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Notice and Grounds of Appeal.

New Jersey Supreme Court

ESSEX COUNTY.

PAUL MULLEN, an infant by Christopher Mullen his next friend and CHRISTOPHER MULLEN, individually, Plaintiffs, *vs.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX, Defendant.	Action at Law. Notice and Grounds of Appeal.

To JOSEPH CASSINI, Esq.,
Attorney of Plaintiffs.

PLEASE TAKE NOTICE that defendant, Board of Chosen Freeholders of the County of Essex, in the above entitled cause, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. The trial court erred in denying defendant's motion for a non-suit on the ground that there was no proof that the defendant was under any duty or obligation to maintain or repair the bridge.

2. The trial court erred in denying defendant's motion for a non-suit on the ground that there was no proof that defendant was negligent or wrongfully neglected to maintain or repair the bridge.

Notice of Grounds of Appeal.

3. The trial court erred in denying defendant's motion for a non-suit on the ground that the accident did not happen on the bridge.

4. The trial court erred in refusing to direct a verdict in favor of defendant on the ground that there was no proof that the defendant was under any duty or obligation to maintain or repair the bridge.

5. The trial court erred in refusing to direct a verdict in favor of defendant on the ground that there was no proof that defendant was negligent or wrongfully neglected to maintain or repair the bridge.

6. The trial court erred in refusing to direct a verdict in favor of defendant on the ground that the accident did not happen on the bridge.

7. The trial court erred in entering judgment for plaintiffs whereas, the court should have entered judgment for this defendant.

8. The trial court erred in charging the jury as follows:

"On July 19, 1926, the little boy here, the plaintiff in this case, had an accident. The *situs* of that accident was a bridge which spans a spring or brook which runs through a portion of the City of East Orange, and this bridge is reached by traveling along Brighton Ave."

9. The trial court erred in charging the jury as follows:

"Just how much importance you are going to put on this fence, I do not know, and I say that

for this reason, that while I am going to leave the questions of fact to you as to whether or not this accident happened on the bridge as a result of the bridge being out of repair, I call your attention to the fact that you may say that this fence was not in a state of disrepair.''

10. The trial court erred in refusing to dismiss plaintiffs' complaint.

11. The trial court erred in refusing to direct a verdict in favor of defendant as to the second Count on the ground that there was no proof of damages.

Yours etc.,

ARTHUR T. VANDERBILT,
Attorney of Defendant.

Dated April 16, 1930.

Affidavit of Service.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PAUL MULLEN, an infant, by Christopher Mullen, his next friend, and CHRISTOPHER MULLEN, individually,

Plaintiffs,

vs.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX,

Defendant.

Action at Law.

Affidavit of Service.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

PAUL BENEDICT, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am a clerk in the law office of Arthur T. Vanderbilt, attorney for the defendant in the above entitled matter.

2. On April 16, 1930, I served a copy of the notice and grounds of appeal in the above mentioned matter upon Mr. Joseph Cassini by leaving said copy with his secretary in his law office at 285 Main Street, Orange, New Jersey, between the hours of 2:30 and 3:30 in the afternoon.

PAUL BENEDICT.

Subscribed and sworn to before me this 21st day of April, 1930.

ARTHUR E. DIENST
Notary Public of N. J.

(Seal)

Summons.

THE STATE OF NEW JERSEY:

To THE CITY OF EAST ORANGE and, in the alternative, THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX:

(SEAL)

YOU ARE SUMMONED to answer the annexed complaint of PAUL MULLEN, an infant, by CHRISTOPHER E. J. MULLEN, his next friend, and CHRISTOPHER E. J. MULLEN, individually, in an action at law in the New Jersey Supreme Court.

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court at Trenton within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of our said Court at Trenton, this day of March, Nineteen Hundred and Twenty-six.

EDWARD J. KELLEHER,
Clerk.

JOSEPH CASSINI,
Attorney for Plaintiffs.

Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PAUL MULLEN, an infant, by CHRISTOPHER E. J. MULLEN, his next friend, and CHRISTOPHER E. J. MULLEN, individually,
Plaintiffs,

vs.

THE CITY OF EAST ORANGE, and in the alternative, THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX,
Defendants.

Action at Law.
Complaint.

FIRST COUNT.

The plaintiff, Paul Mullen, who is an infant under the age of twenty-one years, to wit, two and one-half years of age, residing in the City of East Orange, County of Essex and State of New Jersey, by Christopher E. J. Mullen, who is admitted by the Court here to prosecute as the next friend of the said Paul Mullen, says:

1. The defendant, the City of East Orange, is the owner of a certain highway known as Brighton Avenue, over which avenue there is constructed a bridge spanning a brook which runs in an easterly direction.

2. The defendant, the Board of Chosen Freeholders of the County of Essex, a corporation of the County of Essex and State of New Jersey, is

by virtue of an act of the Legislature of the State of New Jersey required to erect, rebuild, repair and maintain any bridge within the limits of the County.

3. The defendants, The City of East Orange and The Board of Chosen Freeholders of the County of Essex, are by virtue of an act of the Legislature of the State of New Jersey lawfully bound to erect and repair any bridges across a stream and its abutments.

4. On the 19th day of July, 1925, at about 5 P. M. the plaintiff, Paul Mullen, was walking on the westerly side of the aforesaid bridge, and immediately upon reaching the fence on the said bridge the plaintiff, Paul Mullen, fell underneath the fence and into the brook, striking a number of large rocks after having fallen a distance of about twenty-five feet.

5. The said fall of the plaintiff was due to the carelessness, recklessness and negligence of the defendants and resulted from the wrongful neglect of the defendants to keep in repair the bridge on the aforementioned highway, and the said defendants were further careless and negligent in that they permitted the said bridge to remain in a defective condition for a long time without having said fence and portion of ground underneath the fence properly guarded and secured for the safety of pedestrians.

6. By reason of the carelessness, recklessness and negligence of the said defendants as aforesaid the plaintiff was very severely injured, receiving a fractured skull, lacerations, contusions

and other severe internal injuries, and the said plaintiff by reason of his injuries lost his powers of articulation and was otherwise so injured as to prevent his acquiring the power of speech and the power of hearing, and he was otherwise painfully injured and bruised in and about his head and body.

7. By reason of the above mentioned injuries the said Paul Mullen suffered and underwent pain and in the future will suffer and undergo great pain and anguish of both mind and body, and he will in the future be hindered and prevented from attending to any vocation, and he, the said Paul Mullen, has otherwise suffered and sustained great loss, damage and injury by and from the said negligence of the defendants.

Plaintiff, Paul Mullen, demands against the defendant, The City of East Orange, and in the alternative, against the defendant, The Board of Chosen Freeholders of the County of Essex, the sum of twenty-five thousand ($25,000.00) dollars.

Second Count.

The plaintiff, Christopher E. J. Mullen, residing in the City of East Orange, County of Essex and State of New Jersey, says:

1. He is the father of the said Paul Mullen, an infant of the age of two and one-half years.

2. He repeats all of the statements made in the foregoing count and makes them a part hereof.

3. The said Paul Mullen resides with him and is supported and otherwise cared for by him.

4. This plaintiff, Christopher E. J. Mullen, is entitled to the services of the said Paul Mullen.

5. As a result of the injuries to the said Paul Mullen, he, the said Christopher E. J. Mullen, has been obliged to lay out and expend and in the future will be obliged to lay out and expend, divers large sums of money endeavoring to cure the said Paul Mullen of his wounds, bruises and injuries so received by him as aforesaid, and he, the said Christopher E. J. Mullen, has lost and in the future will lose the services of the said Paul Mullen which he has received in the past and which he would continue to receive in the future from him, but for the said injuries to the said Paul Mullen caused by the negligence of the defendants as aforesaid.

Plaintiff, Christopher E. J. Mullen, demands as damages against the defendant, the City of East Orange, and in the alternative, against the defendant, The Board of Chosen Freeholders of the County of Essex, the sum of ten thousand ($10,000.00) dollars.

JOSEPH CASSINI,
Attorney of Plaintiffs.

Answer of Defendant Board of Chosen Freeholders of the County of Essex.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PAUL MULLEN, an infant, by CHRISTOPHER E. J. MULLEN, his next friend, and CHRISTOPHER E. J. MULLEN, individually,
Plaintiffs,

vs.

THE CITY OF EAST ORANGE, and in the alternative, THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX,
Defendants.

Action at Law. Answer of Defendant Board of Chosen Freeholders of the County of Essex.

Defendant Board of Chosen Freeholders of the County of Essex says that:

ANSWER TO FIRST COUNT.

1. It admits the allegations of paragraph 1 of the first count of the complaint.

2. It denies the allegations of paragraph 2 of the first count of the complaint.

3. It denies the allegations of paragraph 3 of the first count of the complaint, insofar as it relates to defendant Board of Chosen Freeholders of the County of Essex.

4. It denies the allegations of paragraph 4 of the first count of the complaint.

Answer of Defendant Board of Chosen Freeholders of the County of Essex.

5. It denies the allegations of paragraph 5 of the first count of the complaint, insofar as it concerns this defendant.

6. It denies the allegations of paragraph 6 of the first count of the complaint.

7. It denies the allegations of paragraph 7 of the first count of the complaint.

8. First Separate Defense.

This defendant will object at the trial of this action that the facts stated in the first count of the complaint do not constitute a cause of action against this defendant, and will move at the trial for a dismissal of the first count on the facts stated therein.

Answer to Second Count.

1. It has no knowledge or information sufficient to enable it to form a belief as to the allegations of paragraph 1 of the second count of the complaint, and it therefore denies the same.

2. Answering paragraph 2 of the second count of the complaint, it repeats the answer made by it to the first count of the complaint.

3. It has no knowledge or information sufficient to enable it to form a belief as to the allegations of paragraph 3 of the second count of the complaint, and it therefore denies the same.

4. It has no knowledge or information sufficient to enable it to form a belief as to the allegations of paragraph 4 of the second count of the complaint, and it therefore denies the same.

5. It denies the allegations of paragraph 5 of the second count of the complaint.

Answer of Defendant Board of Chosen Freeholders of the County of Essex.

6. First Separate Defense.

This defendant will object at the trial of this action that the facts stated in the second count of the complaint do not constitute a cause of action against this defendant, and will move at the trial for a dismissal of the second count on the facts stated therein.

