remaining in this case, gentlemen, is whether either of these companies was negligent and if so whether such negligence was the proximate cause of this accident, or whether both companies were negligent under the rules which I
30 will presently give you, because in view of what I have just now instructed you regarding the provision on the back of this ticket, that it is void as against public policy of this state, it becomes necessary as a first step in this case for the plaintiff to prove to you by a fair preponderance of the evidence in this case that one or both of these companies was negligent and that such negligence, in the second place, was the proximate cause of this accident. Those two things must be proven here
40 by this plaintiff by a fair preponderance of the evi-

dence in this case. It is not for you to dispute whether or not it is wise that the State should have laid down the law that the railroad company where it takes a passenger at a reduced fare can or can not limit its liability. The Court tells you that the State has determined that that is against 10 public policy in a case such as this, and the reason that it is laid down as the law is because the State does not believe that it is good policy to allow a common carrier of passengers to say to a passenger: We will issue this ticket to you, but in issuing this ticket to you at a reduced fare yau must give up your rights to hold us if we are negligent.

It is true that in this State they have gone so far as to say that where a free pass is given, where the user of it pays nothing for his transportation, 20 it is a mere gratuity to the person who rides, that it is not against public policy for the railroad company to secure itself from all liability for negligence, but the courts of this State have not yet gone so far as to say that where the person who uses the ticket, he not being an employee of the company or not doing duties on the railroad train for another company and it not appearing in this case what agreement there may have been as between the railroad company and the express com- 30 pany for which this plaintiff worked—that is, the details and terms under which he was to ride on this railroad—the courts have not yet gone to the extent of saying that under such circumstances the person who accepts a reduced rate commutation ticket such as this may not hold the railroad company to liability for negligence if there is a provision in the ticket releasing from liability. In other words they have not yet liberalized this rule 40

regarding public policy to this extent, so that, so far as you are concerned, gentlemen, is out of the case, and as I have said before the question you have now to determine is whether or not either one or both of these railroad companies was negligent and if one or both are found negligent, whether such negligence was the proximate cause of this accident, because although contributory negligence is set up here as against Mr. Sheridan, the Court further charges you that there is not enough evidence in this case to justify you in finding that he was guilty of any contributory negligence in connection with this accident.

You will want to know what duty the operators of these trains and these railroad companies through their representatives in charge of and operating these trains owed to Mr. Sheridan while riding on the train of the New Jersey and New York Railroad Company. Now, remember, he was not a passenger on an Erie Railroad Company train, so the same degree of care is not exacted of that company as is exacted of the New Jersey and New York Railroad Company. With respect to the degree of care the New Jersey and New York Railroad Company owed Mr. Sheridan, he being a passenger on one of their trains, our Court of Errors and Appeals has said that a common carrier of passengers must use as high a degree of care to protect them from danger that foresight can anticipate. By foresight is meant not foreknowledge absolutely, nor that exactly such an accident as has happened was expected or apprehended but rather that the characteristics of the accident are such that it can be classified among events that without due care are likely to occur, and that due care

would prevent.

I am not going to dwell upon the testimony that has been offered here in this case. You are the sole judges of the facts in this case. You have got to find out what the facts are, but you must take the rules of law that the Court gives you and apply them to the facts as you find them.

With respect now to the Erie Railroad Company, Mr. Sheridan, not being a passenger on its train, it was required to exercise reasonable care in the management, control and operation of its train and of its railroad system, that is, insofar as it pertains to the operation of the train, as a reasonably prudent person would have done under exactly the same circumstances—not a high degree of care, nor on the other hand, not a disregard of rights, but such care as an ordinary average individual, whom you would designate as a reasonably prudent person, would have exercised under exactly the same circumstances.

So under these rules, if you find that neither one of these railroad companies was negligent, that ends the case. You would bring in a verdict in favor of both defendants and against the plaintiff, a verdict of no cause of action.

If you find that either one of them was negligent, or if you should find that both of them were negligent, you must take a further step before you can fasten liability to this accident and assess damages to either one or both of these defendants. You must determine whether or not such negligence was the proximate cause of this accident. By proximate cause, gentlemen, we mean that cause which naturally and probably led up to and which might have been expected to produce the

very thing that happened. It is the moving efficient cause of an accident, without which the accident would not have happened, but it must be a negligent act, and so, if you should find that both were negligent but such negligence was not the proximate cause of the accident, you would bring in your verdict in favor of the defendants and against the plaintiff, a verdict of no cause of action. If you find that one of them was negligent but that such negligence was not the proximate cause of the accident, you would bring in your verdict in favor of that one defendant and against the plaintiff, and if the other defendant was negligent and if negligence was the proximate cause of the accident within the rules that I have given you, you would bring in your verdict against that company and in favor of the plaintiff and assess the damages accordingly.

I think I have given you the rules of law, gentlemen, you will have to apply on the question of liability. It may be suggested, for example: "Supposing that these companies were both negligent and their negligence was the proximate cause of the accident, but they were not equally liable." It has been said, gentlemen, that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes—I am giving you now the general rule as laid down—other than the plaintiff's fault is the proximate cause of the injury. So that where two causes combine to produce an injury, a person is not relieved from liability because he is responsible for only one of them. Within the rule, the causes concurring with one's negligence may be the negligent act of an-

other, if the act of such other is not imputable to the person injured or inevitable accident, or the act of God, or some inanimate cause. A person is not excused from liability for failure to perform a duty because another person failed to perform his duty. Where several causes producing an injury are concurrent, the injury may be attributed to all or any one of the causes. It is sufficient if the negligence of the party so to be charged is an efficient cause without which the injury would not have resulted, and that such other cause is not attributable to the person injured. But it must appear, gentlemen, that such person was responsible for one of the negligent causes which resulted in the injury. Concurrent causes within the rule are causes occurring contemporaneously, and which together cause the injury, which injury would not have resulted in the absence of either. But where the negligence of one consists of a condition merely, which is rendered injurious by the subsequent negligence of a third person the acts of the two persons are not concurrent.

So in this case, it becomes very important for you to determine whether or not one of these companies was negligent or both of them were negligent, or whether neither one of these companies was negligent. It does not follow that because negligence may have brought about this accident that both defendants should respond, even though the negligence which you may find, was the proximate cause of the accident. In order to find against both of these defendants, they must have been both negligent, and their joint negligence and the negligence of each of them must have been the concurrent causes of the accident.

Now, gentlemen, if you find that the plaintiff is entitled to a verdict here against either one or both of these defendants, then he is entitled to be compensated for the injuries which he personally sustained as the natural and proximate result of
10 this accident and the burden rests upon the plaintiff of proving his injuries to you and the extent of his injuries and his damages by a fair preponderance of the evidence.

