Hough & Gillespy, printers, Trenton, N. J.

N. J. Court of Errors and Appeals.

In Chancery of New Jersey.

Between

JOHN KINNEY and CHARITY A. METLER, Administrators of Charles W. Metler, deceased, plaintiffs in error,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

In case. On Writ of Error to Supreme Court.

[Filed October 8th, 1868.]

This is an action on the case, brought by plaintiffs in error in the Supreme Court, and tried before the Chief Justice, at the April Term, A. D. 1867, in which a verdict was rendered for the defendants, under the charge of the court, and the questions reserved to be argued before the Supreme Court upon the following state of the case, and reasons assigned by the plaintiffs below.

New Jersey Supreme Court.

John Kinney and Charity A. Metler, administrators of Charles W. Metler, deceased,

vs.

The Central Railroad Company of New Jersey.

In case.

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This cause came on to be tried before his Honor the Chief Justice and a struck jury, at a Circuit Court held at Belvidere, in and for the county of Warren, on the twenty-third day of April, A. D. eighteen hundred and sixty-seven.

The action was brought by the plaintiffs, as administrators

of Charles W. Metler, deceased, against the defendants to recover damages, under the act entitled "an act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect, or default," approved March 3d, 1848.

The evidence showed that, on the first day of December, A. D. eighteen hundred and sixty-five, the deceased, Charles W. Metler, took passage for himself, at Phillipsburg, for New York, in one of the defendants' express trains, which left the former place at or about the hour of seven o'clock eleven minutes, in the morning of that day, and that he took a seat in one of the cars of that train, and rode therein safely until the train reached the curve near Pikel's mountain, in Tewksbury township, Hunterdon county, between Lebanon and White-house stations, when the express train in which he was riding, while running at a rapid rate of speed, collided with a coal train standing on the track of the defendants' railroad, on which the aforesaid express train was passing; that in consequence of such collision, the car in which the said Charles W. Metler was seated was run into by another car and crushed and broken to pieces, and that the said Charles W. Metler, deceased, was crushed, wounded, and killed, he being dead when found, and removed from the wreck and debris of the broken car.

After much evidence was given on both sides, showing how the collision was occasioned—

Benjamin T. Harris, a witness produced on the part of the defendants, stated that he was the general agent of the defendants, at Phillipsburg; that he knew Charles W. Metler, the deceased; that he saw him on the morning of December first, A. D. 1865, at the defendants' depot at Phillipsburg; that he asked the witness for a pass to New York; witness had known him for several years; he was formerly fireman and engineer on the Central railroad, though he had not been in the employ of the company for more than a year preceding the first of April, 1865; he asked witness for a pass on the ground of his being an engineer and railroad man; after some hesitation, witness filled up a pass and handed it to him, remarking to him that he had better purchase a ticket

than receive a free pass, as those who received such pass had no redress from the company in case of accident; witness had authority to give that free pass; was furnished with blank papers by the general ticket agent. A paper being shown witness, he said—that is a copy of the passes we use, and one of which was given to deceased. Metler accepted the pass, and witness thinks he made no reply to what he said; he did not see Metler afterward. Witness has no recollection of his asking for a pass before, since he left the service of the company. Witness filled up the ticket with a pencil and gave it to Metler with the remark before stated. Witness has not now the lot of papers from which Metler's ticket was taken. Can't repeat the words on the ticket given; am willing to swear that I believe the ticket shown me is a verbatim copy of the pass I gave Metler; never compared them.

Notice from defendants' counsel to plaintiffs' counsel to produce the original pass, a notice was admitted to have been served on him the previous evening, and plaintiffs' counsel here informed the defendants that he never had heard of or seen any such ticket or pass. A pass, being the one shown last witness, partly written and partly printed, was then offered in evidence, as follows, viz. a ticket or pass some two and a half or three inches in length and some two inches in breadth, on one side of which was printed—

"This pass to be delivered to the conductor.

"☞ The person who accepts this free ticket, thereby assumes all risk of accident, and in consideration of its receipt, expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents, or otherwise, for any injury to the person, or for any loss or injury to his or her property while using this ticket."

On the other side was printed and written the following, viz.

Central Railroad of N. J., ———, 186 .

Pass.....W. Metler,

From.....P. Burgh

To.....New York.

Ac'd.

95 B. T. Harris, *Agent.*

Pro ut the same.

To the admission of this pass as evidence, the plaintiffs, by their counsel, objected, because the pass offered in evidence was not the original, nor proved to be a copy of it; and also on the ground of the illegality of the ticket, and the matter endorsed on the back of the pass; which objection the court overruled, and the paper purporting to be a copy of the pass was admitted in evidence; to which the plaintiffs by their counsel excepted.

John C. Jennings, another witness produced and sworn on the part of the defendants, said, he was on the express train at the time of the collision, took the train from Harrisburg —was conductor, in the employ of the Philadelphia and Reading Railroad Company. It was my duty to run to New York (by some agreement.) I was personally acquainted with Metler for five or six years, as being fireman and engineer on the Central Railroad of New Jersey. Saw him on the first of December at Phillipsburg, as he jumped on the platform of the car as we started from there. Saw him next at Clinton station at the forward end of the first passenger car. I collected no fare from him because he told me he had a pass from Mr. Harris; I did not see it.

John Ramsay, a witness produced and sworn on the part of the plaintiff to rebut, said—I was called on at the wreck

by Mr. King, the conductor of another train, who was there. He wanted me to go with him to take the valuables from the dead. He in my presence, searched Metler's pockets, and took out what was valuable; he took out a watch, some papers, and other things; he then took the things in charge; I did not see any pass or ticket; I was a constable at the time in Readington township, Hunterdon county. He wanted me to go with him as an officer. By the court—Am a constable in the same place yet.

After the evidence on each side was finished, his Honor, the Chief Justice, stated that he should assume that the plaintiffs had proved negligence on the part of the defendants, but that he had on a previous occasion looked into this matter, and his present opinion was that the pass offered in evidence by the defendants was a legal bar to the action; and being of that opinion, he should charge the jury to that effect, giving the plaintiffs counsel permission to argue the point of law, or sum up the case to the jury; or he would direct a verdict to be rendered for the defendants, with leave to the plaintiffs to except, or move for a new trial, or make a case stated in the nature of special verdict, so that the matter might be argued before the Supreme Court, and either party at liberty to bring a writ of error. Whereupon the counsel, under the circumstances, declined to argue the point before the court, or the case before the jury.