Arthur T. Vanderbilt,
Attorney of Defendant Board of Chosen Freeholders of the County of Essex.

Postea.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PAUL MULLEN, an infant, by CHRISTOPHER E. J. MULLEN, his next friend, and CHRISTOPHER E. J. MULLEN, individually, Plaintiffs, *vs.* THE CITY OF EAST ORANGE and, in the alternative, THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX, Defendants.	Action at Law. Postea.

This case was tried before Judge Worrall F. Mountain with a jury in the Supreme Court, Essex County, on February 21st and 24th, 1930.

The jury rendered a verdict in favor of Paul Mullen, an infant, by Christopher E. J. Mullen, his next friend, in the sum of Three Thousand ($3,000.00) Dollars and a verdict in favor of Christopher E. J. Mullen, individually, in the sum of Four Hundred ($400.00) Dollars against the defendant, The Board of Chosen Freeholders of the County of Essex.

WORRALL F. MOUNTAIN,
Judge of the Supreme Court,
Essex County.

Testimony.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

February 21, 1930.

PAUL MULLIN, an infant, by CHRISTOPHER MULLIN, his next friend, and CHRISTOPHER MULLIN, individually,
Plaintiffs,
vs.
BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX,
Defendant.
} Action at Law.

Before
Hon. WORRALL F. MOUNTAIN, J.,
and a Jury.

For plaintiffs appears JOSEPH C. CASSINI.

For defendant appears ARTHUR T. VANDERBILT.

(A jury is called and sworn.)
Mr. Cassini opens for plaintiffs.
Mr. Vanderbilt opens for defendant.

Mr. Vanderbilt: I renew my motion which is made in my answer to strike the complaint on the ground therein stated.

The Court: The City of East Orange is not now a defendant in this action.

Mr. Vanderbilt: No, under your Honor's decision of April 24, 1928.

The Court: Is this duty on the County recited in the Laws of 1918?

Mr. Vanderbilt: That is the only basis for it.

The Court: Whereabouts is it?

Mr. Vanderbilt: Chapter 185 of the Laws of 1918, Section 1309, page 609, and Section 1305 on page 612.

The Court: What are the grounds of your motion?

Mr. Vanderbilt: That there is nothing in the complaint that states a cause of action as to the defendant Board of Chosen Freeholders of the County of Essex. That is set up in paragraph 8 of my answer to the first count. I repeat that as to the second count in paragraph 6 of my answer to the second count.

(Argument.)

The Court: The second paragraph of the complaint alleges that the Board of Chosen Freeholders of this County were required to erect, rebuild, maintain and repair any bridge within the limits of the county. Where is your authority for that, Mr. Cassini?

Mr. Cassini: The statute of 1918 and the prior statute of the Bridge Act of 1860.

(Argument.)

The Court: Yes, but you have made the sweeping statement here that they are required to erect, rebuild, repair, maintain any bridge. We are interested in one particular bridge.

Mr. Cassini: Yes, your Honor.

The Court: Why didn't you, in view of the fact that we were only interested in one bridge, why didn't you plead as to one bridge and not any or every bridge in Essex County?

Mr. Cassini: I can plead as to this particular bridge now. I move to amend to this particular bridge, but I had to look at the statute to get my basis for the action.

The Court: You propose to show the *locus in quo* of one particular spot, but you have it against all the bridges in the county.

Mr. Cassini: To show my right to suit.

The Court: Your second paragraph alleges the Board of Chosen Freeholders is bound to erect and repair any bridges across a stream. Both of those paragraphs are wrong. because you are concerned, as I understand it, with one bridge.

Mr. Cassini: That is true.

The Court: At the time this case was tried before, the City of East Orange was released from any liability?

Mr. Cassini: Yes.

The Court: Was a motion of this kind made at that time?

Mr. Vanderbilt: Yes, this motion was made at that time before the trial. To simplify this situation and save the time of the jury, I am only making this motion now so the matter will be of record; in fact, I refer your Honor to a letter you wrote to counsel in this case.

Mr. Cassini: I move to amend the pleadings in reference to this particular bridge to read that the County Board of Freeholders are particularly responsible to repair and maintain and construct this particular bridge on Brighton avenue.

The Court: Is there any objection?

Mr. Vanderbilt: If I may have the exact language of the amendment. I suppose that is in place of paragraphs 2 and 3.

The Court: Yes. Those two paragraphs seem to relate to any bridge in the county.

Mr. Vanderbilt: Yes, that was my objection. If counsel will state the exact language of the amendment.

Mr. Cassini: That the Board of Chosen Freeholders by virtue of an act of the legislature are required to erect, rebuild, repair and maintain

the bridge and its approaches over Brighton avenue in the City of East Orange, County of Essex, and so on.

Mr. Vanderbilt: That takes place of paragraph 2 and 3.

Mr. Cassini: That takes the place of paragraph 2.

The Court: As I understand it you charge the county with the duty of repairing this bridge and its approaches, the bridge that passes over this creek up there on Brighton avenue.

Mr. Vanderbilt: My objection to that amendment is it is pleading a proposition of law. As I interpret it, and under Section 1315 which I refer your Honor on page 612 of the Laws of 1918, the County is expressly exempt from liability for anything that has to do with the approaches to bridges where the approaches are a public road, street, avenue or highway. In paragraph 1 of the complaint it states, and it is admitted on our answer, that Brighton avenue is a public highway and that the City of East Orange is the owner of it.

The Court: The amendment as it has been made, aside from the other inconsistent pleading, is that the County is responsible for this approach and bridge. If it is true that this approach is a part of a public road, when the accident happened, it may be that the County would be free.

Mr. Vanderbilt: Exactly.

The Court: If there is no objection I will permit the amendment.

Mr. Vanderbilt: May I then regard my answer to paragraph 2 as amended the same as it is now, consisting of a denial?

Mr. Cassini: Yes.

Mr. Vanderbilt: Does your Honor rule on my motion?

The Court: Yes, I will deny it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: Doesn't this case turn on where the accident happened?

Mr. Vanderbilt: It was not a dispute at the last trial, but that will have to develop in the evidence here.

Mr. Cassini: In this particular case we had a witness and both the attorneys for the City of East Orange and Mr. Vanderbilt appeared and took depositions from this witness who weighed 400 pounds, and his testimony was read.

Mr. Vanderbilt: His weight has not decreased so there was no objection to reading that testimony.

Mr. Cassini: John Guyre is the name of the witness whose testimony we took by deposition and which I will read: "Q. Mr. Guyre, you live at 59 Washington avenue, Arlington? A. Now. yes, sir. Q. And your full name is John Guyre? A. John. Q. On or about the 19th of July, 1925, you were engaged as what; in what business were you engaged? A. Retired. Q. In 1925? A. Yes, sir. Q. And were you not employed in East Orange somewhere at that time? A. No, sir. Q. Were you in and about Brighton avenue in the City of East Orange on the 19th day of July, 1925? A. Yes, sir. Q. And were you merely a pedestrian at that time? A. No, I was in my room seated, because I could not get out. Q. You were in your room, whereabouts? A. At the Brighton avenue side, seated in a bay-window the same as this. I formerly worked for the Erie Railroad but I have not been able to do anything for the last twelve years. Q. While you were seated there on that day, that is, on the 19th of July, 1925, did

you see anything about five p. m.? A. I saw lots of things.

Q. What did you see? Mr. Vanderbilt: The question is objected to as not material or relevant to this case. The Court: I will admit it. Defendant's counsel prays an exception to this ruling of the Court. A. I saw two little fellows——"

Mr. Vanderbilt: I object to part of this answer. If the Court will read it—because part is not a statement of fact but a statement of what he supposed.

The Court: I will admit that answer down to "cones."

Mr. Vanderbilt: No objection to that.

Mr. Cassini: Is this objection raised before this is read?

The Court: It is evidently improper. You cannot read it to the jury. He says, "I suppose."

Mr. Cassini (continuing): The last question is "What did you see?" "A. I saw two little fellows going past the window and crossing the railroad track on the crossing eating ice cream cones. They got across the track and they got onto the bridge that goes over the creek and they were still on the sidewalk and when they came—the little fellow, he was looking at his cone."

The Court: What was the date of that?

Mr. Cassini: I should not have read that. "I saw two little fellows."

Mr. Vanderbilt: That is repetition.

Mr. Vanderbilt: I object to the next question on the ground there is no foundation laid for it.

The Court: What is the question? "Q. What made the misstep, what happened?"

Sustain the objection.

Mr. Cassini: "Q. What made the misstep, what

happened? A. He fell and rolled under the iron grating of the bridge."

Mr. Vanderbilt: That is the same question I am objecting to.

The Court: I will admit that.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Cassini (continuing): "Q. And where did he go, where did he land? A. He landed down under the bridge, probably five or six feet under, because there is a high incline there and he could not stop. Q. He could not stop from rolling? A. No, sir. Q. And where did he roll after that? A. He stopped and got up and tried to walk up the incline, but he could not. Mr. Vanderbilt: There was an objection to that question. The answer being a conclusion. The Court: Let me see the answer. (The court reads the answer.) The Court: I will admit it. Defendant's counsel prays an exception to this ruling of the court. Exception noted as ground of appeal. Q. And you saw him? A. I was within seventy-five feet of him. Q. What happened after that? A. He tried to get up and he got down on his hands and knees and tried to crawl and he could not make it that way, and the abutments of the bridge were like steps, and he tried to get up that way and he got up as far as he could—— Q. And then? A. He got to the top one and turned around and fell. Q. And landed where? A. In the bottom of the creek. Q. Do you know how far it is from the top of the steps to the bottom of the creek? A. I did get a man to measure it, I think he said it was twelve feet, as near as I can tell. Q. It might be more? A. It might be more. Q. What did you do, when you saw that what did you do? A. I had

