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New Jersey State Library

Complaint.

(Filed Sept. 8, 1924.)

New Jersey Supreme Court.

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ESSEX COUNTY.

FLORA E. CLEAVES, as Administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, Plaintiff, *against* WILLIAM YESKEL and SAMUEL YESKEL, doing business under the firm name and style of YESKEL SUPPLY COMPANY, Defendants.	Action at Law.

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Plaintiff, Flora E. Cleaves, administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, residing in Newark, Essex County, New Jersey, says:

I. That at the times herein stated the defendants were and still are trading under the firm name and style of Yeskel Supply Company, in Newark, Essex County, New Jersey, and engaged, among other things, in the purchase and sale of bags, burlap and similar articles, and in the operation of one or more automobile trucks.

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II. On and prior to July 25, 1924, plaintiff's intestate, Daniel L. Cleaves, was associate superintendent of the lead department of the Balbach

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Smelting & Refining Company, a corporation organized and existing under the laws of the State of New Jersey, and having a plant located between Doremus Avenue and Newark Bay, in the City of Newark.

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III. That on July 25, 1924, servants and agents of the defendants, driving and in control of an automobile truck owned by the defendants, called at said plant of the Balbach Smelting & Refining Company to take delivery of certain burlap bags and scrap burlap which the said defendants had purchased from said Balbach Smelting & Refining Company.

IV. That as such associate superintendent of the lead department of the Balbach Smelting & Refining Company, plaintiff's intestate was in charge of the yard department of said company and responsible for anything removed from the plant of said company and it was his duty to keep under his personal supervision all automobile trucks and other vehicles, and those in charge thereof, entering the plant of said company and to point out to those in charge thereof any material that was to be delivered to such automobile trucks or other vehicles.

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V. That when the said servants and agents of the defendants and the said automobile truck arrived at the gate of said plant of the Balbach Smelting & Refining Company on July 25, 1924, to take delivery of said burlap bags and scrap burlap, plaintiff's intestate, pursuant to the duties hereinabove referred to, and with the consent and at the invitation of said servants and agents of the defendants, stepped on the running board of said automobile truck in order to go with said servants

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and agents to the place where the burlap bags and scrap burlap which were so to be delivered to the defendants were located.

VI. That said running board of said automobile truck was then and had for some time been broken, in disorder and in need of repair and soon after plaintiff's intestate stepped thereon, said running board collapsed, thereby throwing plaintiff's intestate to the ground and under one of the rear wheels of said automobile truck and injuring him so severely that he immediately died as a result thereof. 10

VII. Said decedent left him surviving Flora E. Cleaves, his widow, and a daughter, Isabel Cleaves, an infant of the age of seventeen years, who are his next of kin and who suffered pecuniary loss by reason of his death. 20

VIII. On August 9, 1924, letters of administration *ad prosequendum* were granted by the Surrogate of Essex County, New Jersey, to the plaintiff and were accepted by her.

IX. This action is commenced within two years after the death of plaintiff's intestate.

WHEREFORE, by reason of the premises, plaintiff as administratrix *ad prosequendum* as aforesaid, demands against the defendants one hundred thousand dollars ($100,000) damages. 30

RALPH O. WILLGUSS,
Attorney for Plaintiff,
2 Broad Street,
Red Bank, N. J.

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Answer.

(Filed September 22, 1924.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

FLORA E. CLEAVES, as Administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, Plaintiff, *against* WILLIAM YESKEL and SAMUEL YESKEL, doing business under the firm name and style of YESKEL SUPPLY COMPANY, Defendants.	Action at Law.

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The defendants herein, residing in Newark, Essex County, New Jersey, answering the complaint of the plaintiff say:

1. They admit the allegations contained in Paragraph I of the complaint.

2. They have no knowledge of the facts alleged in Paragraph II; and, for lack of such knowledge, deny the same.

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3. They admit the allegations contained in Paragraph III.

4. They have no knowledge of the facts alleged in Paragraph IV; and, for lack of such knowledge, deny the same.

5. They deny the allegations contained in Paragraphs V and VI.

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Answer.

6. They neither admit nor deny the allegations contained in Paragraphs VII and VIII, but as to the same put the plaintiff upon her proof.

7. They admit the allegations contained in Paragraph IX.

FIRST SEPARATE DEFENSE OF SAID ACTION. 10

1. The plaintiff's intestate, Daniel L. Cleaves, was guilty of contributory negligence, which was the proximate cause of said alleged injuries.

SECOND SEPARATE DEFENSE OF SAID ACTION.

1. The plaintiff's intestate, said Daniel L. Cleaves, was a trespasser at the time of the alleged accident, which trespass was the proximate cause of said alleged injuries. 20

WHEREFORE, defendants demand judgment dismissing the complaint with costs.

MARK TOWNSEND, JR.,
Attorney for Defendants,
921 Bergen Avenue,
Jersey City, N. J.

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Demand for Bill of Particulars.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

FLORA E. CLEAVES, as Administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, Plaintiff, *v.* WILLIAM YESKEL and SAMUEL YESKEL, doing business under the firm name and style of YESKEL SUPPLY COMPANY, Defendants.	Action at Law.

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The defendant demands that the plaintiff file a bill of particulars in the following items within ten days after service of a copy of this demand:

1. Was the decedent employed by the Balbach Smelting & Refining Co. on a salary or by the day?

2. State the wage of the decedent, if any.

3. State the amount of the daily wage of the decedent, if any.

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4. State the age of the decedent at the time of his death.

5. Name the next of kin of the decedent and their relationship to him.

6. Name those of the above named next of kin who were partially dependent upon the decedent.

7. Name those of the above named next of kin who were wholly dependent upon the decedent.

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8. State the extent to which the decedent contributed to those of his next of kin who were partially dependent upon him and the amount of such contribution.

