INDEX.

New Jersey Supreme Court

Notice and Grounds of Appeal.

Filed Dec. 3rd, 1929.

ALBINO SCILIMBRACCA, Plaintiff-Appellee. *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	Action at Law

To: ARTHUR DEVINCENTIS, ESQ.,
Attorney for Plaintiff-Appellee.

Sir:

PLEASE TAKE NOTICE that the defendant-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this case on the following grounds:

1. The New Jersey Supreme Court erred in affirming the judgment of the District Court of the Second Judicial District of the County of Essex, whereas it should have reversed the same in favor of the defendant-appellant.

Yours, &c.,

WM. A. BARKALOW,
Attorney for Defendant-Appellant.

Service of the within Notice and Grounds of Appeal is hereby acknowledged this 27th day of November, 1929.

ARTHUR DEVINCENTIS,
Attorney for Plaintiff-Appellee.

Order of Affirmance and Remittitur.

NEW JERSEY SUPREME COURT.

ALBINO SCILIMBRACCA, Plaintiff-Respondent, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	On Appeal from District Court.

The above entitled cause having been duly considered by the New Jersey Supreme Court at the January Term, 1929, upon the appeal of the defendant-appellant from a judgment rendered in favor of the plaintiff-respondent in the District Court of the Second Judicial District of the County of Essex, and it appearing that no error was committed by the trial court in rendering judgment in favor of said plaintiff-respondent:

It is, therefore, on this 27th day of November, 1929, ORDERED that the judgment rendered in said District Court be and the same is hereby affirmed:

And it is further ORDERED that the record be remitted to the said District Court of the Second Judicial District of the County of Essex to be proceeded with in accordance with this judgment and the practice of said court.

Entered Nov. 27, 1929
on motion of
ARTHUR DE VINCENTIS

A True Copy

FRED L. BLOODGOOD,
Clerk.

Stipulation.

NEW JERSEY SUPREME COURT.

ALBINO SCILIMBRACCA, Plaintiff-Appellee, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	Action at Law

IT IS HEREBY STIPULATED by and between the parties hereto that the filing of a bond on appeal in the above matter be and the same is hereby waived.

ARTHUR DEVINCENTIS,
Attorney for Plaintiff-Appellee.

WM. A. BARKALOW,
Attorney for Defendant-Appellant.

Notice of Appeal.

Filed Dec. 27, 1928.

DISTRICT COURT

Of the Second Judicial District

of the County of Essex.

Albino Scilimbracca, Plaintiff, *vs.* The Central Railroad Company of New Jersey, Defendant.	In Tort

To: Arthur De Vincentis,
Attorney for Albino Scilimbracca.

Sir:

Take notice, that the defendant, The Central Railroad Company of New Jersey, hereby appeals to the New Jersey Supreme Court from the judgment of the Second Judicial District Court of Essex, rendered in the above cited action on the 7th day of December, 1928.

Wm. A. Barkalow,
Attorney for Defendant.

State of Demand and Summons.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

ALBINO SCILIMBRACCA, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	In Tort

Plaintiff residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. On Saturday, September 24, 1927, plaintiff boarded the defendant's train at Asbury Park with Newark, New Jersey, as his destination.

2. As the train was approaching the East Ferry Street Station in Newark and as the plaintiff was sitting in a seat on the right side of the train, a piece of coal struck and broke the window at which the plaintiff was seated causing the flying pieces of glass to strike the plaintiff.

3. The pieces of said glass struck the plaintiff in his eye causing serious injury and excruciating pain; the glass also struck the plaintiff on his face causing several lacerations.

4. As a result of said injury the plaintiff suffered severe pain and the plaintiff was put to medical expense and was unable to work for a period of one month.

Judgment will be claimed in the sum of Five Hundred ($500.00) together with lawful interest and costs of suit.

ARTHUR DEVINCENTIS,
Attorney for Plaintiff.

Essex County, }
The State of New Jersey, } ss.:

To any Constable of said County, or to the Sergeant-at-Arms of the District Court of the Second Judicial District of the County of Essex.

SUMMON

THE CENTRAL RAILROAD COMPANY OF N. J.

to appear before the District Court of the Second Judicial District of the County of Essex to be held at 1092 Clinton Avenue (second floor), in the Town of Irvington, on the Thirty-first day of July Nineteen Hundred and Twenty eight, at ten o'clock in the forenoon, to answer unto Albino Scilimbracca in an action in tort wherein the plaintiff demands from the defendant five hundred dollars. Hereof fail not.

Witness, Hon. Felix Forlenza, Esq., Judge of said Court at Irvington, as aforesaid, the 24th day of July in the year One Thousand Nine Hundred and Twenty-eight.

J. EDWARD DE LANCY,
Clerk.

Judgment Record and Docket Entries.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT.

OF THE COUNTY OF ESSEX.

Suit #233,25

ALBINO SCILIMBRACCA, Plaintiff,	100.00
vs.	8.84
THE CENTRAL RAILROAD CO., OF NEW JERSEY (a corporation) Broad Street Newark, Defendant.	108.84
	In Tort

Plaintiff's Cost

Summons	2.10
Mileage	.24
Listing	1.50
Attorney's Fees	5.00
Order	
Total Cost	8.84

Defendant's Cost

Transcript	1.50
Statements	.50
Execution	

ARTHUR DE VINCENTIS, Plaintiff's Attorney.
JAMES INGLIS, Defendant's Attorney.

July 24, 1928 A summons was issued returnable: July 31, 1928.
The demand was: $500.

The summons was returned as follows:

I served the within summons July 26, 1928 on Miss John Doe she being the Secretary of the within named defendant of the General Agent, by reading it to him and giving him a copy thereof.