The court directed the jury, if they believed the deceased was riding in the cars under the free pass described by the witness to render a verdict for the defendants, as the pass ticket presented a legal bar to the plaintiffs' recovery. Whereupon the jury rendered a verdict accordingly.

The plaintiffs counsel excepted to the charge, or direction of the court.

It is therefore directed and ordered by the court, with the consent of counsel of both parties, that the foregoing be such state of the case, and that the cause be set down for argument at the November Term, 1867, of the Supreme Court, and that either party have leave to turn the case into a special verdict and bring a writ of error.

Dated September 6th, 1867.

(Signed) M. Beasley, Chief Justice.

Assignment of Errors.

NEW JERSEY SUPREME COURT.

John Kinney and Charity A. Metler, administrators of Charles W. Metler, deceased,
vs.
The Central Railroad Company of New Jersey.

In case. On case stated.

The plaintiffs in this suit assign the following reasons why the verdict in this cause should be set aside and a new trial granted, viz.

1. There was no legal or sufficient evidence that the said Charles W. Metler, deceased, had or used the ticket or pass alleged in the case, on the occasion therein named.

2. There was no legal or sufficient evidence that the said Charles W. Metler, deceased, assented or agreed to, or even knew of the agreement alleged to have been endorsed on the said ticket or pass.

3. The said alleged agreement or condition on said pass was illegal, and void in itself, and was not drawn, executed, or stamped, according to law.

4. The fact that a ticket or pass was given to Metler, is not of itself evidence sufficient to raise a presumption that it is in the hands of the administrators; to authorise the defendants to give evidence of its contents upon notice to the administrators to produce it.

5. That if said pass shall be held to be invalid, because the agreement endorsed and printed thereon is illegal, yet the said Metler was not a trespasser, but a free passenger, who went on the said car and rode there with the knowledge and permission of the defendants, and their agents, on the ground of his being a railroad man, and therefore accustomed and entitled to ride on other roads, and particularly so on the defendants' railroad, on which he was formerly several years an employee; or if not entitled to ride free, was only bound to pay fare when the same should be demanded of him by the conductor of the train (and was liable to an action therefor,) and the deceased having been killed while so riding in

the cars, his representatives are entitled to recover in this action.

6. The decision of his Honor, the Chief Justice, in admitting the evidence in relation to said agreement or condition in his charge to the jury in relation thereto, was contrary to the law and facts of the case.

J. F. DUMONT,
Attorney for plaintiffs.

Afterwards, at the November Term, 1867, of the Supreme Court, the case was argued before the Chief Justice, Justices Vredenburgh, Depue, and Woodhull, and at the Term of February, 1868, judgment was rendered in favor of the defendants.

Opinion.

The opinion of the court was announced by

THE CHIEF JUSTICE.

The question in this case which we are now called on to decide, is not as to the construction of the contract, out of which the rights and liabilities of the parties respectively arise, but exclusively as to its legality. It appeared to demonstration at the trial, that the deceased, with full knowledge and of his own accord, entered into the agreement, for the consideration of a free passage, to assume the risk to himself of all accidents which might occur through the negligence of the agents of the railroad company. An accident from such cause did happen, causing the death of the deceased; and the naked point for judgment is whether the defendants are legally dispensed from responsibility by force of such agreement.

This inquiry I must be permitted to regard as quite aside from many of the topics so learnedly discussed before us upon the argument. We were referred to many cases with regard to the incapacity of the common carrier to force, by means of general notices, or the delivery of tickets containing special stipulations, contracts upon their employers, and cases were

cited to show that agreements couched in general terms, imposing the risk of carriage on the bailor would not be interpreted to extend to losses proceeding from the negligence of the bailee or his agents.

These subjects are not considered pertinent, because in the present case it was clear that the contract between the deceased and the carriers received the voluntary assent of the former, and because such contract in clear terms gave immunity to the carriers from the negligent acts of their servants. As I have already remarked, the inquiry goes to the point singly as to the legal validity of agreement which these parties, beyond all question, entered into in good faith.

But another line in the reasoning of the counsel of the plaintiffs seems to require a more deliberate notice. It was insisted that a common carrier could not, even by express contract, exempt himself from liability for his own negligence. But even on this head it does not strike my mind that it is necessary for any present purpose to enter upon the discussion of this vexed question. The duty of the common carrier is *sui generis;* his obligations are so peculiar, it is difficult, perhaps impossible, to apply closely by way of analogy, the rules of law which control his conduct and give rise to his responsibilities, to the situation of other contractors. By the usual principles of law, the common carrier is, with narrow exceptions, an insurer of the safe delivery of the goods coming to his hands; so too, he is bound, as a general thing, to carry all the goods brought to him in the ordinary course of his business. These are obligations falling upon the common carrier by force of his employment, which is of a *quasi* public character. When, therefore, questions arise as to the right of these *social* agents, so to speak, to free themselves, by contract or otherwise, from the burthens set upon them by law, it is obvious that considerations which are wholly foreign to ordinary cases, enter into the discussion. Consequently, all reasoning on this theme must turn on motives of policy and general convenience. And it is on this account that I think that a solution of the question whether a common carrier can or cannot exempt himself by express agreement from the obligation which he takes from the law to conduct his business without negligence cannot have a controlling effect upon the present subject of inquiry.

This conclusion is founded in the fact that I do not regard the contract now in controversy as one which the defendants have made in their *character of common carriers*. I think it plain that they must in this respect be placed on the foot of gratuitous bailees. Every test which can be applied to the case will show that the defendants on this occasion, in this particular matter, were not common carriers. The deceased did not bargain with them on the basis of any such employment. If he had seen fit, he had a right to deal with them in their general character, but he did not do so. As a member of society, it was his right, upon paying his fare, to require of these defendants to carry him upon the terms which the law imposed upon them; but instead of exacting this right, he solicited a mere benevolence, the discharge of which it would not be reasonable to consider as any part of the business of the carrier. The legal existence of this contract, therefore, cannot be impugned on the ground so often advanced where common carriers are concerned, that it is unwise to permit those public employees to throw off any given part of their common law liability. The question ventilated must be settled by such rules of law as are applicable to the ordinary class of gratuitous bailments, or of persons rendering an unbought courtesy.