a police whistle in my pocket and I put it in my mouth and blowed for the crossing flagman to draw his attention that I wanted him. Q. And as a result of that what happened? A. He came out running and I said, "There is a boy——" Mr. Vanderbilt: I object to what was said. The Court: Sustain the objection. Do not tell us what was said. Q. You made a statement to the flagman? A. No statement at all, I only called his attention to the boy that had fell off the bridge. Q. And as a result of that what did he do? A. He went and slid under this opening that the boy had fallen through, it was big enough for a man—— Q. Big enough for a man? A. Yes, big enough for me, and he went down to the bottom, and there were two boys and the father in the meantime, his little brother was with him and he said, "Bobby, I think——" Mr. Vanderbilt: That was objected to. The Court: Do not tell us what was said. Q. The father was down there also with the man whose attention you called? A. No, he was not with him. He got down there after he heard the boy's crying, and he picked up the boy and handed him to this flagman and the flagman took him to that hole under the fence and handed him to a young lady, and the boy was unconscious, I guess." Mr. Vanderbilt: I object to that. The Court: Sustain the objection. Q. And do you know what happened to the boy after he was handed to the lady? A. He was taken to the house. Q. Taken into the house? A. Yes, sir. Q. And that is about all that happened to the boy, you did not see the boy go to the hospital or go in the ambulance? A. No, sir. Q. Can you tell us, Mr. Guyre, with reference to the bridge where this hole or opening was located? A. Well, the full length of the bridge had an iron fence, but

after it left the bridge the fence continued, but this opening was under there—— Mr. Vanderbilt: I object to the rest of that sentence as being a conclusion. The Court: Oh, yes, that is very much of a conclusion. Strike that out. Q. Do you recall the bridge itself, the bridge itself is made of what? A. I have never been on the bridge to examine it, to walk over it. Q. Well, on the sides of the bridge. A. On the sides of the bridge that looks like brownstone. Q. Sandstone? A. Yes, the same as the abutment. Q. Between the bridge and the sidewalk, the opening was between the bridge and the sidewalk, and that would be the easterly side of the sidewalk, under this sandstone wall and the opening, would it not? A. The opening was at the end of that sandstone abutment; still, the iron fence went over that hole, because there was no abutment there, but the hole up on the bridge. Q. To your knowledge how long had that opening been there? A. Well, I lived there three years and I guess it was open all that time. Mr. Vanderbilt: I object to that and ask that it be stricken out as guess work, "I guess it was open all that time." The Court: Strike that out. A. I used to see the boys go from the dumps under there, in and out, I remember that, and I remember probably a week afterwards the place was shut up, closed up. Q. They fixed it a week after this accident? A. Yes, they ran a stone foundation or whatever it was to close that wall up. Q. Do you know the name of the flagman who answered your call? A. Yes, sir, William Penn. Cross Examination by Mr. Ellis."

Mr. Vanderbilt: He is out of the case and I object to it.

Mr. Cassini: It was for the benefit of all parties concerned that this testimony was taken.

Mr. Vanderbilt: With the exception of page 15 I waive.

The Court: I will admit it if it is agreed to, but not otherwise in the face of an objection. You are reading the testimony of a witness whom you have not produced, and as I understand it you are agreeing between yourselves that this testimony is to take the place of his sworn testimony here.

Mr. Cassini: That's right.

The Court: All I can do is to say to you that of course I will admit anything that counsel agrees to, but when there is an objection I have to sustain the objection because this is not being taken in the ordinary way. If you are reading from testimony of the last trial and Mr. Ellis of the City of East Orange cross examined a witness and then the City of East Orange was relieved from any liability by the Court, Mr. Ellis's cross examination I do not think is proper unless Mr. Vanderbilt consents.

Mr. Cassini: At the last case the testimony I am now reading was read and Mr. Ellis was out of the case before the testimony was read.

The Court: That does not make any difference whether that happened. The only thing that concerns me is whether you two gentlemen agree to it or not. It is not a question of whether Mr. Ellis or whether the City of East Orange had been let out, the question is whether you agree to have this put in this way. If you do, very well; but if you do not, it cannot be done.

Mr. Cassini: This particular testimony was taken and both defendants were present. Mr. Ellis cross examined for both and when the representative of Mr. Vanderbilt was asked whether he wanted to ask any additional questions he said "No," or he waived the examination.

The Court: You are not trying this case, so far as this witness is concerned, in the regular way. The witness is not produced for the jury and the Court to see him. You say to us, "Mr. Vanderbilt and myself agree to submit to the Court and jury testimony taken at another place." The jury and I acquiesce, and in the middle of it you say, "We have a little bit of trouble here. I want to put in some testimony and Mr. Vanderbilt says he objects." All you can put in is what you have agreed to put in by this method. If you agree to put it all in we are perfectly willing to have it in. If you have a difference of opinion over it you cannot put it in because the only way it is put in this way is by agreement.

Mr. Vanderbilt: Counsel apparently does not understand my position. The position taken by Judge Ellis, representing the City of East Orange, is entirely different than the County, by reason of its position under the statute can take. We saw nothing to bother us in the testimony of Mr. Guyre and so we did not cross examine, but it does not seem to be fair that Judge Ellis's examination bringing out a different issue should be brought in and made binding on this defendant. Anything we cross examined on we are bound by, but we did not cross examine. We were content to have his testimony go in without cross examination.

Mr. Cassini (Reading): "Redirect examination by Mr. Cassini. Q. How long had the hole existed?"

Mr. Vanderbilt: Where is that?

Mr. Cassini: On page 17, Redirect examination. (Reading): "A. I cannot tell you,——"

Mr. Vanderbilt: If your Honor please——

Mr. Cassini: I have a right to read the redirect

which was directed at Mr. Ellis's cross examination.

The Court: If you cannot agree on this——

Mr. Vanderbilt: I will consent that the redirect examination counsel referred to go in.

Mr. Cassini (Reading): "Redirect examination by Mr. Cassini. Q. How long had the hole existed? A. I cannot tell you, I know it existed the whole time I lived there, three years. Q. Whereabouts were you located at the time you saw these three boys walking up the street with this ice cream cone, with reference to the level of the street? A. Well, it was a bay window the same as this is. Q. And this bay window was as high from the ground as this bay window is here? A. It was higher. Q. How much higher? A. I cannot tell you that—so I could look over the top of the train. Q. Were you on the first floor or the second floor? A. On the second floor of the station. Q. So your view was very clear to this particular spot where the boy fell under the hole? A. Yes, sir. Recross examination by Mr. Ellis: Q. And you say you saw it by looking over the fence? A. Yes, I was high enough so I could look over the top of the fence. Q. And see the hole? A. And see the hole, because the hole extends from the sidewalk on the other side. By Mr. Vanderbilt: Q. How large was the hole when you first saw it, when you first moved there, and how large was it the last time you saw it? A. Of, I can't tell you, I saw boys going under it, and after the boy was hurt I seen a man about as big as I am go under it——"

With reference to the testimony of William Penn, he has since died and I would like to use his testimony.

Mr. Vanderbilt: I did not know that he was dead, but I will take counsel's word for it.

Mr. Cassini (Reading): "William T. Penn, sworn in behalf of the plaintiffs. Direct examination by Mr. Cassini: Q. What is your business? A. Just now it is crossing watchman. Q. What was it on July 19, 1925? A. Why, Mr. Guyre blew a police whistle— Q. What was your business? A. Crossing watchman at that time. Q. What happened on that day? A. Well, that one particular thing in this case— Q. Tell us exactly with reference to this case what you did. A. I was sitting in the shanty and Mr. Guyre being a cripple, blew a police whistle and I ran out and he said, 'Mr. Penn, a child fell off the bridge there' and I ran over towards where this child went off and at that time the father was coming out of the house, and his father came over and I went down the pit and picked the child up and handed him to the father over the top of the fence. Q. Did you see him fall? A. No, I did not. Q. Are you familiar with the creek there? A. Yes. Q. Can you tell us the depth of the creek there at that particular spot where the boy fell? A. Not exactly, I should judge from eighteen to twenty feet; it might be more. Q. You are familiar with the bridge, aren't you ? A. Yes, sir. Q. Can you tell us just exactly where this hole or opening was located with reference to this bridge? A. Well, the bridge runs from the Erie property to Mr. Moffett's property, I should judge about thirty to forty feet along there. Q. The bridge is? A. Yes, the iron fence on the bridge. Q. With reference to the bridge property, where is this hole? A. Well, where the water goes through under the road as between Mr. Moffett's property and the abutment of the bridge. Q. Can you tell us on what side of the bridge, whether it was the south side of the bridge or the north side of the bridge

that this hole or opening was? A. It led directly to the south. Q. The southerly end of the bridge? A. Yes, sir. Q. Was it directly at the end? A. Yes, from the stone abutment to Mr. Moffett's line. Q. Between the end of the bridge and the hole, was that hole directly on the end of the south end of the bridge, or was it in from the south end of the bridge? A. It ran from the end of the bridge south toward Mr. Moffett's, this hole did. By the Court: Q. You have spoken of a railing that runs over the bridge. Does it? A. Yes, sir. Q. Where does it stop? A. On Mr. Moffett's property. Q. That does not mean anything to us. We do not know where Mr. Moffett's property is. A. I should judge from the brook bed it would be about five to six feet. Q. It runs five to six feet south of the brook bed? A. Yes, sir. Q. What comes after that, if you know? A. Mr. Moffett's property. Q. There is no abutment there? A. There is from the bridge going up, a fence line six feet from that to Mr. Moffett's property. Q. So as you approach the bridge it is on your right going north? There is the railing? A. Yes, sir. Q. Where was the hole? A. Off the bridge. Q. Under the south end of the railing? A. Under the railing. Q. At that point how far was it from the bridge to the ground below? A. I couldn't say that, how far it was. Q. There was a drop there, wasn't there? A. Yes, sir. Q. Much of a drop? A. Quite a slope, yes. By Mr. Cassini: Q. This fence continued south over this hole, did not not? A. It did, yes. Q. Do you know how long that hole was there? A. Before I went on the crossing. Q. Was it in the same condition that it was in when you last saw it? A. It was getting worser every day. Q. How long have you been at that crossing? A. Now, nine years. Q. You have known of

that hole to be there all that time? A. Well, it's been filled up the last three years. It is filled up now, in the last three years. Q. It has existed for a long period of time? A. It did, yes."

Mr. Vanderbilt (Reading cross examination of William Penn): "Cross examination by Mr. Vanderbilt: Q. This hole you speak of, as I understand the testimony, was not on the bridge itself, but was on the approach to the bridge? A. Yes, from the abutment of the bridge where these steps go down to the brook bed. Q. Between the abutment of the bridge and the adjoining property of Moffett? A. Yes, sir. Q. In other words, what we call the approach to the bridge? A. Yes, sir. Q. That is not a hole on the bridge property? A. Not on the main bridge, no."