"CHARLES J. SCHROEDER,
Sergeant-At-Arms."

Jul. 27, 1928—A state of demand was filed.

Oct. 31, 1928—Affidavit of A. J. Mitchell was filed. DMD

Oct. 31, 1928—Affidavit of James Inglis was filed. DMD

Dec. 7, 1928—This case was listed and called. The plaintiff and the defendant appearing this cause was heard at this time. The following was sworn as stenographer, Henry F. Wobse. The following witnesses were sworn on behalf of the plaintiff—Albino Scilimbracca.

The following witnesses were sworn on behalf of the defendant Peter Teresco—Ernest E. Munn.

Dec. 7, 1928—Whereupon it is on this day, by this Court considered and adjudged that Albino Scilimbracca the plaintiff recover against The Central Railroad Co., of N. J. (a corporation) the defendant the sum of One Hundred dollars and no cents damages and the costs of suit. DMD

Dec. 27, 1928—A notice of Appeal was filed. DMD

Dec. 27, 1928—A Stipulation Waiving Filing of Bond on Appeal was filed. DMD

Dec. 29, 1928—A transcript of the docket page was issued. PBF

Dec. 29, 1928—A certified copy of the judgment was issued. PBF

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

STATE OF NEW JERSEY, }
County of Essex, } SS.:

I, J. EDWARD DELANCY, Clerk of the District Court of the Second Judicial District of the County of Essex, do hereby certify that the foregoing transcript of the Docket page No. 233,25 is a true copy of the record of the proceedings in the matter wherein Albino Scilimbracca was plaintiff and The Central Railroad Co. of N. J. (a corp.) was the defendant and that the judgment above set forth stands open and unpaid of record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said (Seal) Court, at Irvington, New Jersey, this twenty-ninth day of December A. D. Nineteen Hundred and Twenty-Eight.

J. EDWARD DE LANCY,
Clerk.

Statement of Judgment.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

$23,325

ALBINO SCILIMBRACCA,
Plaintiff,
vs.
THE CENTRAL RAILROAD CO., OF N. J. (a corp.),
Defendant.
In Tort

Judgment in the above entitled cause was entered in the District Court of the Second Judicial District of the County of Essex on the seventh day of December A. D., 1928 for the sum of One Hundred dollars and no cents damages, and eight dollars and eighty-four cents costs of suit, in favor of the Plaintiff, and against the defendant.

I hereby certify, that the foregoing statement is correct, and that said Judgment stands open and unpaid of record in this Court.

Irvington, N. J. December 29, 1928

J. EDWARD DE LANCY,
Clerk.
PBF

[SEAL]

Certificate.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

ALBINO SCILIMBRACCA, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law On Appeal.

I, FELIX FORLENZA, Judge of the District Court of the Second Judicial District of the County of Essex on December 7th, 1928, hereby certify as the state of the case to be used on the hearing of the appeal taken by the above named defendant from the judgment in this cause to the New Jersey Supreme Court, the attached transcript of the proceedings at the trial of said cause and the testimony taken by the stenographer designated by me and duly sworn to transcribe said proceedings and to take down the testimony.

FELIX FORLENZA,
Judge, District Court of the Second Judicial District of the County of Essex.

December 7, 1928.

Transcript of Stenographer's Minutes.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT.

OF THE COUNTY OF ESSEX.

ALBINO SCILIMBRACCA, Plaintiff, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	In Tort

Irvington, N. J., December 7th, 1928.

Before: HON. FELIX FORLENZA, Judge.

APPEARANCES:

ARTHUR DEVINSENTIS, Esq., Attorney for Plaintiff.

WILLIAM A. BARKALOW, Esq., Attorney for Defendant (by WILLIAM F. HANLON, Esq., of counsel).

(H. Richard Woebse, Esq., Stenographer, sworn)

ALBINO SCILIMBRACCA, the plaintiff, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. DeVinsentis.

Q. Mr. Scilimbracca, on the 24th day of September, 1927, were you in Asbury Park? A. Yes.

Q. And you boarded the Central Railroad train to come back to Newark? A. Yes.

Q. Now, when you boarded the train, what car did you take a seat in? In what car did you take a seat in? A. In the first car.

Q. The first car? A. After the locomotive.

Q. What side of the car did you sit on? A. On the right.

Q. On the right side? A. Yes.

Q. Were you sitting right alongside of the window, or did you have an inner seat? A. No, near the window.

Q. You were sitting near the window? A. Yes.

Q. As the train approached the City of Newark, the station in Newark, tell the Court just what happened? A. What happened? Between two stations, East Ferry Street and Ferry Street, I listened to the roar. You understand me? I listened to something of a roar.

Q. The noise? A. That is it. After I felt something in my eye.

Q. You felt something in your eye? A. Yes.

Q. What was it that went into your eye, do you know? A. I was to the Dr. McNulty, and he take from my eye the piece of glass.

Q. A piece of glass was in your eye? A. Yes.

Q. Where did this glass come from? A. Well, I think from the window, from the glass, from the window glass.

Q. The pane of glass in the window broke and the piece of glass came into your eye, is that right? A. Yes.

By the Court:

Q. Which eye is that in, which eye did this glass go into? A. In the right eye.

By Mr. DeVinsentis:

Q. Were you looking out the window at the time? A. No.

Q. Before something came into your eye? A. Yes, I looked through.

Q. You looked through the window? A. Yes.

Cross examination by Mr. Hanlon.