Nor does the objection that this contract is not consistent with good morals or sound policy appear to me of much weight. This consideration was urged on the argument in rather a wider form than the facts will warrant, for the proposition was, that it is pernicious and immoral to allow a a person to contract for a discharge from the effects of his own negligence. But the question to be decided is narrower; the case showing merely the presence of negligence in the servants of the defendants, but none whatever in the defendants themselves. Consequently, we have to do simply with the more limited proposition, does the law prevent a person in a matter not connected with any public employment, to stipulate for an immunity from the results of the omissions or oversights of his own agents?

Now, I think it will be plain to any one who will survey this ground that there is nothing in natural justice which would hold the master responsible for the negligence of his

servant. With relation to the moral code, a man performs in this particular his whole duty when he exercises proper prudence and care in the selection of competent agents to conduct his affairs. The rule of *respondeat superior* is one of great severity, and has been adopted, not from its intrinsic equity, but from its general convenience. It subsists incontestibly as an established legal technicality; can it not be waived, and another rule adopted on any special occasion between party and party?

I confess to an entire inability to comprehend the force of the objection to this being done. The fallibility of all human agency is an imperfection not to be eliminated from any transaction dependent on the employment of such means; in the absence of an express contract, the law, in order to lay down a fixed rule, throws the liability on him who employed the agent; but what in the nature of the transaction is there, which should prevent any party contracting with such principal to take on himself the risk of the servant's misconduct. It was suggested that the tendency of any exemption of the principal would be to remove from common carriers one of their motives to exercise care in their business; but the two fold answer is, first, that the present discussion does not, as has already been shown, relate to the contract of a common carrier; nor, second, does it involve any consideration of the misconduct of the principal; the whole question being whether the master may not avoid the consequences, not of his own, but of his servant's omissions.

The contract before us, so far as its terms are at present involved, did not contemplate the introduction into the affair of any element of danger, which was not necessarily inherent in it; that is the fallibility of human conduct over which the carrier has no control.

The transaction is virtually thus: the carrier says to the passenger, "I have employed careful and skillful men to manage my locomotive and cars, but they are human, and they may fail in their duty, to your danger." The passenger says, "in consideration of a free passage, I will run that risk." The bargain is struck on these grounds, and I am clear that it would be a great refinement to impeach it as being prejudicial to public interests.

Nor do I find such a contract in any respect incompatible with legal principles on analogous subjects. Agreements of fire insurance are familiar instances much in point, for they are in general, stipulations for indemnification against the results of a party's own negligence, or that of his employees. In truth it is obvious that the doctrine asserted in support of the case of the plaintiffs would, if carried to its logical result, subvert, equally with the present contract, almost the entire system of bailments; for that system is erected in part, on the principle of allowing an immunity to the negligence of the bailee. Thus in the case of a deposit, the depositary in the Roman law was answerable for the thing left with him, in case of its loss, only for fraud; and in the English and American law, such bailee cannot be held unless negligence so gross as almost to be evincive of bad faith can be imputed to him.

In such cases, then, the bailor virtually agrees to discharge the bailee from all responsibility for ordinary neglects, such as careless men are apt to fall into, and the law does not scruple to enforce such contracts. Such agreements in kind are not distinguishable from the stipulation now sought to be impeached.

Another analogy will be found in that long line of decisions which have so completely established the proposition that even common carriers can, by express agreement, limit, to some extent at least, their common law liability. In reply to observations on the impolicy of such a relaxation, Baron Parke (14 *L. and Eq.* 340,) compressed the argument into a sentence, and said: "We ought not to fritter away the meaning of contracts, merely for the purpose of making men careful."

From these considerations, I have come to the conclusion that the contract which the deceased made with the defendants was valid in law, and under the circumstances presented at the trial, afforded a full defence to this action.

It will be perceived from the following citations, that a similar doctrine has been held by the courts of New York: *Wells* v. *New York Central R. R. Co.*, 24 *N. Y.* 181; *Perkins* v. *N. Y. C. R. R. Co.*, 24 *Id.* 208; *Wells* v. *N. Y. C. R. Co.*, 26 *Id.* 641; 25 *Id.* 443.

It has not seemed to me proper to consider the other question mooted on the argument, whether the memorandums endorsed on the ticket in question was of such a character as to require a United States revenue stamp. Such objection was not made at the trial, and it is now quite too late to interpose it. The rule is entirely settled, that if an imperfection of this character is relied on, the point must be raised before the instrument is put in evidence. *Robinson* v. *Lord Vernon*, 7 *Com. B., N. S.* 231; *Field* v. *Wood*, 7 *Ad. & El.* 114; *Israel* v. *Benjamin*, 3 *Comp. R.* 40.

The defendants are entitled to judgment on the verdict.

Filed Oct 8th 1868

Assignment of Errors.

NEW JERSEY COURT OF ERRORS AND APPEALS.

John Kinney and Charity A. Metler, administrators of Charles W. Metler, deceased, plaintiffs in error,
vs.
The Central Railroad Company of New Jersey.

In error to the Supreme Court.

Afterwards, that is to say, by consent, on the sixth day of October, 1868, before the judges of the Court of Errors and Appeals of the state of New Jersey, at Trenton, come the plaintiffs in error, by John F. Dumont, their attorney, and say, that in the record and proceedings aforesaid, and in giving the judgment aforesaid, there is manifest error in this, to wit—

1. That on the trial of the said cause there was no legal or sufficient evidence that the said Charles W. Metler, deceased, had or used the ticket or pass alleged in the case on the occasion therein named; and there is error in this, that the Supreme Court based their judgment on the fact that said Metler had received and used said ticket, notwithstanding.