9. State the extent to which the decedent contributed to those of his next of kin who were wholly dependent upon him and the amount of such contribution. 10

10. State any other items of damage which the plaintiff claims to be entitled to as result of the death of the decedent.

MARK TOWNSEND, JR.,
Attorney for Defendants.

Bill of Particulars. 20

(Filed Sept. 30, 1925.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

FLORA E. CLEAVES, as Administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, Plaintiff, *against* WILLIAM YESKEL and SAMUEL YESKEL, doing business under the firm name and style of YESKEL SUPPLY COMPANY, Defendants.	Action at Law.

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The plaintiff herein, by her attorney, Ralph O. Willguss, for a bill of particulars of her complaint, alleges: 40

Bill of Particulars.

1. That the decedent was employed by the Balbach Smelting & Refining Company on a monthly salary.

2. That the monthly salary so received by the decedent was three hundred ($300) dollars.

10 3. That the age of the decedent at the time of his death was forty-seven (47) years.

4. That the name of the next of kin of the decedent and their relationship to him are as follows: Flora E. Cleaves, widow, and Isabel Cleaves, daughter.

5. That said next of kin above named were wholly dependent upon the decedent for support.

20 6. That the decedent contributed to said next of kin above mentioned for their support and for the maintenance of a home for them the whole of his salary with the exception of not over five hundred ($500) dollars a year, retained by him for his personal expenses.

Dated March 4, 1925.

RALPH O. WILLGUSS,
Attorney for Plaintiff,
2 Broad Street,
30 Red Bank, New Jersey.

To

MARK TOWNSEND, JR., Esq.,
Attorney for Defendants,
921 Bergen Avenue,
Jersey City, New Jersey.

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NEW JERSEY SUPREME COURT,

Wednesday, September 30, 1925.

Before—Hon. Nelson Y. Dungan, J., and a Jury.

Flora E. Cleaves, as Administratrix *ad prosequendum* of the Estate of Daniel L. Cleaves, deceased, *v.* William Yeskel and Samuel Yeskel, doing business under the firm name and style of Yeskel Supply Company.	Action at Law.

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For the Plaintiff appears Ralph O. Willguss.

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For the Defendants appear Mark W. Townsend, Jr. and Philip J. Schotland.

Mr. Willguss opens in behalf of plaintiff.

Mr. Townsend: I move for a nonsuit on the opening.

The Court: The opening was not taken down by the stenographer. However, as I listened to your opening, I failed to notice any facts upon which this case could go to the jury.

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Counsel may state again what he expects to prove and then Mr. Townsend may renew his motion.

Mr. Willguss: My theory, if your Honor please, is that Mr. Cleaves was an implied invitee, and the known condition of the truck was such that it in itself was negligent to leave the truck in such

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condition. This step, to their knowledge, for a long time had been in such condition.

The Court: Since your opening was not taken down, state for the record what you expect to prove on the subject of negligence.

Mr. Willguss: I expect to prove that for
10 some period of time prior to the 25th of July, the date of the fatal accident, the running board of the truck, to the knowledge of the defendant, had been in such faulty condition and lack of repair that it was liable to break and throw anybody who stepped upon it at any time; that the condition of the step had been called to the attention of the defendant, and they had failed to repair it or fix it, so it was in faulty condition, and the thing which they failed to do was the immediate cause of the
20 death of Daniel L. Cleaves. The running board, we will show, was so rusted, the bolts were so loose and the wooden supports so rotten that it was likely to go down at any time, and it did go down and cause Mr. Cleaves' death. I believe he was on it lawfully and as an implied invitee.

The Court: I do not think that you have stated that. I do not think you have stated the facts from which that implication arose.

Mr. Willguss: That he was an implied invitee.
30 It was Mr. Cleaves' duty—and I think I will show that it was known to the defendants and their employees—as assistant superintendent of the yard of the Balbach Smelting & Refining Company, to go with any trucks or automobiles or others who came in with the delivery of material or to take out material; that these defendants, with the same truck and with the same drivers, had called at the yard of the Balbach Smelting & Refining Company for exactly the same purpose many times before,

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and on each occasion, without objection, and as I think I may show, with the tacit consent of those employees of Yeskel, Mr. Cleaves rode on the truck in exactly the same way he did on the day when the running board broke and threw him to his death.

The Court: That is all you desire to state? 10

Mr. Willguss: That is all.

The Court: I will hear the other side.

Mr. Townsend: I move for a nonsuit on counsel's opening, first, on the ground that he has stated no facts that made it the duty of the defendant to have that running board in the condition that he claims it should have been in; that the greatest inference that could be drawn was that the plaintiff was a licensee. There is no allegation in his pleading to the effect that he was a licensee or a 20 trespasser; that he is relying upon a custom. There is no allegation in his pleadings pleading a custom, and, therefore, under the facts that he has stated, the only inference is that he said he was lawfully there, and there is no more inference that he was a licensee. I will call your Honor's attention to the cases on the subject.

The Court: I shall be glad to have you do that. Of course, the fifth paragraph of the complaint states that it was at the invitation of the servants 30 and agents of the defendant.

Mr. Townsend: There is a variance between the opening and the pleadings. (Citing cases.) In the case of Kiernan *v.* New Jersey Ice Company, 74 Law, 175; in that case the driver of a coal wagon invited a boy on his wagon, and while riding there he was thrown off, and the Court held that so far as the employees were concerned,

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inviting the boy on the wagon, he had exceeded his authority, that he was either a licensee or a trespasser to whom he owed no greater duty than to refrain from wilfull acts. As far as the allegations are concerned, it goes on to say that the party was lawfully on the truck. The allegation
10 is that it was at the invitation of the defendant.

Mr. Willguss: I am, of course, familiar with the line of cases that Mr. Townsend cites, but if your Honor will examine them, with the facts here, I think there is a wide difference. Those cases are where an employee had asked someone to help him or asked him up on the truck and gave him a ride or something of that sort.

The Court: Of course, a case of that kind would be stronger than yours.