Q. Mr. Scilimbracca, after you felt that glass in your eye, did the conductor come up and speak to you? A. Yes.

Q. And what did you tell him? A. He tell me come to the station and we call the doctor.

Q. Did you tell him that somebody just threw a stone in the window?

Mr. DeVinsentis: I object to that.

The Court: I overrule the objection.

Q. Did you tell the conductor that someone threw the stone? A. No, he don't tell me about that.

Q. Did you tell the conductor that somebody just threw a stone in the window? A. No.

Q. That you saw a stone there? A. No.

Q. Didn't you pick up the stone and show it to him? A. I didn't look around. I showed my eye.

Q. You don't know what happened? A. No, I don't know. I didn't realize what happened.

Mr. DeVinsentis: If your Honor please, I am resting my case on this sole witness's testimony.

The Court: How about your doctor?

Mr. DeVinsentis: I was unable to get the doctor, but I would like to put the plainitff on again.

Albino Scilimbracca, for Plaintiff, Redirect—Recross.

The Court: As to the extent of his injury?
Mr. DeVinsentis: Yes.

Redirect examination by Mr. DeVinsentis.

Q. Mr. Scilimbracca, you went to the doctor right after this accident happened? A. Yes.
Q. What was the doctor's name? A. McNulty.
Q. Did he treat you? A. Yes.
Q. Did he treat your eye? A. Yes.
Q. How much did he charge you? A. The charge?
Q. Yes. A. He didn't charge me nothing.
Q. At the time this accident occurred, were you working? A. Yes.
Q. What were you working at? A. Salesman.
Q. Whom were you working for? A. Groceries Sales Company in New York.
Q. Groceries Sales Company? A. Yes.
Q. Were you able to continue your work after this injury? A. No, for one week I can't work.
Q. For one week? A. One week and after, the week after, for a half a week I can't work.
Q. So you could not work for a week and a half after this accident happened? A. No, sir.
Q. How much were you earning a week? A. Forty dollars a week.
Q. Did you have any other expenses in connection with the treatment of your eye? A. No.
Q. No other expenses? A. No.

Recross examination by Mr. Hanlon.

Q. Mr. Scilimbracca, this doctor was Dr. H. W. Nolte, of 255 Mulberry Street? A. Yes.
Q. You just saw the doctor once? A. Two times.
Q. Did you go twice? A. Yes.
Q. You did not pay him anything? A. No.

Mr. Hanlon: That is all.

By the Court:

Q. What was the matter with your eye? A. (Witness shows eye to the Court.)

Q. Did the glass go in your eye or around your eye? A. In my eye.

Q. What damage did it do to your eye? A. I feel pain for about two weeks. I couldn't work, couldn't work around.

Q. Couldn't you see out of the eye? A. Yes.

Q. Was your eye bandaged? A. No, I feel pain.

Q. What did the doctor do for you? A. Well, the doctor give me, I don't know, I don't remember, some water.

Q. He gave you some water to put in your eye? A. Yes, and take out this glass.

Q. Did you see the glass? A. Well, I don't see the glass, he told me, the doctor, "I take out the piece of glass."

Q. Did it cut your eye? A. No.

By Mr. DeVinsentis:

Q. Did you have your eye covered at any time after this accident happened? A. No, I feel pain there.

Q. Did you have any cut near your eye or in your eye? A. No, no. I feel only the pain.

Q. No cut? A. No, no cut.

Mr. Hanlon: I would like to ask for a nonsuit at this time on the ground that the plaintiff has shown no negligence in this case. I would like to call the Court's attention to the case of Ginn vs. Pennsylvania Railroad Co., 69 Atl. 992, in which the Court said that in an action by a passenger against a railroad company to recover damages for personal in-

juries, the plaintiff in order to cast upon the defendant the burden of disproving negligence must show that the injury complained of resulted from the breaking of machinery, collision, the derailment of cars or something improper or unsafe in the conduct of the business or in the appliances of the transportation. That was the same sort of a case where a man was struck by glass from a broken window.

In the case of Pennsylvania R. Co. vs. McCaffrey, 149 Fed. 404, the Circuit Court of Appeals of the Third Circuit, in sustaining the District Court of the United States for the District of New Jersey, said that in an action against a carrier for injuries to a passenger, the burden of proof of negligence is on the plaintiff, and cannot be shifted to the defendant without showing that the injury in question was caused by some person or thing connected with the carrier's railroad or business of transportation.

The Court: What is that case?

Mr. Hanlon: Pennsylvania Railroad Company vs. McCaffrey, 149 Fed. 404.

The Court: This is a common carrier, and there is a high degree of care due the passenger from the common carrier. A prima facie case is made out by showing the injury.

Mr. Hanlon: I have the case here, if your Honor would like to read it over.

The Court: No.

Mr. Hanlon: This was also a case of a passenger who was struck by a missile coming through an open car window.

The Court: I will deny the motion.

DEFENDANT'S PROOFS.

PETER TERESCO, called as a witness on behalf of the defendant, testifies as follows:

By the Court:

Q. How old are you? A. Fourteen.

Q. Do you go to school? A. Yes, continuation school.

Q. What school do you go to? A. One-day school.

Q. What school did you go to before that? A. Wilson Avenue.

Q. What grade were you in? A. 6-b.

Q. You mean to tell the truth, don't you? A. Yes.

The Court: Let him be sworn.

(The witness was duly sworn.)

Direct examination by Mr. Hanlon.

Q. Peter, do you remember September 24th, last year? A. Yes.

Q. Were you and some other boys on that day throwing stones at the train, as it went by, of the Central Railroad? A. Yes.

Q. Were you subesquently arrested? A. Yes.

Q. Did you tell the Court that you did it? A. Yes.

Q. What did he say to you? A. He said suppose I was sitting in a train and it was passing by and somebody took a big rock and hit me while I was reading a newspaper.