2. That there was no legal or sufficient evidence that the said Charles W. Metler, deceased, assented or agreed to, or even

knew of the agreement alleged to have been endorsed on the said ticketor pass; and there was error in this, that said court rendered their judgment as if there had been such evidence.

3. That the said alleged agreement or condition was illegal and void, and not drawn, or executed, or entered into, by the parties according to law, nor was there any evidence that any revenue stamp was attached thereto, as required by act of congress; and there is error in this, that the judgment of the said court was predicated on the supposition that said pass or ticket was legally drawn and executed, and stamped according to law.

4. That the fact that a ticket or pass was given to Metler, is not of itself evidence sufficient to raise a presumption that that it is in the hands of his administrators to authorize the defendants to give evidence of its contents upon notice to the administrators to produce it; and there is error in this, that the said court adjudged the evidence sufficient to enable the defendants to give evidence of the contents of the said pass or ticket.

5. That if said pass shall be held to be invalid because the the agreement endorsed and printed thereon is illegal, yet the said Metler was not a tresspasser, but a free passenger, who went on the said car and rode there with the knowledge and permission of the said defendants and their agents, on the ground of his being a railroad man, and therefore accustomed and entitled to ride free on other roads, and particularly so on the defendants' railroad, on which he was formerly for several years an employee; or if not entitled to ride free, was only bound to pay fare whenever the same should be demanded of him by the conductor of the train (and was liable to an action therefor) and the deceased having been killed while so riding in said car, his representatives are entitled to recover in this action; and there is error in this, that by the judgment of the said court said Metler is considered and adjudged a tresspasser, if said pass is invalid.

6. That in the judgment of the Supreme Court there is manifest error in this, that the said court affirmed the opinion and judgment of the judge on the trial of said cause, and decided that the said agreement or condition endorsed on the said ticket was legal, and sufficient in law to bar the

plaintiffs' action; and that there was sufficient evidence that the said Charles W. Metler knew the contents and effect of said condition or agreement, and that said condition or agreement was a legal and sufficient bar to the plaintiffs' action, without any evidence that the same had affixed thereto a revenue stamp as required by the act of congress.

7. And there is error in this, that said judgment was rendered in the favor of the defendants, whereas it should have been in favor of the plaintiffs.

J. F. DUMONT,
Attorney for plaintiffs in error.

The defendant in error filed common joinder.

APPENDIX.

[Filed July 2, 1866.]

New Jersey Supreme Court, of the fifth day of June, in the Term of June, in the year of our Lord one thousand eight hundred and sixty-six.

Warren county, *ss.*—The Central Railroad Company of New Jersey, a company duly incorporated by an act of the legislature of the state of New Jersey, the defendants in this action, were summoned to answer unto John Kinney and Charity A. Metler, administrators of Charles W. Metler, deceased, the plaintiffs therein, of a plea of trespass on the case, and thereupon the said plaintiffs, by J. F. Dumont, their attorney, complain against the said defendants for that, whereas the said defendants, at the time of the committing of the grievances herein after mentioned, were the owners and proprietors of a certain train of railroad passenger cars, for the carriage and conveyance of passengers from a certain place, to wit, from the river Delaware, in the town of Phillipsburg, in the county of Warren, in the state of New Jersey, to a certain other place, to wit, the city of Jersey City, in the county of Hudson, in the said state, and other intermediate places over and upon a certain railroad, of, and belonging to, the said defendants, located in this state, extending from the river Delaware, in the town of Phillipsburg aforesaid, through the county of Hunterdon and other intermediate counties in this state, to the said city of Jersey City, in the county of Hudson aforesaid, for hire and reward to the said defendants in that behalf, to wit, at the town of Belvidere, in the county of Warren, and within the jurisdiction of this court. And the said defendants, being such owners and proprietors of the said railroad cars, and of the said railroad as aforesaid, thereupon heretofore, to wit, on the first day of December, in the year of our Lord one thou-

sand eight hundred and sixty-five, at the town of Belvidere aforesaid, the said Charles W. Metler, deceased, in his lifetime, to wit, on the day and year aforesaid, at the special instance and request of the said defendants, became and was a passenger in and by one of the said passenger cars of the said train, to be safely and securely carried and conveyed thereby on a certain journey over and upon the said railroad, to wit, from the town of Phillipsburg aforesaid, to a certain other place, to wit, to the city of Jersey City aforesaid, for certain fare and reward to the said defendants in that behalf; and the said defendants then and there received the said Charles W. Metler, since deceased, as such passenger as aforesaid, and thereupon it then and there became and was the duty of the said defendants, to use due and proper care, diligence, and attention, that the said Charles W. Metler, since deceased, should be safely and securely carried and conveyed in and by the said passenger car on the said journey over and upon the said railroad, from the town of Phillipsburg aforesaid, to the city of Jersey City aforesaid. Yet the said defendants, not regarding their duty in that behalf, did not use due and proper care, diligence, and attention, that the said Charles W. Metler, since then deceased, should be safely and securely carried and conveyed in and by the said passenger car on the said journey over and upon the said railroad, from the said town of Phillipsburg, in the county of Warren aforesaid, to the said city of Jersey City, in the county of Hudson aforesaid, but wholly neglected and refused so to do, and behaved and conducted themselves so wrongfully, negligently, and improperly that, by and through the wrongful acts, neglect, and default of the said defendants and their servants and agents, who were then and there in charge of the said train of passenger cars, and who were then and there employed by the said defendants to guide, direct, regulate, control, manage, and govern the running of the said train of passenger cars and the locomotive engine which was then and there attached to the said train, and which was then and there drawing and impelling the same on the journey aforesaid, the said locomotive engine being driven and propelled by steam, in guiding, directing, regulating, controlling, managing, and governing the run-