20 Mr. Willguss: I don't think so, because here Mr. Cleaves was aiding in the employer's own business. It was a part of his duty to see that they got the particular material that they came for, which may have been a quarter or half a mile off in the yard.

The Court: But he did not get to the point on their truck. Why should he have a right to go from that point on that truck?

Mr. Willguss: It was to expedite the business
30 of the defendants. They came there for bagging located perhaps a quarter of a mile away. It was in connection with the business of the defendants themselves, not of their employees, and I think therein lies the distinction between this case and the cases Mr. Townsend referred to. This was after the truck of the Yeskel Supply Company had entered the gate and passed the gate of the Balbach Smelting & Refining Company, and there

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they were to meet Mr. Cleaves, as he always had ridden with them, first to the scale to weigh the truck, and then go back in the yard where the bagging was that they were to take out. It seems to me that the facts here are sufficient to warrant implied invitation. It was to expedite the business of the defendants themselves. It had been the custom and there was no objection to that custom. 10

The Court (after argument): The Court very reluctantly grants a nonsuit, even at the close of the plaintiff's case, and even more so upon an opening; but it would seem, in a busy circuit like this, quite improper for the court to consume the time necessary for the plaintiff to put in his case, where the opening shows no cause of action against the defendants, and, particularly so, where the original opening is not taken down, and counsel are warned in advance that upon his opening the court may act, and states all the facts which he expects to prove, as has been done in this case. Counsel admits that there was no invitation upon this occasion upon the part of the driver of the truck; that he relies upon an implied invitation because of what Mr. Cleaves had done upon previous occasions, under like circumstances, and I suppose it makes no difference whether the invitation is an implied one or a direct invitation, as I view it, because it would make very little difference. The point is whether or not the defendants in this case, the owners of the truck, owed to the plaintiff's intestate any duty which they failed to perform—that is, if they either directly or impliedly authorized their driver to issue such an invitation. It does not appear that the defendants themselves ever knew the custom upon which the 20 30

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plaintiff relies for his implied invitation. The facts stated in the opening, in my view of it, do not constitute Mr. Cleaves an invitee at all; he was merely a licensee, or perhaps a trespasser. The mere fact that it was his custom to do that, that he had done it on previous occasions, does not constitute him an invitee. It may make him a licensee, make his presence upon the truck merely permissive, and the rule of law is just the same whether he was a licensee or a trespasser. Under those circumstances, the defendants owed to him no greater duty than to abstain from wilfully injuring him, and the facts stated in the opening would not justify the case going to the jury if those facts were presented, upon the idea that Mr. Cleaves was wilfully injured.

It seems to me that that view of the court must necessarily result in a nonsuit, and that will be the action of the court.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Judgment.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

FLORA E. CLEAVES, as Administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, Plaintiff, *against* WILLIAM YESKEL and SAMUEL YESKEL, doing business under the firm name and style of YESKEL SUPPLY COMPANY, Defendants.	Action at Law.

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The above case having been regularly reached for trial before Judge Nelson Y. Dungan and a jury in the Essex Circuit of the New Jersey Supreme Court, on the 30th day of September, 1925, and counsel for the plaintiff having addressed the jury at the opening of the case, the Court, upon motion of counsel for the defendants, directed that a judgment of nonsuit be entered in favor of the defendants, William Yeskel and Samuel Yeskel, doing business as the Yeskel Supply Company, and against the plaintiff.

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(No Costs.) Whereupon it is adjudged that the complaint of the plaintiff be dismissed, without costs.

Judgment entered October 14, 1925.

WM. S. GUMMERE,
C. J.

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Notice and Grounds of Appeal.

(Filed Dec. 3, 1925.)

NEW JERSEY SUPREME COURT,

Essex County.

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Flora E. Cleaves, as Administratrix *ad prosequendum* of Daniel L. Cleaves, deceased,
Plaintiff,

v.

William Yeskel and Samuel Yeskel, doing business under the firm name and style of Yeskel Supply Company,
Defendants.

On Appeal.

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To Mark W. Townsend, Jr., and Philip J. Schotland, Attorneys of Defendants:

Take Notice that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause upon the following ground:

The Trial Court directed a judgment of nonsuit against the plaintiff and in favor of the de-
30 fendants when thereunto moved by counsel for the defendants based upon the opening of the case to the jury by counsel for the plaintiff, while said Court should have denied said motion and should have permitted the jury to receive the testimony of the plaintiff.

RALPH O. WILLGUSS,
Attorney of Appellant.

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71 FEB.T.1926

New Jersey Court of Errors and Appeals

FLORA E. CLEAVES, as Administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, Plaintiff-Appellant, *v.* WILLIAM YESKEL & SAMUEL YESKEL, doing business under the firm name and style of YESKEL SUPPLY COMPANY, Defendants-Appellees.	On Appeal.

BRIEF FOR APPELLANT.

Appeal by plaintiff from a judgment of non-suit (p. 14), entered in the Supreme Court, Essex County, October 14, 1925 (p. 13).

The action is brought by the administratrix *ad prosequendum* of Daniel L. Cleaves, deceased, on behalf of the widow and infant daughter of the intestate, to recover damages for the death of said intestate alleged to have been caused by the negligence of the defendants.

The cause of action rests upon the following state of facts as alleged in the complaint (p. 1):

On July 25, 1924, servants of the defendants, driving and in control of an automobile truck owned by defendants, called at the plant of the Balbach Smelting & Refining Company, to take delivery of certain burlap bags and scrap burlap which the defendants had purchased from said

company. Plaintiff's intestate was associate superintendent of the lead department of the Balbach Smelting & Refining Company, and, as such associate superintendent, was in charge of the yard department of said company and responsible for anything removed from its plant, and it was his duty to keep under his personal supervision all automobile trucks and other vehicles and those in charge thereof entering the plant of said company, and to point out to those in charge of such trucks or other vehicles any material to be delivered thereto. When the servants and agents of the defendants and said automobile truck arrived at the gate of the plant of the Balbach Smelting & Refining Company on July 25, 1924, to take delivery of said bags and burlap, plaintiff's intestate, pursuant to his said duties, and *with the consent and at the invitation* of said servants and agents of the defendants, stepped on the running board of said automobile truck in order to go with said servants and agents to the point of location of the said bags and burlap, which were to be delivered to the defendants. The said running board was then and had for some time been broken, in disorder and in need of repair, and soon after plaintiff's intestate stepped thereon it collapsed, thereby throwing plaintiff's intestate to the ground and under one of the rear wheels of the truck, whereby he was injured so severely that he immediately died.