Q. Did he find you guilty then? A. Yes.

Q. And told you to be a good boy and sent you home? A. Yes.

Q. What time was it, Peter? A. About 8 o'clock.

Peter Teresco, for Defendant, Cross.

Q. Was there somebody else there with you? A. Yes, a boy that died already.

Q. He died, you say? How did he come to die? A. He went on the railroad, on the Pennsylvania.

Q. Was he killed on the Pennsylvania Railroad? A. Yes.

Cross examination by Mr. DeVinsentis.

Q. How long were you throwing stones on this day at the trains going by? A. About two days.

Q. I mean on this particular day,—what was it, do you remember? A. Saturday night.

Q. What time? A. About 8 o'clock, or half past eight, between that time.

Q. Between eight and half-past eight? A Yes.

Q. Where were you standing? A. Down on the street. We picked up rocks and threw them up.

Q. What street? A. On Chambers Street.

Q. Can you tell the Court where Chambers Street is with reference to the Ferry Street station? A. It is two blocks away from the station.

Q. Two blocks away from the station? A. Three.

Q. Three blocks away from the station? A. Yes.

By the Court:

Q. East Ferry Street Station, you mean? A. Yes.

By Mr. DeVinsentis:

Q. The East Ferry Street Station? A. Yes.

Q. Is that toward the City, or is it in the other direction? A. Towards the City.

Q. And how far away from the train were you standing when you threw the stones? A. Like there is the railroad, I was under the railroad, throwing them up.

Q. You mean there was a bridge near there? A. Yes.

Q. You were throwing stones from under the bridge up to the trains? A. Yes.

Q. You were underneath the bridge throwing stones up to the train? A. No, I was on the side of the bridge.

Q. On Chambers Street? A. Yes.

Q. And how fast did the train go,—I mean, do the trains go very fast when they pass this point? A. No, they just start off there.

Q. They just start off there? A. Yes.

Q. How many trains went by between the hour of eight and eight-thirty? A. There was only one that I seen then.

Q. Only one train went by between eight and eight-thirty? A. Yes.

Q. And is that the train that you threw the stones at? A. Yes.

Q. How many stones did you throw at that train? A. I threw one and the other guy threw one.

Q. And at what did you throw the stones? A. At the last car.

Mr. DeVinsentis: That is all.

By The Court:

Q. How many trains did you throw stones at on that day? A. One.

Q. Only one? A. Yes.

By Mr. DeVinsentis:

Q. Was that between eight and eight-thirty? A. Yes.

Mr. DeVinsentis: That is all:

ERNEST E. NUNN, called as a witness on behalf of the defendant, being duly sworn according to law on his oath, testified as follows:

Q. Are you in the employ of the Central Railroad? A. Yes.

Q. As conductor? A. Yes.

Q. On September 24th were you conductor on Train 7107? A. Yes.

Q. That train is from where to where? A. From the Newark Transfer to Broad Street, Newark.

Q. What do you go to Newark Transfer for? A. To take two coaches there off the rear end, 3324, and bring them in to Newark.

Q. You mean that the Asbury Park train drops off the two rear coaches? A. Cuts them right off over on the main, and we back an engine on the other end and take them in to Broad Street.

Q. Now the coach that would be the next to the locomotive on the Asbury Park train, would be what on that train? A. It would be the rear car.

Q. Do you remember Mr. Scilimbracca? A. Yes.

Q. Do you remember this accident? A. Yes.

Q. Where were you when it happened? A. I was out on the platform between the two coaches.

Q. What called your attention to the happening of the accident? A. I heard some glass break in the coach.

Q. What did you do then? A. I looked through the door. I seen that something had happened to the glass. I looked out again. As I did, I seen three or four boys out down along the track. Then I went inside to where the man was and asked him if he got cut. He said that somebody just threw a stone through the window.

Q. Did Mr. Scilimbracca say that to you? A. Yes. As he did, why the stone laid on the floor of the car.

Q. You saw the stone? A. Yes, I picked it up.

Q. Did you show it to him? A. I took it to the Broad Street station and handed it over to the station master.

Cross examination by Mr. DeVinsentis.

Q. Did you go into the car immediately after you heard the glass break, did you say? A. Not immediately. When I looked through the door first I seen what happened. Then I looked out to see if I could see who done it. I knew it must have been a stone that came through. As I looked out, I seen three or four boys.

Q. Where did you see the boys? A. A couple was right along the bank on the track and the others were down on the street.

Q. What time did this happen? A. About 7.35 Standard Time, it may have been :36.

Mr. DeVinsentis: That is all.

By the Court:

Q. What time was it? A. 7.35 or 7.36.

Mr. Hanlon: That is our case.

Judgment for Plaintiff.

The Court: It is denied by the plaintiff that he said there was a stone thrown through the window.

The proof shows that the company has not used that high degree of care which is on the company in cases of common carriers. The boy says that he threw the stone at the last car. The plaintiff says he was sitting in the front car. The boy says he threw stones between eight and eight-thirty. The conductor says the time was at seven something.

I do not think that the defendant has shown that they used that high degree of care to protect the passengers on the train.

There will be a judgment for the plaintiff in the sum of $100, taking into consideration the time loss and pain and suffering.

I, Felix Forlenza, Judge of the District Court of the Second Judicial District of the County of Essex on the day of this trial, do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the cause of Albino Scilimbracca vs. The Central Railroad Company of N. J., on December 7th, 1928, as certified by H. Richard Woebse, the stenographer, appointed to report such evidence stenographically.