ning of the said train of passenger cars and the locomotive engine aforesaid, while on the journey aforesaid, and for want of due and proper care, diligence, and attention of the said defendants, their said servants and agents to their duty in that behalf, and not otherwise, whilst the said train of passenger cars, including the said car in which the said Charles W. Metler, since deceased, was then and there such passenger as aforesaid, and the said locomotive engine, so then and there drawing and propelling the said train as aforesaid, was proceeding along on the said journey on and over the said railroad, and before the arrival thereof at the said city of Jersey City, and while the same was running at a very fast and rapid rate of speed, to wit, on the day and year last aforesaid, at a certain place on the said railroad, that is to say, at that place where the same passes through the township of Tewksbury, in the county of Hunterdon aforesaid, to wit, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, the said train of passenger cars, and the locomotive engine aforesaid, driven as aforesaid, while running with such rapidity and speed as aforesaid, with great violence, power, and force was precipitated upon, dashed against, and run into divers heavily loaded coal cars, which were then and there standing and being on the track of the said railroad there, which said heavy loaded coal cars, so as aforesaid left standing and being on the said track there, the said defendants and their servants and agents in the employ of the said defendants before then, negligently, unskilfully, carelessly, and improperly put and placed and left standing and being, and caused to be put and placed and left to stand and be, and knowingly permitted and suffered to remain and be on the said track of the said railroad there, immediately in the way of the said locomotive engine and passenger train aforesaid, and in such manner as to thereby obstruct, block up, and entirely occupy the said track at that place, and so prevent and hinder the said passenger train and locomotive engine aforesaid from running or proceeding on the said journey, by and through which means, and by reason of the rapid rate of speed and running of the said locomotive engine and passenger train as aforesaid, against, upon, and into the said heavy

loaded coal cars in the manner aforesaid, and while so running with such rapidity and speed as aforesaid, was forcibly, instantly, and violently stopped thereby, and the baggage car of the said passenger train, which was then and there behind the said locomotive engine, and before and immediately preceding the said passenger car of the said train, in and by which the said Charles W. Metler, since deceased, was so carried and conveyed as aforesaid, being on the journey aforesaid, was thereby then and there, by reason thereof, violently forced, pressed, crushed, and driven into and through the said passenger car of the said train, in and by which the said Charles W. Metler, since deceased, was such passenger as aforesaid, and thereby then and there broke in pieces, smashed, and destroyed the said passenger car, to wit, on the day and year last aforesaid, at the township of Tewksbury, in the county of Hunterdon aforesaid, that is to say, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, by means whereof the said Charles W. Metler, in his lifetime, since deceased, then and there being in the said passenger car on the journey aforesaid, was thereby then and there pressed, pushed, thrust, cast, and crushed in among the broken wood, timber, material, and debris of the said passenger car, in which the said Charles W. Metler, since deceased, in his lifetime, then and there was such passenger as aforesaid, and underneath and against the said baggage car, and the said Charles W. Metler was thereby then and there, by means thereof, terribly cut, gashed, bruised, mangled, and crushed in his head, body, and limbs, and the bones of his head, body, and limbs thereby broken; and the said Charles W. Metler was then and there, by means of the premises, instantly killed, and so came to his death by and through the wrongful acts, neglect, and default of the said defendants as aforesaid, and not otherwise, within twelve calender months next before the commencement of this suit, to wit, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid.

And whereas, also heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and sixty-five, to wit, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, the

said Charles W. Metler, now deceased, in his lifetime, at the special instance and request of the said defendants, became and was a passenger in and by a certain other passenger car of a certain other train of passenger cars of the said defendants, to be safely and securely carried and conveyed thereby upon and along a certain other railroad track, there on a certain journey, to wit, from the town of Phillipsburg, in the county of Warren, and state of New Jersey, to a certain other place, to wit, to the city of Jersey City, in the county of Hudson, in the said state, for certain hire and reward to the said defendants in that behalf, and the said defendants then and there received the said Charles W. Metler as such passenger as aforesaid, and thereupon it then and there became and was the duty of the said defendants to use due and proper care, diligence, and attention, that the said Charles W. Metler should be safely and securely carried and conveyed, by the said last mentioned passenger car of the said last mentioned train of passenger cars, on the said journey from the said town of Phillipsburg, in the county of Warren aforesaid, to the said city of Jersey City, in the county of Hudson aforesaid. Yet the said defendants, not regarding their duty in that behalf, did not use due and proper care, diligence, and attention, that the said Charles W. Metler, now deceased as aforesaid, should be safely and securely carried and conveyed, by the said last mentioned passenger car of the said last mentioned train of passenger cars on the said last mentioned journey, from the said town of Phillipsburg, in the county of Warren aforesaid, to the said city of Jersey City, in the county of Hudson aforesaid, but wholly neglected so to do, and by reason thereof, afterwards and whilst the said last mentioned train of passenger cars, including the said passenger car by which the said Charles W. Metler, now deceased as aforesaid, then and there was such passenger as aforesaid, was proceeding along, on, and over the said last mentioned railroad track, there on the said journey from the said town of Phillipsburg, in the county of Warren aforesaid, and before the arrival thereof at the said city of Jersey City, in the county of Hudson aforesaid, that is to say, at a certain place on the said last mentioned railroad track, where the said last mentioned railroad track runs

through a corner of the township of Tewksbury, in the county of Hunterdon, in the said state of New Jersey, to wit, at Belvidere, in the county of Warren aforesaid, and within the jurisdiction aforesaid, the said defendants, and their servants and agents, who were then and there in charge of the said last mentioned train of passenger cars, (including the said last mentioned passenger car by which the said Charles Metler, now deceased, in his lifetime, was such passenger as aforesaid,) to direct, control, regulate, manage, and govern the running and speed of the said last mentioned train of passenger cars, (including the passengar car last aforesaid,) and the locomotive engine which was then and there attached to and drawing and impelling the said last mentioned train of passenger cars, (including the passenger car last aforesaid) which said locomotive engine was then and there driven and propelled by steam, upon and over the said last mentioned railroad track, there so carelessly, negligently, unskillfully, and improperly directed, regulated, controlled, managed, and governed the running and speed of the said last mentioned train of passenger cars, (including the said passenger car by which the said Charles W. Metler, now deceased, in his lifetime, was being carried and conveyed as aforesaid,) and the said locomotive engine so then and there drawing and impelling the same as aforesaid, that by and through their gross carelessness, negligence, improper conduct, and default, was dashed, hurled, and run with great speed, power, violence, and force against, upon, and into divers heavily loaded cars, which then and there stood and were upon the said last mentioned railroad track at that place, and which the said defendants, and certain other servants and agents in the employ of the said defendants, before then put and placed, and caused to be put and placed, and left to stand and be and remain there on the said last mentioned railroad track, in such manner as to entirely occupy and cover the said track, and so as to be immediately in the way of the said last mentioned locomotive engine and passenger train aforesaid, and so as to thereby forcibly prevent and hinder the same from proceeding on the said journey, by and through which means and the rapid rate of speed, and the running of the said locomotive engine and train of passenger cars last men-