According to some of the testimony, as I recall it, and I believe the plaintiff himself insists, his jawbone was injured. He claims that his hearing is diminished, that he cannot hear as well now as he did before the accident. Of course if that is due to other causes, you would not listen to that or
20 consider it for a moment. Any loss of hearing would have to be the natural and proximate result of this accident in order for you to assess damages for it. He claims he had three stitches taken above the eye, not his eyeball, but in the eyelid. I think Dr. Feury said that this is a permanent scar. Now, he is entitled to be compensated for these things, gentlemen, and for the pain and suffering, if he underwent pain and suffering, for such a length of time as you find he experienced it. In
30 addition, he would be entitled to be compensated for any loss of earnings which were the natural and proximate result of the accident. I think he testified he was in the hospital for nine days and laid up for a period of nine weeks, during which he could not work. Now, the mere fact that he didn't work is not an important thing, gentlemen, the question is whether he was incapacitated from work due proximately to this accident. If he was
40 incapacitated for such a length of time and lost any

earnings as a consequence, he would be entitled to be compensated. As I understand he earned on an average fifty-five dollars a week, although his regular wages were thirty-five dollars a week. He says he worked overtime, which accounts for the difference. He claims he spent about forty dol- 10 lars for medicine and paid the doctor three dollars a visit. He is entitled to be compensated for the reasonable value of any medical services or medicines purchased in an effort to cure himself of the injury due to the accident, but in any event he is only entitled to compensation for the injuries received and nothing by way of reward and nothing by way of punishment.

You may now take the case. 20

Mr. Broadhurst: I respectfully except to that portion of the Court's charge wherein the Court said: "The Court charges you that the provisions on this commutation ticket are unimportant because where a person rides as the plaintiff was riding in this case, on a reduced fare, and where he does nothing in connection with the railroad company, it is against public policy to insert such a provision in his ticket." 30

Exception to that part of the Court's charge wherein the Court said that the question for you to determine is whether either one or both of these defendants were negligent because in view of my instructions the provisions on this ticket exempting the company from liability, are void.

Exception to that part of the Court's charge wherein the Court said: "The Court tells you that such a provision is against public policy because it 40

is not good policy to allow a carrier to say to a passenger, 'You must give up your rights in accepting a reduced fare.' "

In other words my point is that the taking from the jury of the question of the provisions on the
10 ticket and holding, as a matter of law, that they are against public policy, is error.

Exception to that part of the Court's charge wherein the Court submitted to the jury the question of determining whether or not the Erie Railroad Company was negligent because in my opinion that is a law question, the undisputed evidence being that it was not negligent.

20

JUDGMENT

(*Entered October 6, 1927*)

This case was tried before Honorable Henry E. Ackerson, Jr., Judge, and a jury at the Hudson Circuit, on October 3, 1927. 01

The jury rendered a general verdict in favor of the plaintiff and against the defendant, New Jersey & New York Railroad Company for $2,000.00 and a general verdict of no cause of action as to the Erie Railroad Co.

Whereupon it is adjudged that the plaintiff, Walter F. Sheridan, do recover of the said defendant, New Jersey & New York Railroad Company, a corporation, the 02 sum of Two thousand dollars dam-

$2000.00 ages, together with his costs, which have been taxed at the sum of

________ ______________

$ ______________

____

making in the whole the sum of

____

______________ 30

Judgment entered October 6, 1927.

WM. S. GUMMERE,
C. J.

40

EXHIBIT D-1

C 368

N. J., & N. Y. R. R.

COMMUTATION

STUB—Not Good for Passage
TO BE DETACHED BY SELLING
AGENT AS RECORD OF SALE
(*Sample*)

M ______ AUGUST, 1926

AND

NEW YORK

Fare, $

(*Perforated here*)

C 368

N. J., & N. Y. R. R.

This Coupon in connection with Commutation Ticket for Month of
AUGUST, 1926
Is good for the FIRST TRIP between

AND

NEW YORK
(*Sample*)
NOT GOOD IF DETACHED

(*Perforated here*)

NEW JERSEY & NEW YORK
RAILROAD
SPECIAL

* WOMAN MAN *

M ______ AUGUST, 1926

8

AND

NEW YORK

in accordance with the conditions of the contract on back of ticket
(*Sample*)

R. H. Wallace
Passr. Traffic Manager

C 368

— *	60 *	59 *	58 *	57 *	56 *	55 *	54 *	53 *	52 *
51 *	50 *	49 *	48 *	47 *	46 *	45 *	44 *	43 *	42 *
41 *	40 *	39 *	38 *	37 *	36 *	35 *	34 *	33 *	32 *
31 *	30 *	29 *	28 *	27 *	26 *	25 *	24 *	23 *	22 *
21 *	20 *	19 *	18 *	17 *	16 *	15 *	14 *	13 *	12 *
11 *	10 *	9 *	8 *	7 *	6 *	5 *	4 *	3 *	2 *

(*Sample*)

Exhibit D-1

(*Printed contract on back of ticket.*)

I. In consideration of this ticket being sold at a reduced rate, a person accepting and using it expressly agrees to and does thereby assume all risk of accidents and damage to person or property, whether caused by negligence of the Company or that of its agents or employees or otherwise. And as a condition precedent to the issuing and use thereof, each person represents that he or she is legally entitled to use such reduced rate ticket under all the laws governing the same, and agrees that he or she will not use this ticket in violation of any law.

II. This ticket is not transferable, and will be valid when presented by the person named hereon for sixty rides during the calendar month from and to the stations named on face of ticket. It must be presented to the Ferry Master (at the ferry entrance on New York side) and to the Conductor each trip.

III. If offered by any other person, or if any erasures or alterations are made hereon, it will be forfeited and taken up by the Conductor or Ferry Master.

IV. This ticket is good for continuous passage only, and on such trains as are scheduled to stop regularly at the stations named hereon, but the holder hereof may ride any number of times, not exceeding sixty on any day or days within the calendar month.

V. No return of any portion of the fare received for this ticket will be made in consequence of the inability of the holder to use the same within the calendar month for which it has been issued, except

Exhibit D-1

in accordance with the redemption rules as contained in the tariff under which it is sold.

VI. No return of any portion of the fare received for this ticket will be made in case the holder loses 10 the same.

VII. No return of any portion of the fare received for this ticket will be made in lieu of other passage money paid to agents or conductors for failure to produce this ticket to cover the ride in question.