In witness whereof I have hereunto set my hand and seal this 15th day of December, 1928.

Felix Forlenza,
J.

Judgment for Plaintiff.

I, H. Richard Woebse, a stenographer duly appointed to report stenographically the evidence given before the District Court of the Second Judiciad District of the County of Essex in the case of Albino Scilimbracca vs. The Central Railroad Company of N. J., do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 7th day of December, 1928, before Hon. Felix Forlenza, Judge of the District Court of the Second Judicial District of the County of Essex, in said matter, he being said Judge on the day of said trial.

In witness whereof, I have hereunto set my hand and seal this 12th day of December, 1928.

H. Richard Woebse.

Grounds of Appeal.

NEW JERSEY SUPREME COURT.

ALBINO SCILIMBRACCA, Plaintiff-Respondent, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY (a corporation), Defendant-Appellant.	On Appeal

The following is a specification of the determinations or directions of the District Court with respect to which defendant-appellant is justified in point of law.

1. The Court denies defendant's motion for a non-suit.

2. The Court erred in not rendering the verdict for the defendant as against plaintiff of no cause of action.

WM. A. BARKALOW,
Attorney for Defendant-Appellant.

Service acknowledged.

ARTHUR DE VINCENTIS,
Attorney for Plaintiff-Respondent.

Opinion.

NEW JERSEY SUPREME COURT,

#427 January Term 1929.

ALBINO SCILIMBRACCA,
Plaintiff-Respondent.
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

Submitted January Term 1929. Decided June , 1929.

On appeal from District Court of Essex County.

For Appellant: WILLIAM A. BARKALOW.

For Respondent: ARTHUR DEVINCENTIS.

Before—Justices TRENCHARD, KALISCH & LLOYD.

PER CURIAM:

This action was brought by a passenger against the Central Railroad Company to recover damages for injuries to plaintiff's eyes caused by the breaking of the glass window near which he was seated in defendant's train. The plaintiff's case disclosed these facts and a motion for nonsuit was made and denied. Later a motion for direction of a verdict in favor of defendant was made and this also was denied.

On judgment being rendered for the plaintiff the defendant appeals alleging error in these rulings.

We think the rulings were right. The nonsuit was properly denied, because from the breaking of the glass the judge sitting as a jury might infer negligence precisely as was held in the case of Hughes vs. Atlantic City Railroad, 85 N. J. L. 212, where a broken electric light bulb caused like injury.

As to the denial of the direction of a verdict for defendant this was based on proof of an alleged admission of the plaintiff that a stone had been thrown through the window, and also the testimony of a boy that he had thrown stones at trains on that night. If this proof had clearly established that the accident happened because of a stone thrown by someone for whom the railroad company was not responsible we might be called upon to say whether such proof would remove the question as one of fact from the trial judge sitting as a jury and convert it into a question of law, but the evidence was not of a character to invoke a ruling on this point. There was no proof that at the time the car was passing at seven-thirty in the evening any stones were thrown at it, and the plaintiff denied having made the admission attributed to him.

The judgment is affirmed.

New Jersey Court of Errors and Appeals

ALBINO SCILIMBRACCA, Plaintiff-Appellee, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF FOR APPELLANT

This is an appeal by The Central Railroad Company of New Jersey, the defendant below, from a judgment of the Supreme Court affirming the judgment rendered in the above action by the District Court of the Second Judicial District of the County of Essex.

Statement of the Case

On September 24th, 1927, plaintiff boarded one of defendants trains at Asbury Park, New Jersey, bound for Newark, New Jersey. When the train was proceeding between East Ferry Street and Ferry Street Stations in Newark, a window, next to the seat in which plaintiff was seated, broke and some pieces of glass entered plaintiff's right eye.

Plaintiff was the only witness produced in support of his case and testified that he boarded the train at Asbury Park and took a seat on the right side alongside of the window in the first car after the locomotive (Rec. p. 13). As the train approached Newark and was between East Ferry and Ferry Street Station, he heard a noise and then felt something in his eye (Rec. p. 13). The

doctor took a piece of glass from his eye (Rec. p. 13). In answer to a question put by his counsel as to where the glass came from, he said:

> A. Well, I think from the window, from the glass, from the window glass.
> Q. The pane of glass in the window broke, and the pieces of glass came into your eye, is that right? A. Yes (Rec. p. 13).

On cross-examination he answered as follows:

> Q. You do not know what happened? A. No, I don't know, I didn't realize what happened (Rec. p. 14).

On behalf of the defendant the following witnesses were produced:

Peter Teresco, age fourteen, who testified that on the evening of the accident he and some other boys were throwing stones at the train of the defendant (Rec. p. 18). Teresco was subsequently arrested and found guilty of stoning a passing train (Rec. p. 18).

The time, he said, was about eight or eight-thirty (Rec. p. 20). Only one train passed at this time.

Ernest E. Nunn was the conductor of the train of the defendant on which plaintiff was riding. He was on the platform. He heard some glass break in the coach, looked out and saw three or four boys along the track. He spoke to plaintiff who told him someone had thrown a stone through the window (Rec. pp. 21, 22). He further testified:

> Q. Did Mr. Scilimbracca say that to you? A. Yes, as he did, why the stone lay on the floor of the car (Rec. p. 22).
> Q. What time did this happen? A. About seven thirty-five *Standard Time*, it may have been seven thirty-six (Rec. p. 22). (Italics ours.)

ARGUMENT

POINT I.

There should have been a non-suit.

At the close of the plaintiff's case there was no evidence of any negligence upon the part of the defendant, nor could any inference be drawn to show that the injury in question was caused by some person or thing connected with the railroad of the defendant.