tioned, (including the said passenger car by which the said Charles W. Metler, in his lifetime, was such passenger as aforesaid,) against, upon, and into the said heavy loaded cars so then and there standing and being upon the said last mentioned railroad track there as aforesaid, the said locomotive engine, and the said last mentioned train of passenger cars, were then and there and thereby forcibly, instantly, and violently stopped, and the baggage car of the said last mentioned train of passenger cars, which was then and there behind the said locomotive engine and immediately before the said passenger car in and by which the said Charles W. Metler, now deceased, was then and there such passenger as aforesaid. on the journey aforesaid, was thereby then and there, by reason thereof, with great force pressed, crushed, forced, and driven into and through the said passenger car in which the said Charles W. Metler, now deceased, then and there was, and thereby then and there broke in pieces and destroyed the said last mentioned passenger car, to wit, on the day and year last aforesaid, at the township of Tewksbury, in the county of Hunterdon aforesaid, that is to say, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, by reason whereof the said Charles W. Metler, now deceased, in his lifetime, then and there being in the said last mentioned passenger car as aforesaid, was thereby, then and there with great force and violence, tossed, cast, thrown, crushed, and forced in and among the broken materials, wood, timber, and wreck of the said last mentioned passenger car, and underneath and against the said baggage car, and the head, neck, shoulders, back, body, and limbs of the said Charles W. Metler was then and there and thereby greatly gashed, cut, wounded, bruised, and crushed, and the bones of his head, neck, body, and limbs were also then and there broken; and the said Charles W. Metler was then and there, by reason of the premises, instantly and violently killed, and so came to his death by and through the gross carelessness, wrongful acts, neglect, and default of the said defendants, as aforesaid, and not otherwise, within twelve calender months next before the commencement of this suit, to wit, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid.

And whereas, also heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and sixty-five, that is to say, at Belvidere, in the county of Warren, and within the jurisdiction of this court, the said Charles W. Metler, since deceased, at the special instance and request of the said defendants, became and was a passenger in and by one of the passenger cars of a certain other train of passenger cars, called an express train, which the said defendants then and there run, to be safely and securely carried thereby on a certain journey, from a certain place along the said last mentioned railroad track, to wit, the town of Phillipsburg, in the county of Warren aforesaid, to a certain other place along the said railroad track, to wit, the city of Jersey City, in the county of Hudson aforesaid, for certain hire and reward to the said defendants in that behalf; and *although* the said Charles W. Metler, since then deceased, was then and there received by the said defendants as such passenger, by the said last mentioned passenger car of the said passenger express train, to be safely and securely carried and conveyed thereby on a certain journey, to wit, from the town of Phillipsburg, in the county of Warren aforesaid, to the said city of Jersey City, in the county of Hudson aforesaid, for certain hire and reward to the said defendants in that behalf; and although the said Charles W. Metler, since deceased, was then and there received by the said defendants as such passenger by the said passenger car of the said passenger express train as aforesaid, to be carried and conveyed as aforesaid, yet the said defendants, not regarding their duty in that behalf, so carelessly, negligently, wrongfully, and improperly directed, guided, controlled, conducted, managed, and governed the running and speed of the said passenger express train, including the said car of the said train, in and by which the said Charles W. Metler, since deceased, was then and there such passenger as aforesaid, and the locomotive engine, which was then and there attached to, and then and there drawing and impelling the said passenger express train, the said locomotive engine being then and there driven and propelled by steam; that afterwards, and whilst the said passenger express train, (including the said car, in and by which the said Charles W. Metler, since

deceased, was such passenger as aforesaid,) and the locomotive engine, so then and there drawing and impelling the said passenger express train, were proceeding on the said journey, to wit, from the said town of Phillipsburg, in the county of Warren aforesaid, to the said city of Jersey City, in the county of Hudson aforesaid, and while the same were running at a fast and rapid rate of speed, to wit, at a certain place on the line of the said last mentioned railroad track, where the said railroad track runs through a corner of the township of Tewksbury, in the county of Hunterdon, in this state, and near to a certain mountain, called Pickel's mountain, that is to say, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, was, by and through the gross carelessness, wrongful acts, neglect, and default of the said defendants, their servants and agents, then and there in their service, dashed, driven, run, hurled, and forced, with great force and violence, against, upon, and into divers loaded cars, heavily loaded with coal, which were then and there standing and being on the said last mentioned railroad track at that place, and which the said defendants and their said other servants and agents of the said defendants had, before then, carelessly, negligently, wrongfully, and improperly put and placed, and caused to be put and placed, and left to stand and be and remain on the said last mentioned railroad track there, in such manner as to thereby then and there entirely cover and occupy the said railroad track at that place, and so as thereby to completely block up and obstruct the said railroad track, it then and there being the same track on which the said locomotive engine, and the said passenger express train aforesaid, were then and there running, and so as to forcibly and violently obstruct, hinder, and prevent the same from proceeding any further on the said journey, by means whereof the said locomotive engine, so as aforesaid, then and there drawing and impelling the said passenger express train, (including the said passenger car, in and by which the said Charles W. Metler, since deceased, was such passenger as aforesaid,) and which preceded the said passenger express train; and while the said locomotive engine and passenger express train aforesaid were running at such fast and rapid rate of speed as afore-