Upon the opening of the case to the jury, plaintiff's counsel stated that he expected to prove that for some time prior to July 25th (the date of the accident as alleged in the complaint) the running board of the truck, to the knowledge of the defendants, had been in such faulty condition and so in need of repair that it was liable to break and precipitate anyone who might step upon it; that

this condition had been called to the attention of the defendants and that they had failed to repair it and that this condition was the immediate cause of the death of plaintiff's intestate; that the running board was so rusted, the bolts so loose and the wooden supports so rotten that the running board was likely to go down at any time; that the plaintiff's intestate was an implied invitee; that it was the duty of plaintiff's intestate known to the defendants and their employees, as assistant superintendent of the yard of the Balbach Smelting & Refining Company, to go with any trucks or automobiles, or others who came into the yard, with delivery of material or to take out material; that these defendants with the same truck and the same drivers had called at the yard for the same purpose many times before, and on each occasion, without objection, and with the tacit consent of those employees of the defendants, the plaintiff's intestate rode on the truck in exactly the same way he did the day the running board broke down and threw him to his death. Plaintiff's counsel further stated, upon the discussion that followed the foregoing statement, that the plaintiff's intestate went upon the running board in order to expedite the business of the defendants, who came for bagging located perhaps a quarter of a mile away; and that this was done in connection with the business of the defendants after the truck had entered the gate of the Balbach Smelting & Refining Company, where the defendant's servants were to meet the plaintiff's intestate, as he had always ridden with them first to the scale to weigh the truck and then to the point in the yard where the bagging was to be taken out (pp. 10, 11-A).

Thereupon the Court granted a nonsuit, to which an exception was reserved (p. 12).

The motion for nonsuit was upon the following grounds (p. 11):

(1) That no facts were stated that made it the duty of the defendants "to have that running board in the condition that he (plaintiff's counsel) claims it should have been in."

(2) That no custom of riding on the running board was pleaded.

(3) That plaintiff's intestate was at most a mere licensee.

Upon granting the defendant's motion, the learned Trial Judge made the following statements which embody the grounds of his action (p. 11-B):

> (1) "The counsel admits that there was no invitation upon this occasion upon the part of the driver of the truck," and
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> (2) "he relies upon an implied invitation because of what Mr. Cleaves had done on previous occasions, under like circumstances," that
>
> (3) it would make "no difference whether the invitation is an implied one or a direct invitation," that
>
> (4) "the point is whether or not the defendants in this case, the owners of the truck, owed to the plaintiff's intestate any duty which they failed to perform—that is, if they either directly or impliedly authorized their driver to issue such an invitation," that
>
> (5) "it does not appear that the defendants themselves ever knew the custom upon which plaintiff relies for his implied invitation," and finally
>
> (6) "The facts stated in the opening, in my view of it, do not constitute Mr. Cleaves an invitee at all; *he was merely a licensee, or perhaps a trespasser.* The mere fact that it was his custom to do that, that he had done it

on previous occasions, does not constitute him an invitee. It may make him a licensee, make his presence upon the truck merely permissive, and the rule of law is just the same whether he was a licensee or trespasser. Under those circumstances, *the defendant owed him no greater duty than to abstain from wilfully injuring him.*"

An analysis of these statements indicates that the motion for nonsuit was granted upon the ground that the facts to be proved, as outlined in counsel's opening, would not establish either an express or an implied invitation to the intestate to ride upon the running board of the truck because they would not establish either an express or an implied authority in defendants' servants to extend such invitation, and that the fact that it was the custom of the intestate to ride upon the running board of the defendants' trucks when sent to the yard of the Balbach Smelting & Refining Company, to take delivery of materials for the defendants would not constitute him an invitee on the occasion of the injury.

We submit that the action of the court was based on too narrow a view of what plaintiff's counsel, in his opening, proposed to prove as well as upon an erroneous conception of the legal basis of plaintiff's cause of action. In this connection it may be stated first that the *custom* referred to was not in any sense a part of the plaintiff's cause of action. It was referred to as evidence for the jury upon the question of the consent of defendants' servants to the course adopted by the intestate and defendants' servants upon this particular occasion as well as upon other previous occasions when materials were to be delivered to defendants' trucks. It would seem to beg the question to offer as an objection to such custom that the defendants had no personal knowledge thereof.

The consent was pleaded and that was sufficient to admit any evidence that would tend to show consent, and at most the question would have been a question of fact for the jury. This is true irrespective of the proposed evidence of custom, because if the occasion of the accident had been the first visit of the truck, acquiescence on the part of the driver in what the intestate did in order to expedite the business of the defendants and intestate's employer would have been a fact upon which the jury might find consent. Therefore, irrespective of the matter of custom, the court should not have allowed that element to control its action.

The trial court deemed the fact of an invitation negatived because an *express invitation* by the driver or his *express consent* was not stated and, in this connection has given an unwarranted effect to the absence of any showing of knowledge by the master of the custom of the parties. An *invitation*, in the law of negligence, certainly may be implied.

29 Cyc., 454.

If the master himself had gone upon the premises to take delivery and the intestate had got upon the running board with the avowed purpose of directing him to the materials or assisting in any way to accomplish this purpose, the master certainly would not be permitted to accept such assistance and then excuse himself for negligence in driving the truck on the ground that the intestate was a trespasser, and such negligence is on no different footing from the negligence in furnishing for such purpose a running board in a dangerous condition. Under the authorities herein cited the servant had the same authority to consent to the intestate's act.