As to what is negligence we refer to the case of *Bleiwise vs. P. R. R. Co.*, 81 N. J. L. 160, wherein Justice Minturn, speaking for the Supreme Court, gives the test as expressed by Baron Alderson as follows:

> "Negligence is the omission to do some-
> "thing which a reasonable man guided upon
> "those considerations which ordinarily reg-
> "ulate the conduct of human affairs would
> "do; or doing something which a prudent and
> "reasonable man would not do." Blyth v. Birmingham Water Co., 11 Exch. 781.

The Court then goes on to say:

> "In the light of this fundamental doctrine,
> "it must appear from some facts in the case
> "upon which negligence can be predicated,
> "that the legal rule requiring the exercise of
> "due care was violated. And hence it has
> "been uniformly held that it is for the court
> "to say whether negligence upon the facts
> "can be legitimately inferred, * * *" (Page 161).

In *Pennsylvania R. R. Co. vs. McCaffrey*, 149 Fed. 404, decided by United States Circuit Court of Appeals, Third Circuit, the facts were as follows:

Plaintiffs were passengers in one of the cars of a train operated by the defendant and Mrs. McCaffrey was struck by something which entered the car from the outside. There was evidence that a train passed the one in which plaintiffs were riding at the time of the accident. It was maintained although no direct evidence was produced that the thing which struck Mrs. McCaffrey had come loose from the passing train. There was evidence on the part of the defendant that the harm-inflicting thing whatever it may have been was thrown through an open window by some of several boys who, as was testified, were pelting the train as it went by them. The Circuit Court of Appeals in reversing the Circuit Court for the District of New Jersey, said *inter alia*:

> "The burden of proof in all such cases "rests at first upon the plaintiff, and even "in the case of a passenger, it cannot be "shifted to the defendant without showing "that the injury in question was caused by "some person or thing connected with its rail-"road or business of transportation" (page 405).

In the case of *Ginn vs. Pa. R. R. Co.*, 220 Pa. St. 552, 69 Atl. 992, the facts were as follows:

Plaintiff was a passenger on one of defendant's trains from Philadelphia to Coatesville. While he was occupying a seat in a car next to a window, which was closed, the window pane was suddenly broken, and plaintiff's eyes were cut by particles of glass. Plaintiff testified that, immediately before the accident, he heard a train on the next track, and as he turned to look out the window, he heard two explosions, and an object flew up and hit the window, and that the object looked like a piece of tin, and resembled a torpedo.

The Supreme Court of Pennsylvania having before it the foregoing set of facts very similar to those in the present case, cited the case of *Thomas vs. R. R. Co.*, 148 Pa. 180; 23 Atl. 989; 15 L. R. A. 416, saying:

> "In order to cast this burden on the de-
> "fendant company, it was necessary for ap-
> "pellant to establish that the injury com-
> "plained of resulted from the breaking of
> "machinery, collision, derailment of cars, or
> "something improper or unsafe in the con-
> "duct of the business or in the appliances of
> "transportation. Thomas v. Railroad Com-
> "pany, 148 Pa. 180, 23 Atl. 989, 15 L. R. A.
> "416. This case is also authority for the rule
> "that where a passenger on a railroad train,
> "while sitting at the window of a car, was in-
> "jured by a missile, the nature and origin
> "of which were unknown, and there was
> "nothing to connect the accident with a de-
> "fect in any of the appliances of transporta-
> "tion or any negligence on the part of the
> "company or its employees, there can be no
> "recovery against the company. These prin-
> "ciples rule the present case."

In *Whalen vs. Consolidated Traction Company*, 61 N. J. Law 606, this Court, speaking through Mr. Justice Dixon says:

> "In Pa. R. R. Co. vs. MacKinney (124 Pa.
> "St. 426), the plaintiff while a passenger in
> "one of defendant's trains was struck in the
> "eye by some hard substance hurled from
> "without, and the trial judge charged the rule
> "of law applicable to the case to be that the
> "mere happening of an injurious accident to
> "a passenger while in the hands of a carrier,
> "will raise, *prima facie*, a presumption of
> "negligence and throw the onus of proving
> "that it did not exist on the carrier. Of this
> "charge the Supreme Court said: 'It is an
> "'old and well settled principle of law of

> " 'very general application in cases of injury
> " 'to passengers while in the course of trans-
> " 'portation,' *but that it could be invoked*
> "*only when there was some evidence tending*
> "*to connect the carrier or his servant or*
> "*some of the appliances of transportation*
> "*with the happening of the injury.* See also 2
> "Shearm & R. Neg. (5th ed. 516)." (Italics ours.)

In the case of *Hughes vs. Atlantic City R. R. Co.,* 85 N. J. L. 212, where the plaintiff was the passenger injured by the bursting of an electric light bulb in the car of the defendant, this court said:

> "In applying the law to a case like the pres-
> "ent we think it clear that the plaintiff was
> "bound to satisfy the jury by the preponder-
> "ance of evidence that the defendant was
> "guilty of negligence that caused the acci-
> "dent" (page 216).

This well settled principle is followed also in the case of *McPherson vs. H. & M. R. R. Co.,* 3 N. J. Adv. Rep. 653.

We most earnestly but respectfully urge that the foregoing cases clearly uphold the defendant's contention that no inference of negligence can be drawn from the mere breaking of a window which unlike the electric light bulb in the Hughes case, and the door in the McPherson case, was not peculiarly within its control, but upon which some outside force could be exerted, over which the railroad had no control. The doctrine of *res ipsa loquitur* does not apply.