said, the said locomotive engine and passenger express train aforesaid, (including the said passenger car, in which the said Charles W. Metler, since deceased, was such passenger as aforesaid,) were then and there forcibly, instantly, and violently stopped, and by reason thereof the baggage car of the said passenger express train, and which was next in the said train to the said locomotive engine, and which then and there immediately preceded and was next to the said car, also of the said passenger express train, in and by which the said Charles W. Metler, since deceased, was then and there such passenger as aforesaid, was then and there and thereby dashed, driven, and violently forced into and through the said passenger car, in which the said Charles W. Metler, since deceased, then and there was; and the said passenger car was thereby then and there demolished, crushed, broken in pieces, and destroyed, with the said Charles W. Metler therein as aforesaid, by means whereof the said Charles W. Metler, since deceased, was then and there and thereby thrown, thrust, forced, jammed, and crushed in and among the broken wood, timber, fragments, and debris of the said passenger car, and underneath the said baggage car, and the said Charles W. Metler, since deceased, was also then and there and thereby, by means of the said premises, terribly cut, wounded, bruised, strained, mangled, and crushed in his head, neck, body, and limbs, and thereby the bones of his head, body, and limbs were then and there broken, and the said Charles W. Metler was then and there and thereby, by means of the premises, instantly and violently killed, and so the said plaintiffs say the said Charles W. Metler, deceased, came to his death by and through the gross carelessness, wrongful acts, neglect, and default of the said defendants as aforesaid, and not otherwise, within twelve calender months next before the commencement of this suit, to wit, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid.

And whereas, also, the defendants, before and at the time of the committing of the grievances herein after next mentioned, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and sixty-five, at Belvidere, in the county of Warren, and within the jurisdic-

tion of this court, then used, and still use, a certain other railroad, located in this state, extending from the town of Phillipsburg, in the county of Warren, through the said county of Warren into and through the county of Hunterdon, and other intermediate counties, to a certain other place, to wit, to the Hudson river, at the city of Jersey City, in the county of Hudson, in the said state, and there terminating; and the said defendants then and there were, and still are, the owners and proprietors of a certain ferry over and across the said Hudson river, to wit, from the said city of Jersey City to a certain other place, to wit, to the city of New York, in the state of New York, which the said defendants then used, and still use, in connection with the said last mentioned railroad. And the said defendants then were, and still are, the owners and proprietors of divers other railroad passenger cars, which they then and there used for the carriage and conveyance of passengers thereby, on and over the said last mentioned railroad, from place to place, along the line thereof, for certain hire and reward to the said defendants in that behalf, and were, and still are, the owners and proprietors also of divers ferry boats, used by the said defendants in connection with the said last mentioned railroad cars, for the carriage and conveyance of passengers, and for the transportation of goods, chattels, and merchandise over the said ferry, to wit, from the said termination of the last mentioned railroad, at the said Hudson river, at the said city of Jersey City, in the county of Hudson aforesaid, over and across the said Hudson river to the said city of New York, in the state of New York aforesaid, and from thence back again, for certain hire and reward also to the said defendants in that behalf. And the said defendants, then and there being such owners and proprietors as aforesaid, thereupon heretofore, to wit, on the day and year last aforesaid, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, the said Charles W. Metler, since deceased, in his lifetime, at the special instance and request of the said defendants, then and there became and was a passenger in and by one of the cars of a certain other train of passenger cars, which the said defendants then and there run, to be safely and securely carried and conveyed, on a

certain journey, from a certain place along the said last mentioned railroad, to wit, from the town of Phillipsburg, in the county of Warren aforesaid, on and over the said last mentioned railroad to the said termination thereof at the Hudson river, at the said city of Jersey City aforesaid, and from thence continuously on, in, and by one of the said ferry boats, over and across the said Hudson river, to a certain other place, to wit, to the said city of New York, in the state of New York aforesaid, and to be there safely delivered for certain hire and reward to the said defendants in that behalf. And the said defendants then and there received the said Charles W. Metler, since deceased, as such passenger as aforesaid, and thereupon it then and there became and was the duty of the said defendants to use due and proper care, diligence, and attention, that the said Charles W. Metler should be safely and securely carried and conveyed, in and by the said car of the said last mentioned passenger train, on the said journey from the town of Phillipsburg aforesaid, on and over the said last mentioned railroad to the termination thereof, at the Hudson river, at the said city of Jersey City, and from thence continuously on, in, and by one of said defendants' said ferry boats over and across the Hudson river, there to the said city of New York, in the state of New York aforesaid, and there to be safely delivered. Yet the said defendants, not regarding their duty in that behalf, did not use due and proper care, diligence, and attention, that the said Charles W. Metler should be safely and securely carried and conveyed, in and by the said car of the said last mentioned passenger train, on the said journey from the town of Phillipsburg aforesaid, on and over the said last mentioned railroad to the termination thereof, at the Hudson river, at the city of Jersey City aforesaid, and from thence continuously on, in, and by one of the defendants' said ferry boats, over and across the said Hudson river, there to the said city of New York, in the state of New York aforesaid, and there safely delivered; but on the contrary thereof, so misbehaved and conducted themselves that, by and through the gross carelessness, wrongful acts, neglect, and default of the said defendants, and their servants and agents in the service of the said defendants, in then and

there directing, guiding, superintending, conducting, controlling, regulating, governing, and managing the running and the speed of the said last mentioned passenger train, and the locomotive engine which was then and there attached to and drawing and moving the said last mentioned passenger train, (the said locomotive engine being then and there driven and propelled by steam,) while on the journey aforesaid, and for want of due and proper care, diligence, and attention of the said defendants, their said servants and agents, to their duty in that behalf, and not otherwise; afterwards, and while the said last mentioned passenger train (including the said car in which the said Charles W. Metler was such passenger as aforesaid,) and the said locomotive engine, so then and there drawing and moving the same, were proceeding on and over the said last mentioned railroad, being on the said journey from the town of Phillipsburg aforesaid, and before the arrival thereof at the said city of Jersey City aforesaid, at a certain point or place on the said last mentioned railroad, where the track of the said last mentioned railroad passes and runs through a corner of the township of Tewksbury, in the said county of Hunterdon, and near to a certain mountain called Pickel's mountain, to wit, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, and while the said last mentioned passenger train and locomotive engine aforesaid, were running along at a high and fast rate of speed, to wit, on the day and year last aforesaid, at the said township of Tewksbury, in the county of Hunterdon aforesaid, to wit, at Belvidere, in the county of Warren, and within the jurisdiction aforesaid, with great rapidity, speed, power, force, and violence were dashed, run, driven, and forced against, upon, and into divers cars loaded with coal, which were then and there standing and being on the track of the said last mentioned railroad at that place, it then and there being the same track whereon the said last mentioned passenger train, (including the said car in and by which the said Charles W. Metler was such passenger as aforesaid,) and the locomotive engine, so as aforesaid then and there drawing and moving the said train, were running there, which said cars so loaded with coal as aforesaid, the said defendants, and the servants and