Mr. Cassini (Reading redirect examination of William Penn): "Redirect examination by Mr. Cassini: Q. Was there a red or black iron fence over this large hole? A. Yes sir."

Mr. Vanderbilt (Reading recross examination of William Penn): "Recross examination by Mr. Vanderbilt: Q. That fence has been there all the time that you had known the bridge? A. Yes, sir. Mr. Cassini: Is there any objection to my putting the physician on now? Mr. Vanderbilt: No."

Leo G. Terhune, sworn in behalf of plaintiffs.

Direct examination by Mr. Cassini:

Q. Where do you live? A. 301 Dodd street, East Orange.

Q. You are a chiropractor? A. Yes, sir.

Q. How long have you been practicing? A. Nine years now.

Q. Did you on July 19, 1925, examine Paul Mullin? A. Yes, sir, I did.

Q. Where did you examine him? A. At Mr. Moffatt's house on Brighton avenue, East Orange.

Q. About what time was it? A. Around six, I imagine, in the evening.

Q. Tell us exactly what you found to be the trouble at that time. A. I found the boy in a semi-conscious condition and evidently he was suffering from severe shock, so I advised that he be sent to the hospital and X-rays be taken.

Q. Were there any contusions of any kind? A. Well, on the right side of his chest.

Q. Were there any other contusions or abrasions as far as you know? A. Not that I noticed.

Cross-examination waived.

PHILIP V. FAVA, sworn in behalf of plaintiffs.

Direct examination by Mr. Cassini:

Q. You are a practicing physician of the State of New Jersey? A. Yes, sir, I am.

Q. How long have you been practicing? A. Four years.

Q. On July 19, 1925, what was your business at that time? A. Interne at the City Hospital, Newark.

Q. Did you have occasion to see this boy Paul Mullin while you were an interne at the City Hospital? A. Yes, sir, I did.

Q. Did you examine him at that time? A. No, not on the 19th of July.

Q. Any other day? A. The next day, July 20th.

Q. What did you find to be the trouble with the boy? A. Well, at about two o'clock that day of

July 20th, I saw the boy on our surgical ward. When I examined him he appeared to be comfortable, rational, that is, not unconscious, and from the history I obtained he had had a fall and I naturally suspected some head injury and the routine is, of course, in those cases to X-ray the skull.

Q. Did you find some blood tumor? A. Yes, he had a hematoma, a blood tumor.

Q. Whereabouts was that hematoma? A. I believe, I don't remember now, on the right side, if I am not mistaken.

Q. Was it the right side? A. I don't remember.

Q. What was the nature of the hematoma? A. Well, a blood tumor is sustained in any injury to the head, it doesn't mean much, but underneath that of course there may be a fracture of the skull and it is often contused.

Q. You had an X-ray taken, did you not? A. I did. I ordered an X-ray picture of the skull.

Q. What did the X-ray show? A. A positive fracture of the parietal bone on the left side.

Q. What kind of a fracture was that? A. A type of fracture described as a linear fracture.

Q. Did you keep him under observation then? A. I believe we kept the boy some three or four days under our observation, yes.

Q. What is your treatment in a case of that kind? A. In the conscious state, of course, like this boy was, the diet merely consists of water, the most part milk, a light diet and in case they are unconscious naturally we cannot feed them an awful lot. We have to wait until they come out of their unconsciousness, if they ever do.

Mr. Vanderbilt: I object. This boy was not unconscious, was he?

A. I just simply mention that——

Q. You saw the boy several days after the injury the first time? A. Yes, sir.

Q. Can you tell us whether this fracture was a fracture of the inner or outer table of the skull? A. On physical examination that is impossible.

Q. Would the X-ray— A. The X-ray might show it, yes.

Q. If the picture is large enough. What is the result then?

Mr. Vanderbilt: I object to that on the ground no foundation has been laid for that question.

The Court: I think the question is ambiguous. If the fracture is large enough. I think that should be confined to the identical fracture he found in the case he examined.

Q. What other symptoms were there, Doctor? A. At that time, you mean?

Q. Yes, A. Well, I found evidence of bleeding from the nose and on physical examination the pupils—we go over their reflexes and of course under the term reflexes we mean the pupils and reflexes, all of that sort of stuff. The pupil examination revealed no divergency from the normal; that is, both pupils reacted well to light and distance, and the knee jerks were present and not in any exaggerated state as you would find sometimes in a fracture of the skull.

Q. Were there any brain symptoms? A. I believe the boy was suffering a severe headache.

Q. Anything else that you recall? A. No. I don't remember anything else.

Q. Did he eventually go home? A. Yes; after four days he was taken home by his parents; they

had signed a release, as we say, and had removed him against our advice.

Q. Would you say at the present time the boy is entirely well?

Mr. Vanderbilt: I object unless he knows.

The Court: Sustain the objection. I do not know that he has examined him recently because he is now being questioned, as I understand it, as to an examination made on July 20, 1925.

Q. Have you examined the boy recently? A. Not within recent years. I did, at our last testimony two years ago, I saw the boy, and from my observation he looked well.

Q. What was your prognosis in this case? A. Well, can I state that generally?

Mr. Vanderbilt: This case.

A. I mean any particular case, including this case.

Q. In this case. A. This boy might be subject to headaches, dizziness, vomiting spells, disturbed sleep, as we say, insomnia, and epilepsy might be a late symptom.

By the Court:

Q. You will have to confine yourself to probabilities and not possibilities, Doctor, so just do that, will you? A. My answer, that being so, for a brain injury, presupposes some injury to the brain tissue from a skull fracture, whether it be slight or a great deal, and if that is so every brain injury presupposes an injury to the brain and the question is how much injury was there. At the time I saw the boy he was conscious, he was rational, and then after four days he was taken

from the hospital, and what happened after that I couldn't say.

By Mr. Cassini:

Q. Assuming that a boy of this boy's age was brought to you for examination and you found this hematoma and the X-ray examination showed a linear fracture, what are the probabilities of an injury of that kind? A. I believe I just stated the probabilities, dizziness, chronic headache and disturbed sleep, loss of appetite and in extreme cases of brain injury traumatic epilepsy.

Cross-examination by Mr. Vanderbilt:

Q. When you saw the boy first in the hospital he was conscious? A. Yes, sir.

Q. Rational? A. Yes, sir.

Q. Suffering from a simple or compound fracture? A. Simple fracture.

Q. No brain symptoms? A. Not at the time I saw him.

Q. No bleeding through the ears? A. No bleeding through the ears.

Q. No bleeding from the nose? A. No bleeding from the nose.

Q. A little bleeding through the nose on the second day? A. Yes, on the second day.

Q. Discharged by you? A. No, not discharged by me.

Q. He went out of the hospital after three days? A. He was removed against our advice after three days.

Q. You saw the boy a couple of years later? A. Two years later.

Q. When you saw him two years later you did not see any evidence of epilepsy, did you? A. No, sir.

Q. Or insomnia? A. That you cannot see.

Q. He looked like a normal boy? A. Yes, but he complained——

Q. Never mind that. He looked like a normal boy and acted like a normal boy, didn't he? A. Yes, sir.

JOHN A. MOFFITT, sworn in behalf of plaintiff.

Direct examination by Mr. Cassini:

Q. Tell us where you reside. A. 107 Brighton Avenue, East Orange.

Q. What is your business? A. United States Commissioner of Conciliation in the Department of Labor, Washington.

Q. Is your residence close to this bridge? A. About ten yards.

Q. You mean ten yards or ten feet? A. Ten feet.

Q. Do you know what the main bridge proper is composed of, alongside of your house? A. Brown stone.

Q. Describe to us exactly the bridge to the north of your property, as you recall it. A. The brown stone bridge extends from the Erie Railroad to my property.

Q. This brownstone bridge, describe it to the jury and tell the jury just exactly as you walk along Brighton avenue what you see of it. A. Going either way, north or south?

Q. Yes. A. On the top of the brownstone part of the bridge, there is an iron railing, an iron fence about three feet high imbedded in the top of the bridge. When it comes to the southern point of the bridge that fence extends out about three and a half to four feet and is supported by

what might be termed an iron bar. This four feet of fence does not rest on the bridge.

By the Court:

Q. This three or four feet is supported by what? A. I should term it an iron bar about an inch thick imbedded in concrete.

By Mr. Cassini:

Q. That is one continuous fence, is it not? A. Continuous fence.

Q. The same fence that you say is imbedded to the north and south of the main bridge proper is the same fence over the bridge? A. The same fence is over the bridge.

Q. Can you tell us the depth of this brook from the center of the bridge to the bottom level of it? A. Approximately 18 feet.

Q. It might be fourteen? A. That is approximately.

Q. Can you describe to us this hole or opening that was located in this bridge or this approach? A. The only description I can give is, as I say,——

Mr. Vanderbilt: I object to that question on the ground it is ambiguous and no foundation has been laid for it, no proof.

The Court: Sustain the objection. First of all I think it should be asked whether he knew the conditions there at the time and find out whether he knew there was any hole there.

Q. Was there a hole or opening in this bridge? Was there, yes or no. A. Not to the bridge, no.

Q. Was there a hole or opening in any portion of the bridge or its approaches or abutments?

Mr. Vanderbilt: I object to the question on the ground it is ambiguous. The witness has already answered as to the bridge.

The Court: Sustain the objection. Ask him where the hole was.

Q. Where was this hole? A. The hole was under the fence, it was the approach to the bridge, under that three and a half feet I am after describing, under that fence.

Q. How big a hole was it? A. I should judge large enough for a man 150 pounds to go through easy enough.

Q. Were did that opening lead to? A. It led to the bottom of the brook.

Q. If you were standing against the fence, facing east, how far did that hole extend, or the opening extend from the fence? A. Standing east looking down into the hole?

Q. No. Standing east with your back against the fence how big an opening?

The Court: You mean standing on top of the hole?

Q. Yes, or how far did this opening extend east from the fence?

Mr. Vanderbilt: If you stood up against the fence how far toward the sidewalk did the hole go?

Q. Yes, how far did the hole extend east of the fence?

Mr. Vanderbilt: Toward the street?