This doctrine is referred to in the case of *Blewise vs. P. R. R. Co., supra,* wherein the facts were as follows:

Plaintiff was injured by the falling of a window on her hand while she was riding on the train of

defendant. The window was operated by a lever fastening at its base, which, being pressed together, caused the window, known as Hayward Self-acting Window, to rise. The window was admittedly out of order and when it became out of order, or in what manner the trouble with it was caused, does not appear in the case. Speaking for the court, Justice Minturn says:

> *"It is not claimed, nor can it be rationally "insisted that this accident falls within the "category of res ipsa loquitur"* (page 161). (Italics ours.)

We therefore urge that the present case should be controlled by the case of *Ginn vs. P. R. R. Co., supra,* and reverting somewhat to the language of the court in this case say: "we contend that to hold there was some negligent act of the defendant was a mere guess or conjecture, and something more definite must be established as a foundation of an action for damages."

Again we submit that while a railroad might reasonably anticipate an accident from a bursting electric light bulb which was peculiarly within its control or from a door which was being continually opened and closed by its employees, or from an overcrowded car, as in the case of *Hansen vs. New Jersey Street Railroad Co.,* 64 N. J. L. 686, or from a trap on a vestibule coach door which might be insecurely fastened, as in the case of *McBride vs. P. R. R. Co.,* 99 N. J. L. 464; there is no way or any means to anticipate that a window, next to which a passenger is sitting, will suddenly break. Such an accident the defendant could not anticipate, and therefore be called upon to use means to avert. See *Barney vs. H. & M. R. Co.,* 7 Adv. Rep. 177. The present case must be distinguished from the Hughes case relied upon by the

plaintiff in his brief and the Supreme Court in its opinion.

It is therefore submitted that the Supreme Court erred in not reversing the judgment of the District Court.

POINT II.

The verdict should have been for the defendant.

At the close of the plaintiff's case, although the burden had not shifted requiring the defendant to explain the cause of this accident, it nevertheless went forward and affirmatively proved that the accident happened through no negligence on its part nor on the part of any of its servants. The defendant prdouced the boy who was admittedly guilty of throwing the harm-inflicting missile. Both the District Court Judge and the Supreme Court seemed to think there is a difference in the time as given by the boy and the time given by the conductor as to when the train passed the point at which the accident happened. We respectfully direct the Court's attention to the conductor's testimony at page 22, line 30 of the Record wherein the question and answer is as follows:

> Q. What time did this happen? A. About 7:35 *Standard Time,* it may have been :36. (Italics ours.)

In the testimony of the boy, Peter Teresco, under cross-examination, at page 20, line 21, Record, we find the following:

> Q. How many trains went by between the hour of eight and eight-thirty? A. There was only one that I seen then.

Q. Only one train went by between eight and eight-thirty? A. Yes.

Q. How many stones did you throw at the train? A. I threw one and the other guy threw one.

Q. And at what did you throw the stones? A. At the last car.

By the Court:

Q. How many trains did you throw stones at on that day? A. One.

Q. Only one? A. Yes.

By Mr. Divencentis:

Q. Was that between eight and eight-thirty? A. Yes.

We respectfully direct the Court's attention to the testimony of the conductor given at page 21, line 17 of Record, to show that the car in which the plaintiff was riding shifted its position from the car next to the locomotive, becoming the rear car at Newark transfer.

Q. On September 24th, were you conductor on train 7107? A. Yes.

Q. That train is from where to where? A. From the Newark Transfer to Broad Street, Newark.

Q. What do you go to Newark Transfer for? A. To take two coaches there off the rear end, 3324, and bring them in to Newark.

Q. You mean that the Asbury Park train drops off the two rear coaches? A. Cuts them right off over on the main, and we back an engine on the other end and take them in to Broad Street.

Q. Now the coach that would be the next to the locomotive on the Asbury Park train, would be what on that train? A. It would be the rear car.

Q. Do you remember Mr. Scilimbracca? A. Yes.

Q. Do you remember this accident? A. Yes.

> Q. What called your attention to the happening of the accident? A. I heard some glass break in the coach.
>
> Q. What did you do then? A. I looked through the door. I seen that something had happened to the glass. I looked out again. As I did, I seen three or four boys out down along the track. Then I went inside to where the man was and asked him if he got cut. He said that somebody just threw a stone through the window.

We think the date of the accident, September 24th, 1927, should have reminded the Court in both instances that Daylight Saving Time was in effect and so used by the boy witness in his testimony, whereas the conductor specifically referred to Standard Time in his account of what occurred.

We submit that the boy's testimony refers to the train in question. Again referring to the conductor's testimony at page 21, line 37, Record, and on page 22, line 1, we read as follows:

> Q. What called your attention to the happening of the accident? A. I heard some glass break in the coach.
>
> Q. What did you do then? A. I looked through the door. I seen that something had happened to the glass. I looked out again. As I did, I seen three or four boys out down along the track. Then I went inside to where the man was and asked him if he got cut. He said that somebody just threw a stone through the window.

The testimony of the boy that he threw a stone and the testimony of the conductor that he saw boys along the track immediately after the crash of the glass in addition to picking up a stone from the floor of the car clearly establishes that this accident was caused by someone over whom the de-

fendant had no control and for whom it was not responsible.

The Supreme Court, therefore, should have reversed the judgment of the District Court and erred in refusing so to do.

POINT III.

The judgment of the Supreme Court affirming the judgment of the District Court of the Second Judicial District of the County of Essex should be reversed.

Respectfully submitted,

Wm. A. Barkalow,
Attorney and Counsel for Appellant.

New Jersey Court of Errors and Appeals

ALBINO SCILIMBRACCA,
Plaintiff-Appellee,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

On Appeal from Supreme Court.