AUGUST, 1926

20

57 V Locke, C. E. V   Hackensack   Clerk   "   Hackensack (Central Ave) 4.40

My name is on file with the Interstate Commerce Commission

This request shall be valid only when countersigned by myself or W. H. D. Rogers.

C. W. ROBIE
Vice-President

COUNTERSIGNED BY

____

EXHIBIT D-2

AMERICAN RAILWAY EXPRESS CO.
(INCORPORATED)
Eastern Departments
OFFICE OF VICE-PRESIDENT
Grand Central Terminal
NEW YORK

July 20, 1926
August Commutation

Erie RR #5

Dear Sir: Will you kindly favor me on account of this Company with order for half rate tickets for the following named persons who are not prohibited by law from receiving reduced rate transportation:

NAME	ADDRESS	ACCOUNT	FROM	TO AND RETURN	LTD. TO	NO. ORDER ISSUED
157 √ Kinsey, Geo. √	Cresskill	Mechanic	New York	Creskill		4.80
158 √ Lane, G. H. √	"	Clerk	"	"		|
159 √ Straub, H. √	"	Clerk	"	"		|
160 √ Leem, Miss I. √	"	Clerk	"	"		|
161 √ Luberti, E. H. √	Demarest	Clerk	"	Demarest		4.85
162 √ Mencke, W. H. √	Closter	Clerk	"	Closter		4.95
163 √ Starbuck, C. B. √	So. Nyack	Clerk	"	So. Nyack		5.85
164 √ Kinsella, J. √	"	Houseman	"	"		|
165 √ Doyle, T. J. √	Nyack	Watchman	"	Nyack		5.95
166 √ Cobb, Leslie √	"	Clerk	"	"		|
167 √ Ross, H. L. √	"	Clerk	"	"		|
168 √ Wheeler, R. S. √	"	Asst. Traf. Mgr.	"	"		|
169 √ Hulin, S. T. √	"	Supt. of. Ins.	"	"		|
170 √ Johnson, Miss G.R. √	"	Stenog.	"	"		|
171 √ Teeple, J. M. √	"	Messenger	"	"		|
		N. J. & N. Y. RAILROAD				
45 √ Sheridan, T. F. √	Carlstadt ×	Driver	New York	Carlstadt		3.65
46 √ Spiegel, W. F. √	"	Electrician	"	"		|
47 √ Blair, G. √	Woodridge	Clerk	"	Woodridge		3.80
48 √ Guckes, C. C. √	"	Helper	"	"		|
49 √ Sanard, L. √	"	Driver	"	"		|
50 √ Landi, Miss F. √	"	Clerk	"	"		|
51 √ Mead, W. G. √	"	Driver	"	"		|
52 √ Rinaldo, C. √	"	Plat. man	"	"		|
53 √ Auld, H. F. M. √	Hasbrouck Hts.	Mechanic	"	Hasbrouck Hts.		4.00
54 √ Jersey, W. A. √	"	Clerk	"	"		|
55 √ Long, H. W. √	"	Clerk	"	"		|
56 √ Wick, Miss R. √	"	Clerk	"	"		|
57 √ Locke, C. E. √	Hackensack	Clerk	"	Hackensack (Central Ave)		4.40

My name is on file with the Interstate Commerce Commission

This request shall be valid only when countersigned by myself or W. H. D. Rogers.

C. W. ROBIE
Vice-President

COUNTERSIGNED BY

____

New Jersey Court of Errors and Appeals

WALTER F. SHERIDAN, *Plaintiff-Respondent,* v. NEW JERSEY & NEW YORK RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court.

BRIEF IN BEHALF OF DEFENDANT-APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review a judgment of the New Jersey Supreme Court in an action brought by the plaintiff-respondent (hereinafter called the plaintiff) to recover damages for personal injuries sustained by him on August 16, 1926, while riding on the train of the defendant-appellant (hereinafter called the defendant) on a half-rate ticket, which contained a clause releasing the defendant from liability in the event of accident. When the train in question, which the plaintiff boarded at Carlstadt, reached Jersey City, there was an accident in which he received certain personal injuries. He thereafter brought this suit to recover damages, and the defendant set up that his claim was barred by the release clause upon the half-rate ticket on which he was riding. He had ridden on such

tickets twice daily continuously, immediately prior to the accident, for five or six years. He was in no way employed by the defendant, but was an employee of the American Railway Express Company and was given the ticket merely because he happened to be the employee of another common carrier. He had no duties to perform for or in connection with the defendant. He was merely a truck driver in Jersey City for his employer.

To the defense that the release clause on the ticket barred recovery the plaintiff filed a general denial.

At the conclusion of the trial counsel for the defendant moved for a direction of verdict on the ground that the plaintiff could not recover because he was riding on a half-rate ticket, which contained a clause releasing defendant from all liability for the accident in question (p. 70, line 30, to p. 71, line 30). The Trial Court denied the motion on the ground that the release clause was invalid because it was against public policy, and an exception was noted to this rule (p. 72 *et seq.*).

Thereafter the case was submitted to the jury and the Trial Judge instructed the jury, as a matter of law, that the release was void as against public policy, and, therefore, the plaintiff could recover if the defendant was negligent and the plaintiff suffered injury (p. 75, line 30, to p. 76, line 20; p. 77, lines 1-40). Exception was taken to this part of the charge (p. 78, lines 20-30). The exceptions so noted are covered by grounds of appeal Nos. 2 and 3 (p. 2, line 30, to p. 4, line 40). The jury brought in a verdict in favor of the plaintiff for $2,000 (p. 85), and it is from that judgment that the present appeal is taken (p. 2). Exception was also taken to the Trial Judge's instruction that the release provision on the ticket was void as a matter of law (p. 83, *et seq.*).

At the time of the trial there were two defendants, the present defendant New Jersey & New York Railroad Company and Erie Railroad Company. The jury found a verdict in favor of the Erie Railroad Company on the ground that its train, which came into collision with the train of the present defendant, was not negligent (p. 85); so that the present appeal is prosecuted only by the New Jersey & New York Railroad Company, and it was on the train of that company that the plaintiff was riding as a passenger at the time he was injured.

(2)

Grounds of Appeal.

The grounds of appeal are three in number (p. 2), although there is probably one in point of law: Did the Trial Court err in denying the defendant's motion for a direction of verdict and in charging the jury as a matter of law that the release clause was void?

(3)

Statement of Facts.

The plaintiff, who lived in Carlstadt, New Jersey, was employed by the American Railway Express Company (p. 20, lines 30-40). At the time of the accident he was riding on the defendant's train from his home for the purpose of starting work for his employer at Jersey City, New Jersey (p. 32, lines 30-40). He had commuted between Jersey City and Carlstadt for that purpose for five or six years immediately preceding the accident (p. 34, lines 1-10). During that period he used a commutation ticket, an exact duplicate of which was offered in evidence marked "Exhibit D-1" (p. 55, lines 15-20), and printed in the record (pp. 86, *et seq.*).