The gravamen of the plaintiff's cause of action is that the master put his servant to do a particular thing and furnished him, to be used in the work, a vehicle which to the master's knowledge was dangerously out of repair and liable to cause injury to anyone who might properly enter upon it in the course of accomplishing the master's errand.

It clearly appears from the opening statement of counsel that it was proposed to prove the dangerous condition of the vehicle, by reason of its rotten and defective running board, known to the master, that he failed to correct the condition and that on the particular occasion, as well as on other previous occasions, the intestate, with the acquiescence and tacit consent of the drivers of the truck, got upon the running board to direct them to the place of delivery of the materials for which they had been sent. This we submit was sufficient to take the case to the jury.

This is not an instance of a servant taking upon his master's vehicle a passenger who is a complete stranger to the master's business, either to give him a ride or to gratify some purpose of the servant foreign to his employment. There are many cases of that character in which the master is not liable for the acts of the servant and owes no duty save to refrain from wilfully injuring him. The authority of such cases is not disputed.

In the case at bar the plaintiff's intestate was permitted to ride upon the running board for the purpose of expediting the business of the defendants. The defendants' servants were sent to take delivery of materials and the act of the servants in permitting the plaintiff's intestate to get upon the running board for the purpose of directing them to such materials was clearly within the scope of their employment, and if that is so, the

defendants were guilty of actionable negligence in placing in the hands of the servants a vehicle dangerous to the life of anyone who might properly go upon it with the permission of the servants in the course of accomplishing the master's errand. Upon the foregoing it is submitted.

I.

The custom of the parties was not a part of the plaintiff's cause of action, but was merely evidentiary and need not have been pleaded.

The custom referred to was merely incidental and relied upon as evidence of another fact, *consent* of the driver, and in such cases the custom need not be pleaded.

> *17 Corpus Juris*, 518;
> *Kinney* v. *Met. Ry. Co.*, 261 Mo., 97; 169 S. W., 23;
> *Harrison* v. *Burrell*, 58 Ore., 410, 421; 115 Pac., 141;
> *Smith* v. *Bloom*, 159 Ia., 592; 141 N. W., 32.

In *Kinney* v. *Met. Ry Co.*, 261 Mo., 97; 169 S. W., 23, *supra*, the action was for injuries received in a rear end collision, and plaintiff, the injured motorman, alleged that the car with which his car collided was without rear lights, and it was held that evidence of the custom of the company to keep a red signal light on the rear of cars at night was admissible although the custom was not pleaded; that the existence of the custom was merely an evidentiary fact and not the basis of a cause of action.

The fact that it was not stated in the opening that the defendants had knowledge of the custom

is not material if it was within the scope of their servants' employment to consent to the course adopted by the intestate or by the servants and the intestate.

II.

The consent or acquiescence of the drivers of the truck to the riding on the running board of the truck by plaintiff's intestate was within the scope of the servants' employment.

It is well recognized that while performing the duty he is sent to perform, a servant's acts by way of performance bind the master.

The *test* of the master's responsibility is not whether such act was done according to the master's instructions, *but whether it was done in the transaction of the business which the servant was employed by the master to do.*

> *West Jersey R. Co.* v. *Welsh,* 62 N. J. L., 655, 42 Atl., 736;
> *McCann* v. *Consol. Tract. Co.,* 59 N. J. L., 481, 36 Atl., 888;
> *Wooding* v. *Thom,* 148 N. Y. App. Div., 21 (aff'd., 209 N. Y., 583);
> *Mott* v. *Consumer's Ice Co.,* 72 N. Y., 543.

In the latter event, the servant has authority to do what is necessary and reasonable for that purpose.

> *West Jersey, etc. R. Co.* v. *Welsh,* 62 N. J. L., 655;
> *Adams* v. *Tozer,* 163 N. Y. App. Div., 751, 756.

The rule is well stated in *Rolfe* v. *Hewitt,* 227 N. Y., at p. 491:

> "A servant is acting within the scope of his employment when he is engaged in doing for his master what he has been directed to do."

or, as otherwise stated in Mechem on Agency (vol. 2, §1875), and quoted in the case last above cited:

> "Any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct and logical result of it."

What the plaintiff's intestate did was not to gratify or accomplish any personal or private purpose on his part, but was in the performance of his duty to expedite the transaction of the business between his own employer and the defendants, and was in fact in aid of the performance of the work of defendants' servants.

Even when the negligent act causing an injury is the act of the servant, the act need not have been absolutely necessary for the proper performance of his duty in order to be within the scope of his employment.

McCann v. *Consol. Traction Co.*, 59 N. J. L., 481.

It would follow, necessarily, that if the intestate was on the running board with the consent of defendants' servants and for the purpose of expediting the defendants' business, he was not a trespasser or licensee.

The rule which exempts the owner of premises from liability for injury to a person who goes upon them, is confined to a person who goes upon the premises for his own convenience or purpose not connected with the owner's business or with the use to which the premises are put or adapted.

Plummer v. *Dill*, 156 Mass., 426;
Larmore v. *Crown Point Iron Co.*, 101 N. Y., 301.

The fundamental difference between invitation and licence is strongly exemplified in this case.

Wharton on Negligence, §349, says:

> "The principle seems to be that invitation is inferred where there is a common interest or mutual advantage, while license is inferred where the object is the mere pleasure or benefit of the person using it."

See also to the same effect *Gibson* v. *Skidmore,* 99 N. J. L., 131.

In *Slee* v. *Neller* (Mich.), 197 N. W., 530, A., the owner of premises, engaged B., the owner of a truck, to move certain materials from A's premises in East Lansing to Lansing. C. was doing work for A. on his said premises and assisted the B's truck driver in loading and went with the truck to Lansing to unload. It was held within the scope of the driver's employment to allow C. to ride back to East Lansing.