agents then and there in the service and employ of the said defendants, and who then and there had charge of the said cars so loaded with coal as aforesaid, before then, had very carelessly, negligently, wrongfully, and improperly put and placed, and caused to be put and placed, and left to stand and be, and knowingly permitted and suffered to remain and be there on the said track at that time, immediately in the way of the said last mentioned passenger train and locomotive engine aforesaid, and in such dangerous position as to thereby obstruct, block up, and entirely occupy the said track there, and so as to forcibly prevent the said last mentioned passenger train and car aforesaid, and locomotive engine aforesaid, from running or proceeding further on the said journey, by reason whereof the said last mentioned locomotive engine, and the said last mentioned train of passenger cars, (including the said car, in and by which the said Charles W. Metler was such passenger as aforesaid,) while running at such high and fast rate of speed as aforesaid, were then and there and thereby forcibly, instantly, and violently stopped, and the baggage car of the said last mentioned train, which was immediately behind the tender of the said locomotive engine, and in front of and preceding the said car of the said passenger train, in which the said Charles W. Metler then and there was, being on the journey aforesaid, was thereby then and there, by reason thereof, violently forced, pressed, crushed, and driven by the said tender of the said locomotive engine against, upon, into, and through the said car of the said last mentioned passenger train, in which the said Charles W. Metler then and there was, and thereby then and there broke in pieces, crushed, and destroyed the said car, in which the said Charles W. Metler then and there was, to wit, on the day and year last aforesaid, at the township of Tewksbury, in the county of Hunterdon aforesaid, that is to say, at Belvidere aforesaid, in the county of Warren, and within the jurisdiction aforesaid, by means whereof the said Charles W. Metler, since deceased, in his lifetime, then and there being in the said car of the said last mentioned passenger train, was then and thereby pressed, thrust, cast, and crushed in and among the broken wood, iron, and debris of the said car, against and

underneath the said baggage car, and thereby then and there, by means thereof, terribly gashed, strained, wounded, bruised, and crushed in his head, neck, shoulders, body, and limbs, and thereby then and there had the bones of his head, shoulders, body, and limbs broken, and was then and there and thereby, by means of the premises, instantly and violently killed, and so came to his death by and through the gross carelessness, wrongful acts, neglect, and default of the said defendants as aforesaid, and not otherwise, within twelve calender months next before the commencement of this suit; and the clothing and wearing apparel, to wit, one coat, one vest, one pair of pants, one pair of drawers, one shirt, one necktie, one pair of stockings, and one pair of boots, the property of the said Charles W. Metler, which he then and there had on his person and wore; and also one gold watch, the property of the said Charles W. Metler, which he then and there had on his person, the said property being of great value, to wit, of the value of three hundred dollars, was also then and there and thereby, by means of the premises aforesaid, soiled, torn, injured, broken in pieces, and destroyed, to wit, on the day and year last aforesaid, at Belvidere, in the county of Warren, and within the jurisdiction aforesaid.

Wherefore the said plaintiffs say that they have been injured, and have sustained damages to the amount of twenty thousand dollars. And therefore the said plaintiffs, as such administrators as aforesaid, for the benefit of the said Charity A. Metler, she being the widow of the said Charles W. Metler, deceased, and of Anna L. Metler, infant daughter (aged five years) of the said Charles W. Metler, deceased, being next of kin to the said deceased, according to the form of the statute in such case made and provided, bring their suit, &c.

And the said plaintiffs bring into court here the letters of administration, to which the plaintiffs, after the death of the said Charles W. Metler, to wit, on the sixth day of December, in the year of our Lord one thousand eight hundred and sixty-five, at Belvidere, in the county of Warren aforesaid, administration of all and singular the goods and chattels, rights and credits, which were of the said Charles W. Metler,

deceased, at the time of his death, who died intestate, by William L. Hoagland, esquire, surrogate of the county of Warren aforesaid, in due form of law was granted, which gives sufficient evidence to the court here of the said grant of administration to the said plaintiffs as aforesaid. The date whereof is a certain day and year therein named, to wit, the day and year in that behalf above mentioned.

J. F. DUMONT,
Attorney for plaintiffs.

Warren county, *ss.*—John Kinney and Charity A. Metler, administrators of Charles W. Metler, deceased, put in their place John F. Dumont, their attorney, against the Central Railroad Company of New Jersey, of a plea of trespass on the case.

[Filed July 23, 1866.]

The New Jersey Supreme Court, of the fifth day of June, in the Term of June, in the year of our Lord one thousand eight hundred and sixty-six.

The Central Railroad Company of New Jersey
adsm
John Kinney and Charity A. Metler, administrators of Charles W. Metler, deceased.
} *In case.*

Warren county, *ss.*—And the said the Central Railroad Company of New Jersey, the said defendants in the above cause, by Frederick T. Frelinghuysen, their attorney, come and defend the wrong and injury where, &c., and say that they are not guilty of the said supposed grievances above laid to their charge, or of any or either of them, or any part thereof, in manner and form as the said plaintiff hath above

thereof complained against them, and of this they, the said defendants, put themselves upon the country, &c.

FRED'K T. FRELINGHUYSEN,
Attorney of defendants

State of New York, county of New York, *ss.*—John Taylor Johnston, being duly sworn according to law, on his oath saith—that he is the president of the Central Railroad Company of New Jersey, the defendants in the above cause; that the foregoing plea is not intended for the purpose of delay, and that he verily believes the said defendants have a just and legal defence to the said action upon the merits of the case.

JOHN TAYLOR JOHNSTON.

Sworn and subscribed this 23d day of July, A. D. 1866, before me.

ENOS W. RUNYON, *M. C.*