In order to obtain that ticket, he, as an employee of the American Railway Express Company, each month, made a requisition in writing to that Company (p. 39, lines 20-35; p. 55, lines 20-25). That Company would then make a requisition in writing to the defendant for a half-rate ticket (see Exhibit D-2 printed at the end of the State of Case) for the plaintiff and the defendant would then issue the ticket at one-half the regular rate charged passengers. The reduced fare ticket was provided for by rule 74 of the Hepburn Act (p. 58, line 30 to p. 59, line 30). It was this kind of a ticket (Exhibit D-1) which the plaintiff was using on the day in question, and it was identical to the ones he had used continuously night and morning for a period of four years (p. 40, lines 10-30).

It appeared from the evidence the accident was caused by the train in which the plaintiff was riding coming into a head-on collision with a train of the defendant Erie Railroad Company. The Erie Railroad Company's train was just starting to leave the station at Jersey City, and the defendant's train was about to enter the station at that point (p. 61, lines 20-40; p. 65, lines 1-30). The towerman in charge of the movement of trains at the terminal set the signal against the train of the defendant and the train of the Erie Railroad Company, because it appeared that they would both get on to the same track traveling in opposite directions. The train of the Erie Railroad Company obeyed the signal and stopped and the train of the defendant New Jersey & New York Railroad Company disregarded the signal and after running some distance past it, collided head-on with the train of the Erie Railroad Company (p. 65, lines 10-30).

BRIEF OF THE ARGUMENT.

I.

The Trial Judge erred in refusing to direct a verdict in favor of the defendant and in charging the jury that the provisions in the ticket exempting the defendant from responsibility for the plaintiff's injuries were void.

The plaintiff at the time of the accident was riding from Carlstadt, Bergen County, New Jersey, where he resided, to Jersey City, Hudson County, New Jersey, where he was employed as a driver at the stables located in that city, owned by the American Railway Express Company, his employer. We contend that his journey, therefore, was an *intrastate* journey, and that if the exemption contained in the ticket which he was using at the time is not against the public policy of the State of New Jersey, the Trial Court erred in holding that it was void. In this brief, under subdivision (a), we shall refer to the decisions of the State Court to substantiate this point. As it may be contended that as the ticket on its face read "between Carlstadt and New York" the plaintiff was engaged in an *interstate* journey, we shall, under subdivision (b) of this point, refer to the decisions in the Federal Court holding that exceptions of this character contained in tickets are not void as against the public policy of the United States. The ticket upon which the plaintiff was riding on the train of the defendant provided (Exhibit D-1, p. 87, lines 1-20):

> "1. In consideration of this ticket being sold at a reduced rate, a person accepting and using it expressly agrees to and does thereby assume all risk of accidents and damage to

person or property, whether caused by negligence of the company or that of its agents or employees or otherwise. And as a condition precedent to the issuing and use thereof, each person represents that he or she is legally entitled to use such reduced rate ticket under all the laws governing the same, and agrees that he or she will not use this ticket in violation of any law."

(a)

There is no decision in the State of New Jersey directly on all fours with the case *sub judice*. The question has been flatly decided in the State of New York by the Court of Appeals in *Anderson* v. *Erie Railroad Company*, 223 N. Y. 277, 119 N. E. 557. In that case plaintiff's intestate, a clergyman, obtained from defendant a written order that at any time during the year its agents would sell to him for his personal use, a clerical ticket subject to the conditions on the back thereof. He presented this order and purchased from defendant's agent at Elmira, New York, a ticket over defendant's road from that place to Leroy, New York, for which he paid $1.20, the regular fare being $2.35. The condition on the back of the ticket was:

> "In consideration of this ticket being sold at a reduced rate, a person accepting and using it expressly agrees to and does thereby assume all risk of accidents and damage to person and property, whether caused by negligence of the Company or that of its agents or employees, or otherwise. And as a condition precedent to the issuing and use thereof, each person represents that he or she is legally entitled to use such reduced rate ticket under all laws governing the same, and agrees that he or she will not use this ticket in violation of any law. This ticket is not transferable."

While en route the car in which he was riding was derailed and he was killed. The action was

brought to recover for damages alleged to have been sustained by reason of his death, and the plaintiff in the Trial Court obtained a verdict for a substantial sum. Appeal was taken to the Appellate Division where the judgment was reversed and the plaintiff appealed from that reversal to the Court of Appeals. McLaughlin, J., in writing the opinion for the Court dealing with the question under consideration said (119 N. E., p. 557):

> "The sole question presented by the appeal is whether the release from liability for negligence given by plaintiff's intestate to defendant, in consideration of the reduced rate at which the ticket was sold to him, prevents a recovery. Had the intestate, at the time of the accident, been traveling on a pass, there could be but one answer to the question. A recovery could not be had. This court settled that question over half a century ago. *Wells* v. *N. Y. C. R. R. Co.*, 24 N. Y. 181. It was there specifically held that a contract between a railroad corporation and a person traveling on a pass, by which the former was exempted from liability for the negligence of its agents or servants for an injury to the latter, was not against public policy, and was a valid agreement which would be enforced when called in question. The rule as thus established has since been followed in this state (citing cases). It is also the rule which has been adopted in many of the other states, of which see the following: *Rogers* v. *Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Quimby* v. *Boston & Maine R. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Dugan* v. *Blue Hill Street Ry.*, 193 Mass. 431, 79 N. E. 748; *Griswold* v. *N. Y. & N. E. R. R. Co.*, 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; *Kinney* v. *Central R. R. Co.*, 34 N. J. Law, 513, 3 Am. Rep. 265; *Payne* v. *T. H. & I. Ry. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472. The same rule prevails in the Supreme Court of the United States. *B. & O. Southwestern Ry. Co.* v. *Voigt*, 176 U. S.

498, 20 Sup. Ct. 385, 44 L. Ed. 560; *Northern Pacific Ry. Co.* v. *Adams,* 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Boering* v. *Chesapeake Beach Ry. Co.,* 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Ry. Co.* v. *Thompson,* 234 U. S. 576, 34 Sup. Ct. 964, 58 L. Ed. 1476. The English decisions are to the same effect. *McCawley* v. *Furness Ry. Co.,* L. R. 8 Q. B. 57; *Hall* v. *Northwestern Ry. Co.,* L. R. 10 Q. B. 437. * * *

"Does an agreement to sell a ticket at a reduced rate of fare, in consideration of exemption from liability in case of negligence, change the rule? I do not think it does. No good reason can be suggested why it should. If a railroad company and a passenger be permitted to make such contract at all, then they are the sole judges of the amount of consideration which will compensate the one for being relieved from liability and the other for assuming the risk, whether it be the whole fare or anything less than that.