In *Adams* v. *Tozer,* 163 N. Y. App. Div., 751, a third person who hired a van to move goods and rode thereon at the driver's invitation when returning for a load, is not within the rule as to trespassers and the master is liable for injury to him caused by the driver's negligence.

> "In the case at bar the appellant was engaged with the driver in the common enterprise of removing two loads of household goods from a car to the house which appellant was to occupy. The work could not well be done by the driver alone, but the assistance of the plaintiff was necessary both as to the loading and unloading of the van, and it was evidently in the contemplation of the appellant and respondent at the time of hiring the van that the necessary assistance should be furnished by the appellant to supplement the work of the driver and team. The van was

> fitted with a seat for the use of the driver and of any other person who might have the right to use it. The obligation of the respondent was to move the goods from the car to the house, and the driver representing the respondent had the authority to do what was reasonable and necessary for that purpose. The route from the car to the house through the various streets was given, indicating that the car and the house were not in proximity, but the distance was not stated. *While it was not shown that it was customary for the persons assisting in the work of moving goods to ride back in the wagon returning empty, it may fairly be assumed that in the interest of expediting the work and conserving .the strength of the workers such course was practical and reasonable, and fairly within the contemplation of the parties at the time the bargain was made,* and we think that the driver was not acting outside of his authority in inviting the appellant * * * to ride."

In *Wooding* v. *Thom,* 148 N. Y. App. Div., 21 (aff'd., 209 N. Y., 583) the following rule laid down in *Gleason* v. *Amsdell,* 9 Daly (N. Y.), 393, is quoted:

> "*He* (master) *is answerable for the negligence of one whom the servant employs by his authority,* to aid the servant in the employment of the master's business; *and it is not necessary in such a case to show that such authority was expressly given; but it may be implied from the nature of the business, the course of trade and the circumstances of the particular case.*"

The defendants, with knowledge of the dangerous condition of their truck, sent it out in charge of their servants for a particular purpose and with implied authority to use it in all necessary or convenient ways for the accomplishment of that purpose. It was proposed to prove that what was

done by the plaintiff's intestate was directly connected with the defendants' business and with the consent of the defendants' servants. Such consent we submit was within the employment and the implied authority of the servants, and the plaintiff should have been permitted to introduce testimony to establish her case before the jury.

It is therefore finally submitted that

III.

The judgment herein should be reversed.

Dated December 29, 1925.

Respectfully submitted,

RALPH O. WILLGUSS,
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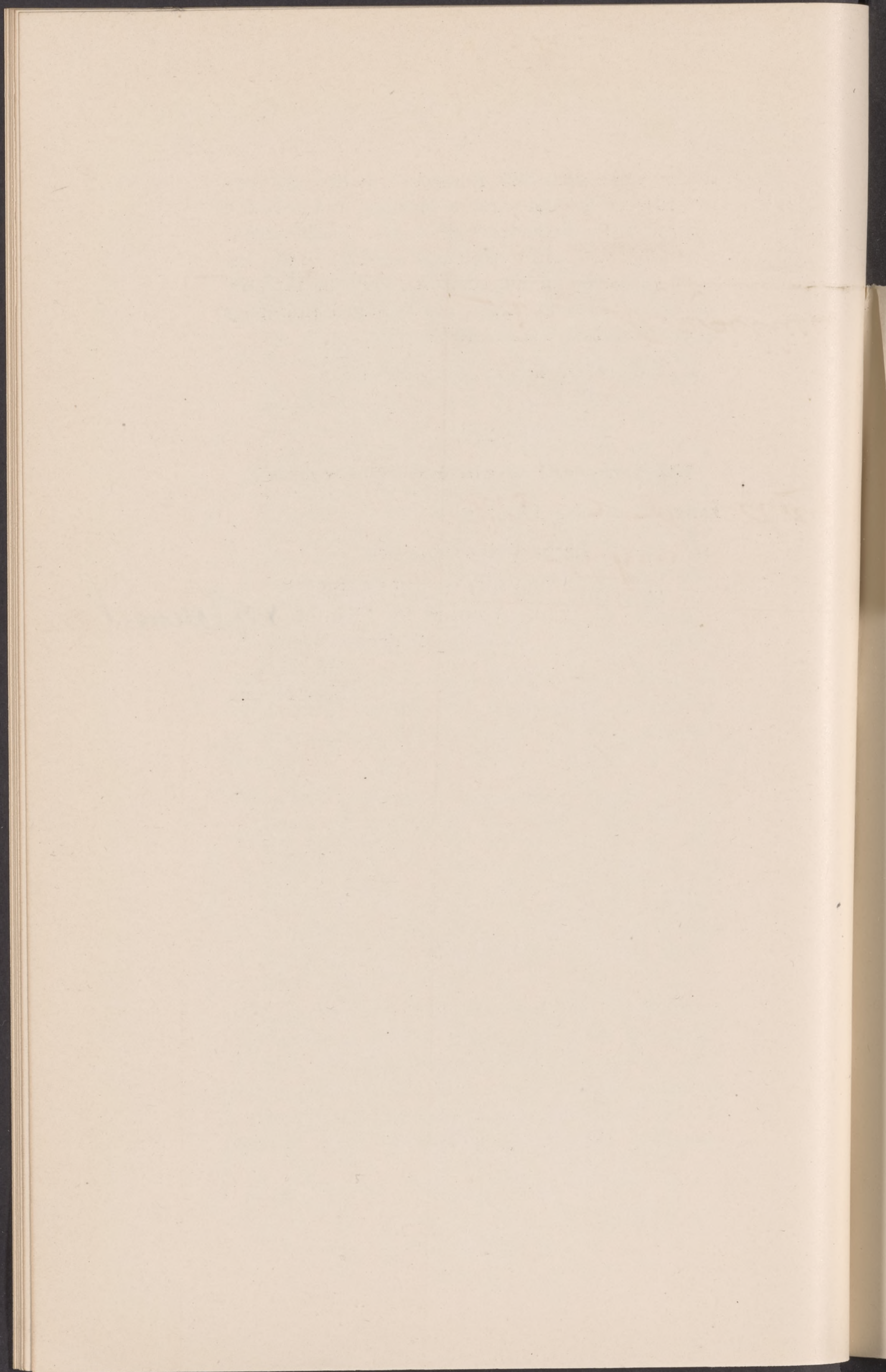