BRIEF FOR APPELLEE.

This is an appeal by The Central Railroad Company of New Jersey, the defendant below, from a judgment of the Supreme Court affirming the judgment rendered in the above action by the District Court of the Second Judicial District of the County of Essex.

Statement of the Case.

On September 24th, 1927, plaintiff boarded one of defendant's trains at Asbury Park, New Jersey, bound for Newark, New Jersey. When the train was proceeding between East Ferry Street and Ferry Street stations in Newark, a window, next to the seat in which the plaintiff was seated, broke and some pieces of glass entered plaintiff's right eye.

Plaintiff testified that he boarded the train at Asbury Park and took a seat on the right side, alongside of the window, in the first car after the locomotive (Rec. p. 13). As the train approached Newark and was between East Ferry and Ferry

Street stations he heard a noise and felt something in his eye (Rec. p. 13). Plaintiff testified the glass broke and the broken glass entered his eye.

Peter Teresco, age fourteen, was called for the defendant, and testified that he and some other boys were throwing stones at the trains of the defendant. He testified that he and the other boys had been throwing stones at the passing trains for two days (Rec. p. 19). He also testified that he threw a stone at a train that went by between eight o'clock and eighty-thirty o'clock (Rec. p. 19).

Mr. Ernest E. Nunn, was the conductor of the train of the defendant on which the plaintiff was riding. He testified the train went through this spot and arrived at Newark at seven-thirty five.

ARGUMENT.

POINT I.

As to the defendant-appellant's Point I of the argument set forth in their brief, that there should have been a nonsuit, the defendant contends that at the close of the plaintiff's case there was no evidence of any negligence upon the part of the defendant nor could any inference be drawn to show that the injury in question was caused by some person or thing connected with the railroad of the defendant. The defendant cites the case of *Pennsylvania Railroad Company* vs. *McCaffrey*, 149 Fed. 404. This case does not apply to the facts of the case at bar because the *McCaffrey* case deals with some object coming into the train through an open window and injuring the passengers. The case at bar deals with passengers injured by a piece of glass from a broken window of the train and not with some harm-inflicting thing that came through the open window.

The defendant-appellant also cites the case of *Ginn* vs. *The Pennsylvania Railroad Company,* 69 Atl. 992, and *Thomas* vs. *The Railroad Company,* 148 Pa. 180. These cases do not apply because they deal with a missile entering the open window and injuring the passengers. Such are not the facts of the case at bar, which involves a defect in the conveyance that caused the injury. The defendant-appellant further cites the case of *Whalen* vs. *Consolidated Construction Company,* 61 N. J. Law 606, and again the facts in the case cited are quite different from the facts of the case at bar and, therefore, the law applicable to the case cited would not apply to the case at bar.

In *Schott* vs. *Weiss,* 92 N. J. Law 494, the ground of appeal stated that there was no evidence on which the defendant could be charged with negligence. The trial judge held that the case as presented by the plaintiff raised a jury question. It was not error to refuse a nonsuit by the trial judge.

In the case at bar the trial court rightly refused a nonsuit inasmuch as the facts presented by the plaintiff made a *prima facie* case. In the *per curiam* opinion rendered by the Supreme Court in affirming the judgment of the trial court the Court said:

> "The non-suit was properly denied because from the breaking of the glass the judge sitting as a jury might infer negligence precisely as was held in the case of Hughes *vs.* Atlantic City Railroad, 85 N. J. Law 212, where a broken electric light bulb caused like injury" (Rec. p. 27).

Therefore, it is submitted that the district court judge rightly denied defendant-appellant's motion for a nonsuit.

POINT II.

As to defendant-appellant's Point II that verdict should have been for the defendant, the evidence clearly shows that the defendant did not explain, although it tried to. The evidence shows some boys threw stones at passing trains which went through the point of accident, between eight o'clock and eighty-thirty o'clock P. M. The evidence of both the plaintiff's and the defendant's witnesses shows that the train in which the plaintiff was riding arrived at the Newark station at seven thirty-five o'clock P. M. Therefore, it was impossible for the glass to have been broken by the boys. In the *per curiam* opinion of the Supreme Court in affirming the judgment of the trial court it held as follows:

> "As to the denial of the direction of a verdict for the defendant, this was based on proof of an alleged admission of the plaintiff that a stone had been thrown through the window and also the testimony of a boy that he had been throwing stones at trains on that night. If this proof had clearly established that the accident happened because of a stone thrown by someone for whom the railroad company was not responsible we might be called upon to say whether such proof would remove the question as one of fact from the trial judge sitting as a jury and convert it into a question of law, but the evidence was not of a character to invoke a ruling on this point. There was no proof that at the time the car was passing at seven-thirty in the evening any stones were thrown at it, and the plaintiff denied having made the admission attributed to him (Rec. p. 27)."

The trial judge sitting as a jury passed upon the evidence adduced by the defendant-appellant's

witnesses and decided as a question of fact that the burden imposed upon the defendant-appellant by law had not been fulfilled. The trial court sitting as a jury decided the question of fact and said:

> "The proof shows that the company has not used that high degree of care which is on the company in cases of common carriers. The boy says that he threw the stone at the last car. The plaintiff says he was sitting in the front car. The boy says he threw stones between eight o'clock and eight-thirty o'clock P. M. The conductor says the time was at seven something. I do not think that the defendant has shown that high degree of care to protect the passengers on the train" (Rec. p. 23).

The Supreme Court, therefore, rightly affirmed the judgment of the district court.

POINT III.

The judgment of the Supreme Court affirming the judgment of the district court of the Second Judicial District of the County of Essex should be affirmed.

Respectfully submitted,

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