"In *Bissell* v. *N. Y. C. R. R. Co., supra,* the question involved was the exemption from liability by reason of a pass given to a person in charge of live stock being transported. That case has been criticized by the Supreme Court of the United States (*Railroad Co.* v. *Lockwood,* 84 U. S. (17 Wall.) 357, 21 L. Ed. 627) and not followed by some of the states, notably Massachusetts, where a distinction is drawn between passes given to passengers and those given to employees and drovers. This distinction is placed upon the ground that a pass given to a drover or employee is a part of the consideration for which the stock is transported or the employee enters and continues in the employment, and, therefore, as to them it is not a gratuity and they are passengers for hire. The question as to such passes is in no way involved here, and therefore it would serve no useful purpose to consider the numerous decisions bearing upon the subject. As already indicated, the sole question here is whether an agreement to relieve a railroad

company from liability on account of negligence, in consideration of a ticket being sold at a reduced rate, be enforceable. The intestate agreed if the defendant would sell him a ticket at the reduced rate at which it was sold, he would assume all risks of accident due to the negligence of the defendant's agents and servants. In fairness, it seems to me, such agreement should be enforced. The intestate was an intelligent man. He deliberately and voluntarily entered into the agreement. It was printed on the back of the ticket, and as evidence that he had full knowledge and appreciated the effect of the agreement is his signature thereto. The ticket and agreement thereon were received in evidence at the trial without objection."

Provisions of this character have been held to be legally binding and not void as against public policy with reference to employees, members of their family and others riding upon passes.

Kinney, Admr. v. *C. R. R. of N. J.,* 32 N. J. L. 408, aff'd 34 N. J. L. 513 (E. & A.);

Morris v. *West Jersey & S. R. Co.,* 94 Atl. 593 (E. & A.);

Dodd v. *C. R. R. Co. of N. J.,* 80 N. J. L. 56, aff'd 82 N. J. L. 844.

The facts in the case of *Kinney* v. *Central Railroad Company* cited, *supra,* are stated in the opinion of the Supreme Court as follows (p. 408):

"This cause was tried before the Warren Circuit. It was a suit by administrators, founded on the death of their intestate, while in the cars of the defendants, occasioned, as it was alleged, by the negligence of the servants of the railroad company. It appeared that the deceased had applied, on the occasion in question, to one of the agents of the company for a free pass, and that he had been informed that if he took such pass he must as-

sume all risks of accident, and that he thereupon received from such agent a ticket having upon it the printed endorsement following, viz., 'This pass to be delivered to the conductor. The person who accepts this free ticket thereby assumes all risk of accident, and in consideration of its receipt expressly agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to his or her property while using this ticket.' "

The Trial Court instructed the jury that if they believed the decedent was riding under the contract endorsed on the ticket, the defendants were entitled to a verdict. The question of law upon which the case was thus put, was reserved. The sole question on the appeal was the legal validity of the agreement which the parties had entered into in good faith.

Justice VAN SYCKEL in writing the opinion for the Court of Errors and Appeals, affirming the judgment of the Supreme Court dealing with the question of the validity of the provisions in question said (34 N. J. L. 515):

> "The contract is clear in its expression, made between competent parties, and unless it contravenes some settled rule of law, or is contrary to public policy, it fully dispenses the company from liability. * * * To hold otherwise would be to say that a man, from the mere fact that his occupation is that of a common carrier, cannot, as to an individual transaction, be a gratuitous bailee.
>
> "The Company, therefore, in asking immunity against loss in this case, does not seek to escape from any part of its common law liability.
>
> "The objection that this contract is inconsistent with good morals and sound policy has been considered in all the cases of this kind

> which have been submitted to judicial criticism. It differs widely from the question whether a person should be allowed to stipulate against loss from his own negligence. Reasons of great cogency could be started against the validity of such a contract, which can have no pertinency to this issue.
>
> "The doctrine of *respondeat superior* has not been adopted because there is any equity in imposing the loss upon the superior, but in order to induce the principal to use greater care in the selection, and to exercise increased watchfulness over the acts and conduct of his agents.
>
> "While it may with great force be urged, that the policy which dictates this rule would be infringed by permitting a railroad company, in the pursuit of its ordinary business, to contract for immunity from such loss, it is difficult to perceive how this consideration can apply to a transaction without their ordinary employment, to a mere gratuity or accommodation, which concerns none but the immediate parties to it.
>
> "Why should the passenger who solicits a free pass be permitted to escape the liability to loss which he voluntarily assumes in order to secure the accommodation? It is certainly a breach of good faith in the passenger, to attempt to fix the carrier with responsibility in such case.
>
> "The suggestion that the tendency of such exemption would be to increase peril to public travel, by withdrawing one of the motives which leads the carrier to use the highest degree of care, will not bear examination.
>
> "How can it be said that non-liability for damage to an occasional free passenger might induce, in the slightest respect, a want of vigilance, which would most probably inflict untold loss upon the company?
>
> "The damage in this case resulted from the fault, not of the directors of the company, but from that of its subordinate agents, and no

satisfactory reason has been given why the contract, which the parties themselves made, should be restrained of its full operation."

In the case of *Morris* v. *West Jersey & S. R. Co.*, 87 N. J. L. 579, *supra*, the plaintiff, a woman, was riding on a ticket which contained a stipulation that the person accepting and using it thereby assumes all risk of accident, etc. A verdict was directed in favor of the defendant by the Trial Judge. It appeared that the plaintiff obtained the ticket through her husband, who was employed by an express company, under a contract which apparently contained some stipulation for services to be rendered, and in return, free transportation to be given. In this case this Court passed on the question whether a partial consideration for the ticket had any effect on the legal status of the passenger. The plaintiff at the trial offered to prove that the terms of the contract of employment between the plaintiff's husband and the defendant were such that he should have so much money and two tickets monthly for his family; that the ticket which the plaintiff was using was part of the consideration for his services and, therefore, he had paid for the passage of his wife on the train. The Trial Court overruled that offer of proof on the ground that it was immaterial. Justice PARKER in writing the opinion for this Court said (p. 594):

"The statute applicable is the Hepburn Act of 1906 (34 Stat. 584 *et seq.*; Comp. Stat. 1913, Sec. 8563 *et seq.*). This act forbids the issue of 'free passes' to any but certain specified classes of travelers, forbids unauthorized persons to use them, and (*inter alia*) forbids carriers to transport persons unless their rates are published and not then for any 'greater or less or different compensation' than that fixed by such published rates.