Q. Yes. A. How far did the hole extend east from the fence to where?

Q. Toward the street. A. About 18 inches.

Q. You saw this hole there, did you? A. Yes, sir.

Q. For how long had you seen it there? A. Oh, a couple of years prior to the time the city fixed it up.

Q. When was it that it was fixed, do you know? A. About a week after the accident occurred.

Q. At the end of the bridge is an iron girder, isn't there? A. I would hardly call it a girder, it is an iron rail about one inch thick that separates the fence.

Q. How does that fence run? A. North and south.

Q. On what does the fence rest? A. Part of the fence rests on the top of the bridge. Four feet of the fence is carried on by a rod, as it might be termed, an inch thick and then separated at the end again by another rod imbedded in concrete an inch thick.

By the Court:

Q. There was nothing the matter with the fence, was there, as far as the structure was concerned? It was all right? A. Nothing the matter with the fence. It was under the fence there was a hole.

By Mr. Cassini:

Q. By the way, is the span of that bridge from one abutment to another, what is the bases of it, the roadway part of it? A. The roadway part is brownstone covered with concrete, the roadbed.

Q. Is there a sidewalk on the sides? A. On both sides.

Q. That rests on the same sort of foundation? A. Yes, sir.

Q. How far does that foundation extend? Do you know, at the end, not the foundation but the base you talk of.

Mr. Vanderbilt: You mean the abutments?

Q. I don't know how to describe it. I have in mind the span. If this end of the bridge and the approach begins here (indicating)——

Mr. Vanderbilt: Maybe I can clear that on cross with the aid of these photographs.

Q. Has this bridge any side walls, as you would call them? A. None.

Q. Is there any projection of this bridge that goes in a westerly direction; I mean now the sandstone or brownstone as you would call it? A. Well, the abutments, they extend out at the top about, I should judge, a foot and a half, then, it goes down in step formation to the bottom and then extends out from the bridge about 30 feet.

Q. Can you tell us if that abutment or step formation you talk of, whether that is directly straight or not? A. Directly straight. Pardon me, what do you mean by directly straight, up and down?

Q. I mean does it go east and west? A. It goes west.

Q. Is it a 90 degree angle from the main bridge? A. I should say so.

Q. Isn't it a fact that that abutment or step formation, the end of that abutment or step formation, is closer to your house than the bridge proper, if a line were drawn from the main part

of your building? A. Yes, the bottom of that abutment would be closer.

Q. So that the abutment, or brown sandstone step formation referred to slopes to the southwest, isn't that so from the main bridge? A. I wouldn't say so. I would say directly west.

Q. I am referring to the step formation. Wouldn't it be southwest? A. Well, it might be termed by some southwest, but I would term it west, myself.

Q. Now, can you tell us what caused this hole or opening that was under this fence? A. No.

Q. Have you any idea what caused it? A. Rain, probably, the elements.

Q. So, this hole was caused by lack of dirt? A. Lack of earth.

Q. Do you recall this particular day, July 19, 1925? A. Very distinctly.

Q. What was that? A. A Sunday afternoon.

Q. Tell us exactly what you saw and what you did. A. The father of Paul Mullin and his mother and brother Robert came to my home as my guests for dinner.

Q. Who is Robert? A. Since died, a brother of Paul, and while we were at dinner the little boy came running into the house and said that Paul had fallen into the brook. His father and I started out, we were looking for Paul, and he was laying down at the bottom of the brook in a lot of cobblestones. His father jumped down to the brook and lifted the boy up to Mr. Penn, a flagman of the Erie Railroad, since dead, and Mr. Penn handed him up and we brought him into my home and laid him on the bed and sent for the nearest doctor I could get.

Q. What doctor did you send for? A. Dr. Terhune. He made three visits to our home that night

and suggested that the boy be sent to the City Hospital, which was done.

Q. Did you see the boy yourself immediately after he was taken from the brook? A. Yes, sir.

Q. What was the condition of the boy? A. I would say the boy was unconscious, and he was vomiting something like—it was running out of his mouth, with no force to bring it up, something like blood, a dark substance coming out of his mouth.

Cross-examination by Mr. Vanderbilt:

Q. I show you a photograph and I ask if you are familiar with that location. A. Yes, sir.

Q. Does that show the west side of the bridge? A. Yes, sir.

Q. I call your attention in particular to the part marked X. Does that indicate the spot— A. That is the spot where the hole was.

Q. Where the hole was, but where you say the city filled it up a few days after the accident? A. Yes, sir.

Q. Your house is to the right-hand side of this picture? A. Yes, this way (indicating).

Q. This shows the bridge with its brownstone or sandstone arch and two supporting columns. A. Yes.

Q. These abutments and these abutments (indicating) are in step-like formation? A. Yes, sir.

Q. Beyond the southerly abutment was this hole? A. Yes, sir.

Q. Which has since been filled in with earth, stone and concrete. A. Yes, sir.

Q. Running from the southerly abutment to your line was this fence, is that right? A. Yes, sir.

Mr. Vanderbilt: I ask to have this photograph marked for identification.

(The same is marked D-1 for identification.)

At one o'clock p.m. the court takes a recess until two o'clock p.m.

After Recess.

Q. This hole you are testifying about which is now shown filled up with this rough rock and concrete which you said was put there by the City of East Orange, that lies between the southerly abutment of the bridge and your property line to the south of the bridge, doesn't it? A. Yes, sir.

Q. That is the four feet of space you were referring to as being between your property line and the bridge. A. About four feet six inches.

Q. Referring now to the southerly side of the south abutment and your property line. A. Yes, sir.

Q. Now, I show you another photograph and I ask if you recognize this. This other one was the one I first showed you. You recognized that. A. Yes, sir.

Q. Is this the same picture taken on a smaller scale showing the southerly abutment and the place where the hole has been filled up with rough stone and concrete? A. This it is here (indicating).

Q. Now, I call your attention to these rods on the right-hand side of the concrete. Are those the iron rods you refer to as supporting this fence? A. Yes, sir.

Q. That led from the abutment, in a southerly direction, to your property line? A. No, this iron rod doesn't come down as far as—the iron rod only comes about to here, that supports the fence (indicating).

Q. Near your property line? A. From my property line about eight to ten feet.

Mr. Vanderbilt: I ask to have this photograph marked for identification.

(Same is marked D-2 for identification.)

Q. Does D-2 for identification correctly represent the fence as it ran across the bridge, across the abutment of the bridge and then as it continued on beyond for four feet or so? A. Yes. Here is where the fence stops on the bridge (indicating).

Q. Referring to the curl over the south side of the southerly abutment. A. Yes, then an extension of that fence runs four and a half feet south and is supported by a little iron post.

Q. That is the iron post which is shown here (indicating)? A. It is here (indicating).

Q. Yes. A. I wouldn't say so, because it runs down there (indicating).

Q. The iron post is imbedded there in concrete? A. Yes, sir.

Re-direct examination by Mr. Cassini:

Q. This picture D-2 for identification shows this step formation? A. Yes, sir.

Q. Of this bridge? A. Yes, sir.

Q. Will you tell us whether or not that is a ninety-degree step formation, sandstone, with the bridge proper?

Mr. Vanderbilt: I object because it probably misleads the witness. It is misleading to me. Ninety degrees to what?

Q. I want to know whether or not this particular step formation, sandstone blocks located in

this picture, whether that formation is ninety degrees with the sandstone bridge that runs north and south over Brighton avenue.

The Court: Ninety degrees on top of the lower part of the step?

Mr. Cassini: Whether it is ninety degrees in here where it meets the main portion of the bridge (indicating).

The Court: I do not know what you mean yet.

Q. Does that step formation, sandstone, which leads from the top of the bridge down to the brook, does that slant to the west? A. It slants to the southwest.

Q. So that it is not absolutely a ninety degree angle with the bridge? A. I couldn't answer your question on the question of angles. I know what an angle means, but in this instance I can say that the bridge runs from the top and extends southwest.

Q. I show you Exhibit D-1. Can you tell us whether or not this side wall built of sandstone, can you tell us in what direction that side wall slopes? Does it slope to the south or to the north? A. It slopes to the southwest.

Q. So that wall is not built in a right angle, or it does not form a right angle with the main portion of the bridge, does it? A. No, it does not, it runs off.

Q. It runs off in a slope? A. Yes, sir.

Q. Can you tell us about how much of a slope, or how much to the south the slope of that side wall is with reference to a point here (indicating) where it joins the main bridge? A. It leads off to the southwest at the bottom here, about I should judge three and a half feet.

Q. So that if a line was drawn, or if a straight line was run from the edge of the southerly portion of this iron fence to a point down in the bottom of the brook would it meet with the stone wall of the brownstone wall fence? A. I should say so.

Q. Did this hole, referred to in this picture, extend to the most southerly point of the fence in this picture? A. Yes, sir.

Q. You cannot be guided by this picture because this picture shows a filling there, but I mean prior to this filling was that hole to the full extent of that iron fence, if you recall, at that time? A. I cannot say positively.

Mr. Vanderbilt: I offer the photographs in evidence.

Mr. Cassini: I object to them unless we have some evidence as to what location those pictures were taken from. We haven't any evidence of that kind at all. We merely have two pictures and we do not know where they were taken from.

Mr. Vanderbilt: Mr. Moffitt identified them as being accurate.

The Court: There isn't any objection of their being pictures?

Mr. Cassini: Yes, with the exception that it does not show the relative position of the walls and I want some testimony as to that.

The Court: The party who is offering them does not have to give you all the testimony of the walls. It is whether the pictures are evidential. The only thing I see about them that is objectionable are two wild ducks under the bridge. If it is agreed

that they are accurate representations, the various photographs, I will admit them.

Mr. Cassini: This does not show the accuracy of the slant of the sandstone wall. This picture was taken from an angle wherein it would appear this would be a straight wall while it is not.

Mr. Vanderbilt: Counsel is now referring to D-2 for identification, and the purpose of that photograph being to get a closeup of where the hole had been.

Mr. Cassini: This is taken from a point so far away from the bridge that it does not show the side walls.

Mr. Vanderbilt: Yes, but it is just as the witness described them on cross examination, extending back in sort of a slight V formation.

By the Court:

Q. Are these two pictures accurate representations of the place that was photographed? A. I should say so.

The Court: I will admit them.

Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Exhibits D-1 and D-2 for identification are received in evidence and marked Exhibits D-1 and D-2, respectively.)

WILLIAM D. WILLIGEROD, sworn in behalf of plaintiffs.

Direct examination by Mr. Cassini:

Q. What is your business? A. City Engineer of East Orange.

Q. How long have you been City Engineer? A. About nineteen years.

Q. Are you familiar with this bridge on Brighton avenue? A. In general, yes.

Q. Did you make any repairs to this bridge on Brighton avenue? A. No, sir.

Q. Did you have any repairs made? A. No, sir. We threw some concrete or stone, or a mixture of the two in a hole beneath the fence, but I wouldn't characterize that as repairs to the bridge or anything else.

Q. When did you do that? A. I suppose within a week or so of the accident.

Q. You had something done to the bridge, I mean to the filling there? A. There was the hole which had been opened by the passage of folks getting under this fence, and we simply barred their further passage, it being understood that the going through there had been directly or indirectly the cause of the accident, and we barred that, knowing that to be a thoroughfare, and thought it best for the public to have it closed.

Q. You think that caused the formation of this hole? A. I don't know what caused the formation of the hole. I assumed from the surrounding circumstances, the path leading there from along the south bank to the westward part there and boys were seen to go through there constantly, and apparently they created that little hole burrowed under the fence.

By the Court:

Q. Is any part of that related through personal experience? A. No, I have never gone under the fence myself.

By Mr. Cassini:

Q. Do you know whether or not any member of the Board of Chosen Freeholders of the County of Essex repaired that bridge?

Mr. Vanderbilt: I object to that as immaterial and this witness is not competent to say.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

Q. Can you tell us whether or not the County of Essex or the Board of Chosen Freeholders repaired that bridge on Brighton avenue?

Mr. Vanderbilt: I object to the question for the same reason.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

Q. Can you tell us whether or not by an examination of this picture, whether or not that fence is a part of this bridge?

Mr. Vanderbilt: I object as misleading because that fence may refer to the fence which plainly crosses the bridge, or it may refer to the fence which extends beyond the bridge. Mr. Moffitt has testified there were two fences there.

The Court: Mr. Moffitt said there was a three-foot fence imbedded on the top of the bridge, and this fence extended three and a half to four feet south of the bridge, but did not rest on the bridge, but was supported by an iron bar imbedded in the concrete. Direct your question to that part of the fence.

Q. I am now showing you Exhibit D-2, and I ask you whether or not the portion of the fence indicating the girder here on the bridge proper to this point, indicating the southerly part of the fence, whether that portion of the fence is a part of the bridge proper?

Mr. Vanderbilt: That is objected to because it calls for a conclusion of law. What is a bridge has been defined for us not only by the County Home Rule Act, but also in the case I referred to this morning, and it is not competent for this witness to give his own definition of it.

The Court: Has there been any change in the law since 1888, as to the definition of a bridge, or the way the term bridge is used?

Mr. Vanderbilt: No, not in reference to county bridges. Chapter 185 of the Laws of 1918 assembles all the 300 or 400 acts that govern the county prior to 1918. That is on page 612. Brighton avenue is admitted to be a public highway of the City of East Orange and applying that fact to this definition the county is not responsible for the approaches.

(Argument.)

The Court: The legislature made a sharp distinction. They have indicated, apparently, that the bridge proper ceases where

the public road begins. That is what I would think by reading that section of paragraph 1315 of Chapter 185 of the Laws of 1918, in connection with this opinion by Justice Dixon in 54 Law.

(Argument.)

Mr. Cassini: This fence extends and is imbedded in the main bridge or structure of this bridge and continues off this bridge five or six feet. It is the same fence and put there by the same people who put the original fence over the bridge.

Mr. Vanderbilt: There is not a word of that in the evidence.

The Court: No, and I do not think counsel for the plaintiffs knows that.

Sustain the objection.

Plaintiffs' counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. I show you Exhibit D-1 and I ask you whether or not the side walls projecting from the main bridge, whether they are at right angles with the bridge proper or whether they slope to the north or south of the bridge? A. I take it your question refers to what I term a wing wall springing out to the westward on the southerly end of the arch of the bridge and along the bank of the stream over which the bridge spans, and I would say from the picture that wing wall is very close to a right angle to the direction of the span of the bridge, probably within, certainly within five or ten degrees of a right angle.

Q. I show you the other side of a wing that you call side wing of the wall, and I ask you whether or not that is a ninety degree angle.

Mr. Vanderbilt. Referring to the north wing, running west.

A. From the angle at which this picture was taken I would say they have about the same direction in respect to the line of the main stem of the bridge there, nearly a right angle.

Q. So that from this picture, from the position this picture was taken you would say that forms a ninety degree angle? A. I would not say that from that picture exactly. I say that it is undoubtedly within ten degrees of a right angle and of course a right angle is ninety degrees as measured from its base.

Q. How much difference would there be in ten degrees north or south, how much difference would it be in feet, if you know? A. That cannot be answered that way. An angle is a divergence of two lines and you cannot measure it by any dimension unless you have given the distance from the intersection of those two lines at which you want to take the deflection of the two lines. Of course there is a deflection as the two lines converge. Whatever we establish as that point I cannot tell that unless I can make a computation; I cannot tell you offhand how much that linear deflection is.

Q. Can you tell us what the distance of the side wing wall is from the main bridge?

Mr. Vanderbilt: At the top or bottom?

Q. The whole thing, the length of it. A. I have to put that in my own language. The wing wall travels from the main structure westerly along the back of the stream. As it travels westerly this top stoops down so that at the top it doesn't extend away from the bridge at all, it starts there

(indicating). Now, at the bottom I have no way of telling except a guess from this picture.

Q. I don't want you to guess. A. That's all I can do from this.

Q. When did you last see this bridge? A. I saw it yesterday.

Q. Isn't it a fact from an observation of this picture that the slope of this side wing to the north, the north side wing is very much to the north whereas the south side wing does not appear to slope very much according to the picture? A. You mean diverges parallel to the stream?

Q. No, diverges from the angle formed here (indicating). A. I am trying to answer your question. I take it you mean a divergence horizontally from a given direction north or south or a fixed direction. If that is the accurate interpretation of your question, I would say no. The two wing walls appear down here to have the same direction in relation to the line of the bridge.

Q. From an observation of this picture D-1, looking at the north wing, the north side wing of this bridge, doesn't the picture show you that that side wing faces a great deal more to the north than the side wing on the south portion of this bridge slopes to the west? A. No, sir.

Q. From your personal examination of this picture? A. No, sir, it does not.

Q. Would you say that this picture represents a true and accurate picture of the side walls as they are now located? A. It hasn't been changed since the picture was taken.

Q. Wouldn't the side wing or wings of this particular bridge shown in this picture, depend entirely from what position this picture was taken? A. No, the relation of any factors on the ground are not affected by the location of the

camera in taking a picture. The appearance of the picture may be verified by the camera, but their actual relation, of course, is not changed in the picture.

Q. Is this fence continuous from the bridge to what distance? A. Well, I would say this is an iron fence on the top of the bridge along the parapet wall on the west side of the bridge.

Q. Did that continue from the north side to the south side? A. There is only one fence there and such fence as is there is a continuous fence.

Q. Does this bridge and this fence span the stream?

Mr. Vanderbilt: I object to that question because it is ambiguous and misleading. I think the two elements should be separate.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

Q. The iron fence goes all the way across the bridge? A. I would say so, yes.

Q. It starts at one abutment and goes across to the other abutment, is that right? A. I would say that while the abutments are largely hung beneath the surface of the ground and therefore their extremities cannot be seen either in the picture or on the surface of the ground.

Q. From your recollection? A. The fence appears to me to extend from a place above the south extremity of the southerly abutment to a place above the north extremity of the northerly abutment.

Q. Does it go beyond that? A. I don't believe so.

By Mr. Vanderbilt:

Q. Well, do you know? A. As I explained it in my last answer that cannot be determined except by digging down and exposing the entire abutment.

Q. Have you done that? A. No, sir.

Mr. Vanderbilt: Then, I move to strike out the answer as being guess work, that part of the answer not based on his own knowledge.

By the Court:

Q. Do you know that as a fact? A. No, sir, I say it appears to.

The Court: Then, I will strike it out.

By Mr. Cassini:

Q. What did you refer to? A. On this picture D-2 there is shown on the left side a portion of a stone arch bridge or the parapet wall and wing wall of the bridge and surmounting them an iron fence which extends several feet to the south of the southerly side of the wing wall at the south end of the span or bridge. That fence entends south to a point which my former answer was intended to indicate, so far as the surface conditions would suggest or show.

Q. Does the south wing wall of this bridge project to the west as far as the end of this fence, if you know? A. The fence does not have a west end, but has a southerly end and a northerly end.

Q. I am talking now of the southerly end of the fence. A. No, as I explained in my last answer, the fence extends south along the side of the

street from the wing wall and the end of the parapet wall.

Q. How far does the end of the wing wall extend south? A. The wing wall travels east and west, not north and south, that is its width, about two or three feet, it extends on the east and west, as I understand the direction there.

Q. I show you D-1 and I ask you whether or not the southerly wing wall extends to the southwest from the main bridge. A. That question was asked before and answered by me. I answered that it has no substantial diversion from a right angle to the line of the span of the bridge which is also the line of Brighton avenue.

Q. What is the direction of that bridge, the course of the water stream at that point? A. The course of the stream that is spanned by the bridge is substantially east and west. Of course in spanning that stream it has a direction in the direction of the span, north and south substantially. The bridge carries Brighton avenue over the stream and the stream is an east and west stream.

Q. With reference to this bridge where was this hole or opening? A. It was under the fence, which fence is along the westerly side of the bridge, and was immediately south of the end of the parapet wall upon which the fence largely rests and also immediately south of the wing wall of the bridge.

Q. Is there any approach to this bridge at all from the south? A. I would say there is no approach to that bridge, no, sir, none necessary; that is in the sense that we speak of a bridge approach.

Q. Was this just one span? A. The bridge spans from a sandstone cliff to the south to the railroad embankment, which was there before the

bridge was built on the north, and there was a casement to be spanned and there was therefore no occasion to have an artificial structure to carry one from the highway to the bridge structure.