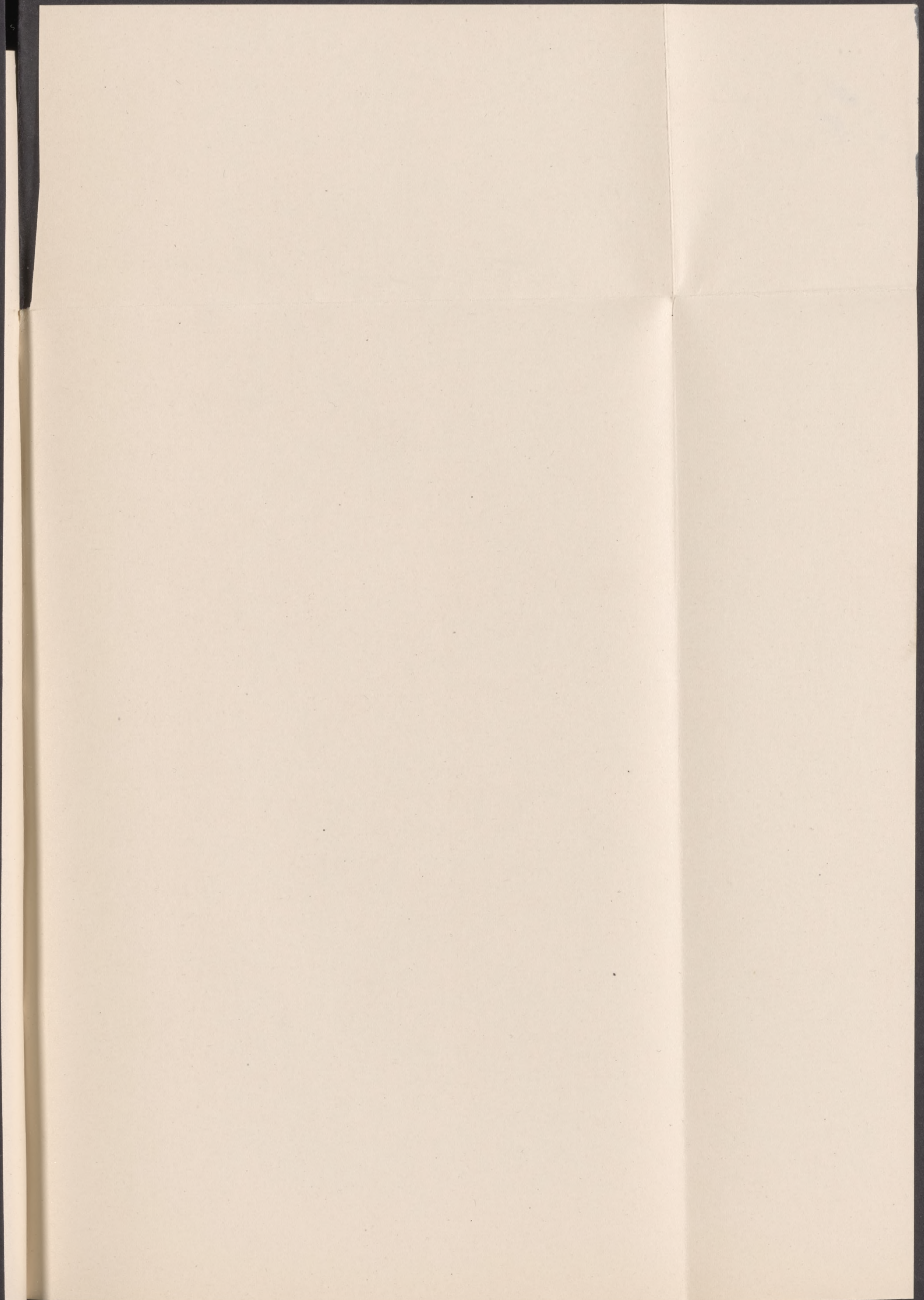

Three copies of the within brief received this 2nd day of January 1926.

Mark Townsend, Jr.
Attorney for Appellees.

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#71

New Jersey Court of Errors and Appeals

FLORA E. CLEAVES, as Administratrix, *ad prosequendum* of DANIEL L. CLEAVES, deceased, Plaintiff-Appellant,

v.

WILLIAM YESKEL and SAMUEL YESKEL doing business under the firm name and style of YESKEL SUPPLY COMPANY, Defendants-Appellees.

On Appeal.

BRIEF FOR APPELLEES.

This appeal involves the familiar doctrine of the law of negligence applicable to invitees or trespassers and licensees upon automobiles and its application to the state of facts described by the plaintiff's counsel in opening his case to the jury. It is to be noted that there was a variance between the complaint and the statement of facts. The former alleged an express invitation, the latter an implied one. Judge Dungan held that this statement and the facts to be proved constituted the deceased a trespasser of a mere licensee, to whom no duty was owing except to refrain from acts wilfully injurious, and he therefore granted defendants' motion for a nonsuit upon this opening statement. The question whether the servant had the authority, real or apparent, to extend an express invitation is out of the case except so far as

it may or may not have some bearing upon the question of implied invitation, hereinafter discussed.

It is fundamental, we submit, that if he were a trespasser or a mere licensee no duty was owing him except to refrain from acts wilfully injurious. If the opening statement of counsel disclosed that deceased was a mere licensee or trespasser the action of the Trial Court was proper, notwithstanding the complaint stated an express invitation.

> *Savage* v. *P. S. Railway Co.*, 95 N. J. L., 432;
> *Carey* v. *Gray*, 98 N. J. L., 217.