"It is immaterial whether, as counsel proposed to prove, Morris was either to be classed as an employee of the railroad company, in view of that company benefitting by his contract with the express company, or he was not. In either event, the pass used by the plaintiff was what the Hepburn Act calls a 'free pass,' notwithstanding that it may have been issued upon consideration of her husband's services; and consequently the stipulation against liability was binding. *Charleston, etc. Ry. Co.* v. *Thompson*, 234 U. S. 576, 34 Sup. Ct. 964, 58 L. Ed. 1476 and cases cited. On this point, the decision cited is controlling."

In the case of *Dodd* v. *C. R. R. Co. of N. J.*, 80 N. J. L. 56, affirmed 82 N. J. L. 844, it seems to us that this Court in affirming the opinion of the Supreme Court went even further in holding provisions of this kind not void as against public policy than is necessary to go in the case at bar. In that case the plaintiff was employed as a porter by the United States Express Company, with the duty of handling freight at the terminal of the Central Railroad Company. He was unloading a box car which was next to a platform, when a train was backed down and collided with the car in which he was riding, causing his injuries. The defense interposed grew out of two contracts, one between the express company, plaintiff's employer, and the railroad company, the defendant, and the other between the plaintiff, himself, and the express company. By contract with the railroad company, the express company agreed to assume all risk of injury to the plaintiff resulting while he was upon or about its trains, and to indemnify the Railroad Company from all loss of this character. By contract between the plaintiff and the Express Company, the plaintiff agreed to assume all risk of accidents that he might sustain in the course of his

employment, whether occasioned by negligence or otherwise. He further agreed that he would execute, without charge, releases of all such claims and ratify all agreements between its employer, the Express Company, and the Railroad Company.

Justice SWAYZE in writing the opinion for the Supreme Court said (p. 59):

> "The question which arises is whether a contract of that kind is contrary to public policy, as the learned judge of the District Court held, or whether, like other contracts, it ought to be enforced as the parties intended. This question is to be solved in view of the existing state of the law without regard to the changes, which perhaps now are generally considered desirable changes, introduced by statutes in other jurisdictions. We have no statute forbidding a contract by which the employee agrees to exempt his employer from liability * * *.
>
> "There are other considerations which lead us to the conclusion that the contract was not against public policy. The risks assumed by the plaintiff were those of accidents and injuries sustained in the course of his employment, and, as we have said, not willful acts of the company. So far as he assumed the ordinary risks attendant upon the hazardous character of the place in which he was employed, he did no more than every servant is held, wisely or not, to have done by implication of law. So far as he assumed the risks of injuries occasioned by negligence, these, if not the willful act of the railroad company, would necessarily be the acts of its servants, and the effect of the contract was to exempt the railroad company from the applicability of the rule of *respondeat superior*, by which the law makes it responsible for the acts of others. The contract does not evince an intention to waive all claims for injuries, by whomsoever committed. It goes no further than to exempt the corporations from liability for the acts of third persons, and the plaintiff still has redress against the persons who were actually guilty of negligence.
>
> "The view that we take is thoroughly supported by the authorities. In fact the cases cited are much stronger in favor of the plaintiff than the present case, since they involved the construction of similar contracts made by express messengers who traveled as passengers upon the trains, or by those who traveled free under special contracts."

(b)

The following decisions in the U. S. Supreme Court indicate clearly that provisions exempting common carriers for negligence are not void as against the public policy of the United States:

> *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440;
>
> *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576;
>
> *Kansas City Southern Railway Company* v. *Van Zant*, 260 U. S. 459;
>
> *Baltimore & Ohio Southwestern Railway Company* v. *Voigt*, 176 U. S. 498.

In *Northern Pacific Ry. Co.* v. *Adams*, 192 U. S. 440, plaintiff's intestate was a lawyer and the attorney of several railroad companies. He was riding on a free pass and was thrown from the train while he was passing through from one car to another, due to the excessive speed at which the train was traveling. The ticket on which he was riding contained a provision exempting the carrier from responsibility for negligence. The United States Supreme Court in an opinion rendered by Justice BREWER dealing with the validity of the release provision on the ticket said (p. 451, *et seq.*):

> "Is the company responsible for injuries resulting from ordinary negligence to an indi-

vidual whom it permits to ride without charge on condition that he take all the risks of such negligence?

"This question has received the consideration of many courts and been answered in different and opposing ways. We shall not attempt to review the cases in state courts. Among those which hold that the company is not responsible may be mentioned *Rogers* v. *Kennebec &c. Company,* 86 Maine, 261; *Quimby* v. *Boston &c. Railroad Company,* 150 Mass., 365; *Griswold* v. *New York &c. Railroad Company,* 53 Conn., 371; *Kinney* v. *Central Railroad Company,* 34 N. J. Law, 513; *Payne* v. *Terre Haute &c. Railway Company,* 157 Ind., 616; *Muldoon* v. *Seattle City Railway Company,* 7 Wash., 528. * * * The English decisions are to the same effect. *McCawley* v. *Furness Railway Company,* L. R. 8, Q. B. 57; *Hall* v. *Northeastern Railway Company,* L. R. 10, Q. B. 437; *Duff* v. *Great Northern Railroad Company,* Ir. L. R. 4, Com. Law, 178; *Alexander* v. *Toronto &c. Railway Company,* 33 Up. Can. Q. B. 474. * * * He (plaintiff's intestate), was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He voluntarily chose to accept the privilege offered and having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

In *Charleston & Western Carolina Ry. Co.* v. *Thompson* 234 U. S. 576, *supra,* a member of the

family of an employee was traveling on a free pass issued by the company under the Hepburn Act. A verdict was rendered in favor of the plaintiff. The U. S. Supreme Court in an opinion by Justice Holmes, reversing the Trial Court on the question of the validity of the exemption provision, said (p. 577, *et seq.*):

"The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Sec. 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass but on the contrary contemplated the pass as being what it called itself, free.

"As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. *Northern Pacific Ry. Co.* v. *Adams,* 192 U. S. 440. *Boering* v. *Chesapeake Beach Ry. Co.,* 193 U. S. 442."

The case of *Kansas City Southern Railway Company* v. *Van Zant,* 260 U. S. 459, applies the same rule.