Q. So, there is no approach to this bridge at all. A. That is what I would say.

Cross-examination by Mr. Vanderbilt:

Q. I show you Exhibits D-1 and D-2 and I ask you where this X appears if that is the place you caused to be filled in with stone and concrete after this accident? A. Yes, sir.

Q. Where the X is there is where the hole was at the time of the accident? A. Except that the X isn't big enough on the picture to cover it.

Q. I say where the rough stone and concrete is shown is where the hole was?

Mr. Cassini: I object unless he knows where it happened.

The Court: Objection overruled.

Q. You had the hole filled in as City Engineer of East Orange, didn't you? A. No, sir.

Q. Did you do it as a private citizen? A. Yes, sir.

Q. Who paid for it? A. I don't think the expense amounted to anything.

Q. You cannot get anything done, concrete and stone, without paying for it these days, can you? A. Oh, yes.

Q. Maybe the City Engineer of East Orange can, but the ordinary layman cannot. A. Yes, that is a small amount.

Q. Who put that in? A. The foreman of our road department.

Q. Under your directions? A. Yes, sir.

Mr. Cassini: I object.

Q. I call your attention to the fence as shown on D-2 and I ask you to notice that the fence from the left over to the end of the wing wall has a curve on it, and there is an upright, a sort of buttressing and supporting rod there too, then we go on and there is another piece of fence. Aren't those two separate and distinct fences? A. No, sir.

Q. What was the hook or curve put in there for? A. That is only a curve that goes to make up the fence, this is only the one piece of the structure, not a termination or end of the fence at all.

Q. What was that put in there for, can you tell us? A. No, sir, I cannot.

Re-direct examination by Mr. Cassini:

Q. Why did you fill in this hole? A. In the same spirit and same motive that I would get out of a car and move a boulder from the middle of the road if I saw one there, or if I saw the cover off a manhole I would stop and put the cover back on and I would do that as a private citizen or as the agent of the city.

Q. Were you ordered by the City of East Orange to fill this hole in? A. No.

Q. You did that of your own free will? A. Yes, sir.

Re-cross-examination by Mr. Vanderbilt:

Q. In the performance of your duty as City Engineer of East Orange? A. No, sir.

Q. You did not do that as Mr. Willigerod, the private citizen, did you? A. Just as much that as in the performance of my duty as City Engineer.

Q. You would not have done it if the bridge had been down in Newark, for example. A. I would have corrected anything of that kind I found existing anywhere, the same as you would if you were going along a highway and saw the cover off a manhole and thought a human might fall into it, you might be at that time engaged by the county, but I wouldn't consider that you were performing your duty for the county when you did that. It is an extraordinary thing and you are justified in doing it; it is a duty of public welfare.

Q. You never called this to the attention of any county authority?

Mr. Cassini: I object as immaterial and irrelevant.

The Court: Sustain the objection.

GENEVIEVE MULLIN, sworn in behalf of plaintiffs.

Direct examination by Mr. Cassini:

Q. You are the mother of Paul Mullin? A. Yes, sir.

Q. Do you recall what took place on July 19, 1925? A. I do.

Q. Tell us what it was that took place. A. It was on Sunday afternoon about five o'clock we were just about finishing dinner and my little boy Robert seemed scared and came in and told us that his brother Paul fell in the brook and my husband and my father were there at that time and they went out to the brook and in a few minutes my husband came in and had Paul stretched out in his arms. He appeared to be unconscious, he didn't know us, and we put him upstairs to bed.

He was a terrible color and he was blue and yellow, and vomiting constantly.

Q. Do you know anything about his eyes? A. Yes, his eyes were rolling.

Q. Did he recognize you? A. He didn't seem to know us.

Q. Did he talk to you? A. No.

Q. How old was Paul? A. He will be seven tomorrow.

Q. How old was he then? A. Two and a half.

Q. Did you do anything with him? The doctor came that day? A. No, the doctor told us to keep him perfectly quiet. The doctor saw him three or four times up to midnight.

Q. That same day? A. Yes, sir.

Q. Did you get a bill from Dr. Terhune? A. Yes, sir.

Q. Have you paid the bill? A. Yes, I did, it has been paid.

Q. How often did the doctor come in that day or that night? A. Three or four times.

Q. That was Dr. Terhune? A. Yes, sir.

Q. What happened the next day? A. The next morning they took him to the hospital in a taxi.

Q. What made you take him to the hospital? A. Dr. Terhune said he should go to the hospital, and in the meantime I had a sister who is a graduate nurse at the City Hospital and she saw him and she advised me to take him there because she would be with him.

Q. Did you leave the boy at the City Hospital? A. Yes, he was there four or five days.

Q. Why did you take the boy out of the hospital? A. He was crying all the time and the doctor said it was very bad for his head, and he advised us to take him home and put him in his crib and we did and kept him in his crib for six weeks.

Q. Who took care of him then? A. I did.

Q. How did you take him home from the hospital? A. In a taxi. My sister, the nurse, took him home.

Q. Did you call in another physician? A. Yes, sir.

Q. Who did you call in? A. Dr. Cassini.

Q. Did he take care of him after that? A. Yes, he came in to see him.

Q. How many days did you keep him in bed? A. We kept him in his crib for six weeks.

Q. Do you know what the condition of the boy is now? A. Yes, very cross and irritable at times.

The Court: She can tell us how he acts.

Q. How did he act? A. Very cross and irritable, and has headaches and at times complains of a sharp pain in the head and seems to want to sleep all the time; he is very dopey.

Q. How often during the week does that happen? A. Some weeks two or three times a week and sometimes he goes for weeks feeling pretty good.

Q. Is there any other condition you observe about him? A. No.

Q. How about his hearing? A. Sometimes I think he is deaf, because I have to repeat several times before he hears me.

Cross-examination by Mr. Vanderbilt:

Q. Do you think that is due to deafness or an ordinary trick of boys who do not like to hear things at times? A. I think he is deaf.

Q. Did you ever try to come up behind him and see if he responds to the clicking of fingers or anything like that? A. No.

Q. You think he is deaf because he does not pay attention to you at times. A. I wouldn't say that.
Q. Is the boy here in Court? A. Yes, sir.

Adjourned to Monday, February 24, 1930, at ten o'clock a.m.

NEW JERSEY SUPREME COURT

ESSEX CIRCUIT

February 24, 1930.

Mullin vs. *Board of Freeholders.*
Second Day

Continued pursuant to adjournment.
Counsel present as before stated.

CHRISTOPHER E. MULLIN, one of the plaintiffs, sworn in his own behalf.

Direct examination by Mr. Cassini:

Q. You are the father of Paul Mullin? A. I am.
Q. Do you recall the 19th day of July, 1925? A. Yes, sir.
Q. Do you recall what happened that day? A. We were having supper and my boy fell into the brook under the bridge.
Q. Did you see the boy fall into the brook? A. Not fall in, no, sir.
Q. Did you hear about it? A. My son came in and told me that my boy was in the brook.
Q. When he told you that what did you do? A. I ran out and saw him laying at the bottom of the brook on top of rocks.

Q. Did you pick him up out of the brook? A. Yes, sir.

Q. Who was there with you when you did pick him up? A. Mr. Penn and my father-in-law, Mr. Moffitt.

Q. After you took the boy out of the brook what happened then? A. I gave him to Mr. Penn and then took him up again and laid him on the bed and my father-in-law called the doctor in.

Q. Then the doctor came. Who was the doctor? A. Dr. Terhune.

Q. I show you Exhibit D-2 and I ask you whether or not that step formation, brownstone formation is a ninety-degree angle wtih the bridge proper. A. I shouldn't think so.

Q. To what direction does it slope? A. More to the west.

Q. Have you any idea of how much it slopes to the west? A. Well, considerably.

Q. I show you the fence over this hole, and I ask you to the east of that fence how far this hole or opening extends, if you know, to the east of the fence. A. You mean the brownstone?

Q. Here is the fence (indicating). This is Exhibit D-2. The fence is shown on Exhibit D-2. To the east of that fence how far did this hole or opening extend? A. About two feet.

Q. How far from the sidewalk? A. About six to eight inches.

Q. I show you the fence over the bridge and extending beyond the bridge, and I ask you whether or not that is a continuous fence. A. Yes, sir.

Q. What happened to the boy after Dr. Terhune treated him? A. We kept him over night at his grandfather's house and took him to the hospital.

Q. When did you take him to the City Hospital? A. I believe it was the next day.

Q. How long was the boy in the City Hospital? A. About four days.

Cross examination by Mr. Vanderbilt:

Q. Referring to Exhibit D-2, what is that curve that comes along that fence about at the southerly end of the southerly abutment, do you know? A. That is an ornament.

Q. An ornament there in the middle of the fence? A. Yes, sir.

Q. There are a couple of uprights right at that point, are there not? A. Yes, sir.

Q. Is that your boy (indicating)? A. Yes, sir.

WILLIAM D. WILLIGEROD, recalled in behalf of plaintiffs.

Direct examination by Mr. Cassini:

Q. Have you examined this bridge? A. I have seen it a number of times.

Q. When did you see it last? A. Twice within the last four days.

Q. I show you Exhibit D-2.

Mr. Vanderbilt: I question what this is. This witness has been called and examined at length, practically all Friday afternoon.

Mr. Cassini: I have brought him down here once more because I think from the evidence produced here, in reference to abutments and bridges the jury might be

somewhat confused and for that reason I am bringing him here this morning again.

The Court: All right, but do not go over anything that you went over before.

Mr. Cassini: I will try not to.

Q. Can you tell us what an abutment is? A. The abutment to a bridge?

Q. Yes. A. It is an artificial structure designed to support the span of the bridge, one at each end of the span.

Q. An approach? A. An approach to a bridge?

Q. Yes. A. I would say an approach to a bridge is an artificial structure designed to serve the same function that the bridge does; that is to say, carry the same character of objects, automobiles, vehicles or railroad trains or what not, and carry them from the normal surface of the ground to the margin of the bridge.

Q. An approach to a bridge is no part of the bridge, is it? A. I would say it is not.

Q. Now, you examined this bridge, and can you tell us whether or not this brownstone southerly wing wall of this bridge on Exhibit D-1, can you tell us what direction that side wing wall slopes?

Mr. Vanderbilt: That has all been gone over at great length. Mr. Willigerod said it moved on substantially a ninety degree angle from the main bridge, and that was so as to both wing walls. We covered that for about an hour.