Counsel's statement (p. 11, lines 1-10) to the effect that the deceased was on the truck with the tacit consent of the defendants' employee and riding in the same way as he had always done merely prevented him from being a trespasser if the driver had authority, express or implied, to consent to his riding on the step. At most his status remained that of a mere licensee.

> *Karas* v. *Burns Bros.*, 94 N. J. L., 59;
> *Zanpella* v. *Fitzhenry*, 97 N. J. L., 517;
> *Fleckenstein* v. *Great Atlantic & Pacific Tea Co.*, 91 N. J. L., 145;
> *Vanderbeck* v. *Henry*, 34 N. J. L., 472.

An allegation that he was on the truck lawfully does not show that the deceased had any greater rights than a mere licensee.

> *Land* v. *Fitzgerald*, 68 N. J. L., 28;
> *Taylor* v. *Haddonfield*, 65 N. J. L., 102.

Counsel assumes as a legal proposition that the fact that the deceased had frequently ridden in the same way and under the same condition changed his legal status to that of an invitee. To follow

such argument to a logical conclusion would result in a trespasser becoming an invitee if he persisted in his course of conduct frequently enough. The legal relationship in this respect is not measured by user.

Appellant did not contend that the defendants knew of this practice. His duties as stated by counsel were to his employer and to see that the defendants received only so much material as they had ordered. The means of performing that duty was the business of his employer and not these defendants. While it may have been more convenient for the plaintiff to ride to the place in the yard where the material was to be delivered and in that respect it was a temptation for him to get upon the running board, yet this Honorable Court has expressly disapproved the notion that "temptation is equivalent to invitation."

> *Friedman* v. *Snare & Triest Co.*, 71 N. J. L., 611.

The allegation that the deceased was resting upon the truck for the purpose of expediting defendants' business did not make him an invitee.

> *Lasapio* v. *Roehler*, 1 N. J. Misc. Rep., 346.

The statement of counsel that evidence of the practice of the deceased to ride upon the running board was only to show that defendants' driver knew of it, makes the discussion whether it should have been pleaded academic.

Implied Invitation.

The facts necessary to create an implied invitation and the liability thereunder has been settled by this Court repeatedly in the following language:

> "The gist of liability in such cases consists in the fact that the person injured did not

act merely on motives of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in a manner in which he used them, but that such use was not only acquiesced in but was in accordance with the intention or design for which the way or place was adopted and prepared or allowed to stand."

Nolan v. *Bridgeton & Millville Traction Co.*, 74 N. J. L., 561;
Gibeson v. *Skidmore*, 99 N. J. L., 133.

In these cases it will be found that in addition to other facts the defendant has done something calculated to, and in fact induced the use of the premises by the person injured to the defendant's knowledge. No pretense is made in the case *sub judicia* that the defendants themselves had ever held out by affirmative act to the deceased that the step of this five ton Mack truck was intended to be used as a means of conveyance of passengers, or that the truck was designed to transport him around the yard of his own employer, or that they even knew he was accustomed to riding thereon. The subject of implied invitation, as we view it, relates to the acts of the defendants themselves and not to the acts of their employees, and in this respect we respectfully contend that no action of the driver of this truck could create the deceased an implied invitee. In fact, the statement is barren of facts tending to prove even that the employees had even the right to extend an expressed invitation. The burden of showing such facts was upon the plaintiff.

Karas v. *Burns Bros.* (*supra*).

Applying these tests to the case at bar an implied invitation was not extended.

Counsel for the plaintiff relies upon the cases of common carriers as creating implied authority on the part of employees to extend invitations to persons to ride thereon. He overlooks the fact that the business of the carrier is of transporting passengers and it is only in cases where the injured is no *sui juris* that the action of the employees appears to be within the general scope of their agency that recovery is allowed.

> *Solomon* v. *Public Service R. R. Co.*, 87 N. J. L., 284;
> *Karas* v. *Burns Bros.*, 94 N. J. L., 61.

If we should assume for the purpose of argument that an implied invitation was established another obstacle to the plaintiff's recovery existed, to wit: *deceased exceeded the bounds of the invitation in riding upon the step of this truck and therefore, was a mere licensee.*

The step on this truck manifestly was for the purpose of gaining entrance to the body of the truck, and the duty, if any, upon the defendants was limited to the care requisite for the reasonable use thereof for the purpose for which it was assigned.

> *Saunders* v. *Eastern Hydraulic Brick Co.*, 63 N. J. L., 556.

The accident did not occur while he was upon the step preparatory to entering the cab, but after the truck had gone some distance, he remaining thereon all the time. This invitation, if any, was to ride in the place provided for that purpose, to wit, the seats. The use of the step as a seat was as much beyond the limits of invitation as it would have been for him to have ridden on the front

bumper or on the hood of the truck, or on the cow catcher of a locomotive while a passenger upon a train.

It is, of course, true that if he had sustained the injury resulting in his death while acting within the scope of his invitation he would not assume a risk of the step breaking, but in using it for a purpose for which it was not designed and beyond the scope of his invitation, he became a mere licensee.

> *Bonfield* v. *Blackmore,* 90 N. J. L., 253;
> *Ryerson* v. *Bathgate,* 67 N. J. L., 337;
> *Saunders* v. *Eastern Hydraulic Brick Co., supra;*
> *N. Y. & N. J. Telephone Co.* v. *Speicher,* 59 N. J. L., 23;
> *Gavin* v. *O'Connor,* 99 N. J. L., 162;
> *Smith* v. *Mountain Ice Co.,* 74 N. J. L., 26;
> *Carey* v. *Gray,* 98 N. J. L., 217.

While this point was not urged or considered by the Court below as a basis for its action, it is sufficient to sustain this judgment if this Honorable Court should determine that it is sound.

> *McCarthy* v. *West Hoboken,* 93 N. J. L., 247.

The judgment herein should be affirmed.

Respectfully submitted,

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Attorney for and of Counsel with Appellees.

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