In *Baltimore & Ohio Southwestern Railway Company* v. *Voigt,* 176 U. S. 498, *supra,* an express messenger riding in a car set apart for the use of an express company, was injured by the negligence of the railway company. There was an agreement between the two companies that the former would hold the railway company free from all liability for negligence, whether caused by the negligence of the railway company or its employees. Voigt entering into the employ of the express company and the railway company. It was whereby he agreed to assume all the risk of accident or injury in the course of his employment, whether occasioned by negligence or otherwise, and expressly ratified the agreement between the express company and the railway company. It was held that he could not maintain an action against the railway company for injuries resulting from the negligence of its employees. Mr. Justice SHIRAS, who delivered the opinion of the Court, reviewed many state decisions, and concluded with these words (p. 520):

> "Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

The reason given by the Trial Judge for his refusal to direct a verdict and as expressed in his charge to the jury, was that the provision of the ticket being against public policy, it was void. The cases cited above indicate that both in New Jersey and in the United States Courts, a provision exempting a common carrier from ordinary negligence such as occurred in this case, is not against the public policy of the State of New Jersey, nor of the United States, and therefore void. There seems to be no ground for reasonable distinction between such a provision in a pass given to an employee or the members of his family, and a ticket given at a reduced rate to an employee of another common carrier. If the one is not against public policy, the other must of necessity not be against public policy. Certainly the public policy of the State is not determined on the basis that the life or limb of an employee or the members of his family are less precious than those of other members of the public, such as this plaintiff. To be against public policy, the provision must be such that to permit it would tend to increase carelessness and recklessness on the part of the defendant. The trains whereon a very few passengers are riding on free tickets or part free tickets also carry thousands of passengers who are riding on full fare tickets. How can it be said that the mere fact that a few of several hundred passengers were riding on free tickets or part free tickets would tend to make the defendant or its servants negligent, when if it was negligent and an accident occurred the loss occasioned to the full fare passengers would undoubtedly be thousands of dollars in excess of any saving brought about to the railroad company by the release clauses in the few isolated cases where passengers were riding on free tickets or part free tickets. The Trial Judge to some extent

relied on what are termed "the stock drover cases" for authority in deciding the motions and in charging the jury that the exemption was void as against public policy. He undoubtedly referred to the cases in the U. S. Supreme Court of

New York Central Railroad Co. v. *Lockwood,* 84 U. S. 357; 21 L. Ed. 627;
Norfolk Southern Railroad Co. v. *Chatman,* 244 U. S. 276.

In the first case Justice BRADLEY reviews numerous cases dealing with provisions in contracts exempting carriers from liability and arrives at the following conclusions (p. 641):

"The conclusions to which we have come are:

"First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

"Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

"Fourthly. That a drover traveling on a pass such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

"These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire."

It will be observed that the Court in the case of *New York Central Railroad Co.* v. *Lockwood, supra,* assumed at the outset that the plaintiff was a passenger for hire and proceeded to consider the validity of the provision with that assumption in mind. At the very beginning of the opinion the Court said (p. 634):

"It may be assumed *in limine,* that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers *for hire,* can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

In *Norfolk Southern Railroad Co.* v. *Chatman,* 244 U. S. 276, the same question was involved as was decided in the *Lockwood* case, *supra.* Justice CLARKE in disposing of the question said (p. 280):

"The Lockwood case shows that live stock contracts such as we have here, providing for the transportation of caretakers of stock on free passes, were in use by carriers as early as 1859 (17 Wall. 357, 365), and that they have continued in use up to this time is apparent from the decisions hereinbefore cited, from the case at bar and from many recently reported cases. *Tripp* v. *Michigan Central R. R. Co.,* 238 Fed. Rep. 449. Notwithstanding the fact, as we have seen, that such transportation has been declared by a long line of decisions not to be free in the popular sense, but to be transportation for hire, with all of the legal incidents of paid transportation, the carriers of the country have continued to issue it and to designate it as 'free.'"

It appears in both of the cases that the plaintiff was required to sign the agreement to attend to

the loading, transporting and unloading of his cattle and to accompany the same, releasing the carrier from all liability due to the injury of the cattle or of himself. It appeared further that if the plaintiff refused to sign this agreement, he was compelled to pay three times the rate that he would otherwise have to pay, and that no drover had cattle carried except on an agreement of this kind. It is clear that this distinguishes the drover cases from the case at bar, because here the plaintiff was not obligated to travel upon the part free ticket that he was using, but had the right to travel on a full fare ticket, and instead of all the passengers being compelled to accept these half-fare tickets with the exemption contained therein, it appears that only a few, namely, the employees of the American Railway Express Company, had the privilege of using them. There is a further distinction in that a common carrier of goods has always been held to a higher degree of responsibility than a carrier of passengers, and is an insurer. The provisions of drover's pass as indicated by the opinion in the *Lockwood* case, *supra,* contains an exemption of liability for negligence of the carrier to the goods, as well as to the drover. The plaintiff in the *Lockwood* case being compelled to ride upon a freight train with his cattle, it might well be that the Court would consider it against public policy for the carrier to exempt itself from responsibility for negligence as to him, because such exemption might tend to make the defendant's servants or agents careless in their protection of him. In the case at bar, however, the plaintiff being carried in a passenger train with thousands of other passengers who paid full fare, there could not possibly be any thought that the defendant's servants or agents would be careless in the operation of the train, for, as pointed out previously,

an accident would result in injury to the full-fare passengers, which were in the majority, and no benefit would be obtained from the exemption contained in the tickets of the few half-fare passengers.

It is also to be observed that although the *Lockwood* case, at the conclusion of the opinion, states that the Court purposely abstains from expressing any opinion as to what would have been the result of its judgment had the plaintiff been considered a free passenger instead of a passenger for hire, the same Court has since that time decided that the provision in tickets used by free passengers exempting the carriers from liability, are, in fact, binding and not against public policy.

> *Northern Pacific Ry. Co.* v. *Adams,* 192 U. S. 440;
> *Charleston & Western Carolina Ry. Co.* v. *Thompson,* 234 U. S. 576;
> *Kansas City Southern Railway Company* v. *Van Zant,* 260 U. S. 459;
> *Baltimore & Ohio Southwestern Railway Company* v. *Voigt,* 176 U. S. 498.

Of course, if as we contend this Court holds that the plaintiff was an intrastate passenger, in view of the fact that he was traveling between Carlstadt, New Jersey, and Jersey City, New Jersey, then it would not be in anywise bound by the decisions of the United States Supreme Court in the cases of *New York Central Railroad Co.* v. *Lockwood* or *Norfolk Southern Railroad Co.* v. *Chatman,* cited *supra,* because they deal with interstate transportation, and this Court is not bound to accept their decision on the question of public policy in an intrastate case.

II.

CONCLUSION.

We respectfully submit that the judgment below should be reversed.

COLLINS & CORBIN,
Attorneys of Defendant.

EDWARD A. MARKLEY,
CHARLES W. BROADHURST,
Of Counsel.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY
[8265]

47 FEB.T.1928

New Jersey Court of Errors and Appeals

10

WALTER F. SHERIDAN, *Plaintiff-Respondent,* vs. NEW JERSEY & NEW YORK RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	Action at Law. On Appeal From Supreme Court.

20

BRIEF IN BEHALF OF PLAINTIFF-RESPONDENT.

Statement of Facts.

The plaintiff who lived in Carlstadt, N. J., was employed by the American Railway Express Company (p. 20, lines 30-40). At the time of the accident, he was riding on the defendant's train from his home for the purpose of starting work for his employer at Jersey City, N. J. (p. 32, lines 30-40). He in nowise had anything to do with the defendant either by reason of his employment or by reason of his riding on the train. He was riding on the train of the defendant upon a com-

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mutation ticket which he purchased from the defendant and which ticket he handed to the conductor of the defendant company when he boarded said train (p. 21, lines 10-20). While a passenger on said train, there was a head-on collision with the train of the defendant, Erie Railroad Company (p. 61, lines 20-40; p. 65, lines 1-30). The
10 plaintiff's presence in said car was in consequence of and under the rights given to him by virtue of the commutation ticket which he purchased from the defendant. There was a verdict for the plaintiff from which the defendant now appeals.

ARGUMENT.

POINT I.

20

The trial court did not err in refusing to direct a verdict in favor of the defendant and in charging the jury that the provisions on the commutation ticket exempting the defendant from responsibility for the plaintiff's injuries were void.

There is one question of law argued by the defendant and upon which it bases its ground for
30 reversal, and that is, that the printed provisions on the back of said ticket, wherein the defendant relieves itself from liability for its negligence, is valid and, therefore, the opinion of the court in declaring such provisions void is erroneous. The plaintiff in this case paid a sum of money, namely, $3.65 (p. 21) to the defendant at its depot in Jersey City. The plaintiff, therefore, it seems to me, was a passenger on the train of the defendant and was so by reason of the payment to the
40 defendant of a sum of money fixed by the de-

fendant. The defendant cites a number of cases in its brief all of which dwell upon the proposition that one riding upon a free pass and upon which free pass is inserted a provision relieving the carrier from liability in the event of negligence and subsequent injury to the holder of the pass or someone riding in pursuance thereof, assumes the risk and cannot hold the carrier liable 10
for injuries sustained. The Kinney case, Morris case and Dodd case cited by the defendant, seem to me not to be in point and I will not take up the court's time in discussing the rules of law set forth therein. The only case cited by the defendant which seems to support its proposition is the case of Anderson vs. Erie Railroad Company, 119 N. E., 557. This case is the only case in the country which holds that one riding on a 20
ticket sold at a reduced rate is bound by the provisions therein contained and that the carrier is not responsible for its negligence. This case is against the greater weight of authority in this country and also in England. The opinion by the court was a divided one, three for affirmance and three for reversal.

It has been already here held and it is still well settled that no contract purporting to exempt a common carrier of passengers from liabil- 30
ity for negligence of itself or its agents or servants to a passenger, particularly a carrier for hire, is valid, it being against public policy. The authorities are practically unanimous in support of the proposition that no contract, condition or limitation will relieve a common carrier from liability to a passenger carried for compensation for the consequences of the negligence of the carrier or its employees, or modify that liability so 40

as in any way to restrict it within the limits fixed by the common law, *notwithstanding such contract is agreed to by the passenger in consideration of special concessions as to rates or otherwise.* See 10 Corpus Juris, Par. 1154, pages 714, 715 and 716.

The reason for the distinction, it seems to me, between a person riding on a pass and a person paying a reduced rate, is that the person holding a free pass is nothing but a trespasser or at the most a licensee through the generosity of the railroad company, but a man paying fare, and a fare is reasonable compensation to the common carrier for the riding, has a right to be called a passenger whether working for another concern or not. The undisputed evidence in this case is that the plaintiff, though he worked for an express company, nevertheless had no duties pertaining to the operation of or in connection with the railroad. He was not employed by the railroad company nor was he an express messenger. The trial court properly held that the provisions on the back of the commutation ticket were void as against public policy. However, there was no testimony in the case that the ticket which the plaintiff was riding on had the provisions set forth by the defendant. The defendant's contention is that a similar ticket shown to the plaintiff contained a provision relieving the defendant from responsibility.

In the case of *New York Central Railroad Co.* vs. *Charles C. Lockwood*, 84 U. S., 357, the court sustained the proposition that one riding on a carriage for hire is entitled to all the benefits of a passenger and any stipulation, agreement, etc., to relieve the company from responsibility in the

event of its negligence through its agents or servants is void. See also Norfolk Southern Co. vs. Chatman, 244 U. S., 276.

The Court held in the case of *Oceanic Steam Navigating Co.* vs. *Corcorian*, 9 Fed. (2d), p. 724, that common carriers are bound to exercise utmost care and diligence in the performance of their duties and a contract allowing a carrier to evade its obligations to the public is illegal and void. It was also held in this case that agreements made in the United States contrary to public policy are absolutely void and unenforceable *no matter how solemnly made.* See also Lehigh Valley R. R. vs. State of Russia, 21 Fed. (2d), 396.

The defendant contends that inasmuch as the plaintiff was riding on a train from Carlstadt to Jersey City, he was an intrastate passenger. It seems to me that the defendant was a common carrier of passengers for hire and it serves no useful purpose in this case as to whether plaintiff was an intrastate or interstate passenger. Our courts must look to the opinions of the highest courts of the country for judicial opinions and other states for legal principles to aid them in deciding propositions not heretofore adjudicated. It seems to me that the cases cited in this brief are applicable and directly in point. The only case to the contrary is the Anderson case. This case is against all the law on this proposition throughout this country, especially in view of the fact that it was decided by a divided court; this state should not follow this case, but should hold that if there was a provision on the back of the commutation ticket sold to the plaintiff, that it was against pub-

lic policy and, therefore, void and that the trial court was not in error in so charging the jury and refusing a direction of verdict for the defendant.

CONCLUSION.

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I respecfully submit that the judgment below should be affirmed.

ARCHIE ELKINS,
Attorney of Plaintiff.

ALEX. SIMPSON,
of Counsel.

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Gallo & Ackerman, Inc., 142 Liberty Street, 'Phones—Rector 7257-8.

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