Q. (Question read.) A. I answered the same question the other day.

Q. Have you seen the bridge since your testimany was taken in this case? A. Yes, sir.

William D. Willigerod, for Plaintiffs—Recalled—Cross.

Motion for Nonsuit.

Q. What did you see with reference to the southerly side wing wall? A. I saw nothing at divergence with my testimony.

Q. Was the south side wall a ninety degree angle with the bridge? A. I didn't so testify. I testified it was within ten degrees of being a ninety degree angle and I still believe it is.

Q. So that the side wall slopes in what direction? A. My testimony was and my belief now is that it deflects from a right angle to the south something between five and ten degrees.

Q. Was there any approach to this bridge? A. I would say the bridge has no approaches.

Cross-examination by Mr. Vanderbilt:

Q. You testified that the approach to a bridge is an artificial structure leading up to the bridge. Is there any reason why, and isn't it a matter of fact that definition includes even the land adjacent to the bridges? A. I would say not, no, sir.

Q. In other words a bridge comprehends two abutments and a span connecting those two abutments? A. Yes, sir.

Q. And if the nature of the land is such that there is no need of an approach that is all there is to the bridge, the two abutments and the span over it. A. Yes, sir.

Mr. Cassini: The plaintiffs rest with the exception of Dr. Cassini.

Mr. Vanderbilt: I respectfully move for a nonsuit on the ground there is not any proof in this case of any liability on the defendant, Board of Chosen Freeholders of the County of Essex.

Motion for Nonsuit.

The term bridge has been testified by the last witness as consisting of the two abutments and the span which connects them. That, your Honor will see, by an examination of the photographs D-1 and D-2, this hole that has been complained of is outside of and beyond the southerly abutment and is no part of the bridge. Therefore, there is no liability on the Board of Chosen Freeholders of the County of Essex with respect to anything beyond that abutment. What is beyond the abutment is a part, according to the pleadings in this case, of a public highway known as Brighton avenue, owned and maintained by the City of East Orange, and if there is any negligence in the case it is the negligence of the City of East Orange and not of the Board of Chosen Freeholders of this county.

The second ground of my motion is there is absolutely no proof in this case of any liability on the part of the defendant, Board of Chosen Freeholders of the County of Essex, to maintain the bridge.

The Court: What was the amendment made in this case?

Mr. Cassini: The amendment was from any bridge to this bridge.

The Court: What proof have you put in this case that the Board of Chosen Freeholders has to maintain or repair this bridge?

(Argument.)

The Court: I will deny the motion. On the first ground the law seems to be set forth in the old general statutes in Volume

1, paragraph 9, under "Bridges." Without reading that that particular section seems to have been commented upon and explained in the case of Murphy against the Board of Chosen Freeholders, where an individual was injured on a bridge over the Delaware and Raritan Canal in Mercer County. It seems that particular paragraph of that act was contained in these so-called Laws of 1918, Chapter 185, and I think I will hold that the defendant must indicate why it should not be held in this case on the law.

As to the second question, that presents a question of fact which I will leave to the jury.

I will hear the defense.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Vanderbilt: May I ask the Court, so I can go on with my case, to point out what the question of fact is?

The Court: The question of fact is whether or not this hole was part of the bridge. The bridge has been termed by the engineer to be that part, as I understood him, of the artificial structure over this stream on this supporting span, and he has indicated that he thought an approach was an artificial structure leading from the normal structure to the margin of the bridge. In this case we have photographs indicating the character of the bridge. It was and is stone in construction and has what has been called wing abutments. It has a fence on the top. The fence is pictured in the

photographs marked as exhibits, as proceeding continually over and across the bridge, and having a support or anchor at the end of the abutment. There is some scroll work on that fence and whether that fence stops there or continues as a matter of fact, is a jury question. The fence seems to be divided, that is, another fence of the same character of construction seems to start at the same place and continues several feet beyond, and under this fence was the hole in question. Now, if this hole was no part of the bridge, of course the defendant cannot be held. That is only one reason why they cannot be, but I am going to leave the question of whether this is part of the bridge or not to the jury. I think it is a question of fact.

Mr. Vanderbilt: My exception will be noted.

Exception noted as ground of appeal.

Mr. Cassini: The doctor for the plaintiff has now arrived and I would like to put him on at this point if I may.

Mr. Vanderbilt: No objection.

HERMAN C. CASSINI, sworn on behalf of plaintiffs.

Direct examination by Mr. Cassini:

Q. What is your full name? A. Herman C. Cassini.

Q. You are a practicing physician of the State of New Jersey? A. Yes, sir.

Q. And have been how long? A. 20 years.

Q. In addition to being a practicing physician, are you a surgeon? A. Yes, sir.

Q. Did you see this boy, Paul Mullin? A. I did, yes, sir.

Q. Can you tell us what the condition of Paul Mullin was at the time you saw him? A. I was called to see the child about five or six days after the child was home from the City Hospital. In the home at that time I saw the child. It was in a stuporous condition and it showed all the physical manifestations of having received an injury to his head.

Q. What did you do? A. In those cases?

Q. Yes. A. The treatment is——

By the Court:

Q. What did you do in this case? A. In this case here I prescribed an ice bag and treated the child symptomatically.

By Mr. Cassini:

Q. Do you think the patient was seriously ill? A. I do, yes.

Q. Do you know whether or not the child received a fracture of the skull? A. The information that the mother gave me was that an X-ray was taken at the hospital and it reported a fissure fracture of the skull.

Q. What is the consequence of a fissure fracture? A. A fissure fracture is always attended with hemorrhages in the skull. There is always physical changes that take place. You cannot have a crack in the skull without having a tear into the dura and without having a hemorrhage attended with the fracture.

Q. What is a hemorrhage? A. A hemorrhage

is a tearing of the vessels which occurs when a fracture occurs in the bone.

Q. You mean a blood vessel? A. The blood vessel tears.

Q. Do you recall a hematoma being formed in the fracture or about the fracture in this particular case? A. That was on the scalp, a hematoma or blod clot over the site of injury.

Q. Can you have a fracture of the skull without a fracture of the inner lining of the skull? A. It is almost a physical impossibility.

Q. What are the consequences of a fracture of that kind? A. Well, a fracture has to heal, just the same as any injury on the body has to heal. If you get an injury to your skin, a laceration, it has to heal by scar. If you get that in your bone it has to heal by scar. If you get it in the head it has to heal by scar. I think an injury to head is of much more consequential value than an injury to other parts of the body because an injury to the head always is left with some potential possibility that in the future a child may meet with some serious condition, for instance, epilepsy is one of the conditions, tumors of the brain is another, impairment of motion of the child and it all depends on where the injury has occurred. There is always the danger of having to meet with some serious consequence in future years, after the injury has occurred.

Q. Which is the most serious of those consequences and when do they usually develop? A. No one can tell. It may develop in five, ten or twenty years after the injury.

Q. When did you see this boy Paul Mullin last? A. Two days ago.

Q. Do you know what his condition is now? A. Just in a state of nervousness, from the his-

tory of the mother and my examination, just this state of nervousness.

Q. Is there any permanent cure in these cases of fractured skull? A. No.

Q. Would you say that a fractured skull is never free of damage and that the chances are the patient will be permanently disabled? A. I do, yes.

Q. Is this boy, Paul Mullin, also subject to convulsions? A. The child has convulsions immediately after the injury, from the history the mother gave me. I never saw the child in a state of convulsions. From what I know I do not believe the child had a convulsion since the injury, but at the time of the injury he did have convulsions.

Q. Do you know whether the child complains of anything now? A. Well, the child complains of headaches often.

Cross-examination by Mr. Vanderbilt:

Q. Will you look at the boy now and tell us what there is about him that indicates a nervous condition to you? Will you ask him to come up and look at him? A. Yes. (Witness does as requested.)

Q. Which one of you is nervous? (Doctor asks the boy to put his tongue out.)

Q. What is there about the young man that exhibits nervousness? A. He had a tremor of the fingers.

Q. I didn't notice any. A. I did.

Q. I noticed it more in your hand than in his. A. Yes, you would expect it in my hand.

Walter S. Washington, for Defendant—Direct —Cross.

WALTER S. WASHINGTON, sworn in behalf of the defendant.

Direct examination by Mr. Vanderbilt:

Q. You have been a practicing physician of this state for fifty-four years? A. Not of this state.

Mr. Cassini: We admit the doctor's qualifications.

A. I have been forty-three years in this state and practiced eleven years before that.

Q. Have you examined Paul Mullin, the little boy just called to the stand, and when? A. Two weeks before the last trial.

Q. That was in April, 1928? A. Yes, sir.

Q. What did you find his condition to be? A. Perfectly normal.

Q. Have you seen him since? A. I saw him here on Friday and I asked him how he was and he said he was all right.

Q. Do you think it is at all likely in a boy who had the accident this chap had four years ago and whose condition was such as you found it two years ago and again today, is likely to have epilepsy or any of these other things which have been testified to? A. No, not at all.

Cross-examination by Mr. Cassini:

Q. Do you know what this boy had? A. I knew by the testimony; that's all.

Q. Do you know what he had yourself or what he was afflicted with? A. By the testimony.

Q. What testimony? A. At the last trial.

Q. What was it that he was afflicted with? A.

He had a linear fracture on the left side of his head and a hematoma on the outside.

Q. Linear fracture on the left side of his head and a hematoma on the outside? A. Yes.

Q. What takes place in those cases? A. It depends on the case. You mean in this case?

Q. Yes, in this case. A. Well, he had a linear fracture without any depression, without any pressure.

Q. I want the pathology of the case. A. I am giving it to you now pretty well. I can go ahead and give you something more. No evidence of any pressure on the brain of any kind whatever.

Q. What takes place? What is the pathology of a linear fracture? What happens? A. Why, a linear fracture is a straight line without any depression of the fragments whatever. It is different from a long bone or a depressing fracture in which there is a pressure on the brain. In this boy, simply callus is thrown out, that is, a provisional callus between the edges of the fracture. If he does not have any fracture symptoms then all he has is probably a headache for a time and that disappears and that is not anything pathological; you cannot show it. Then, he becomes normal again.

Q. How do you know he has no fracture symptoms? A. By the symptoms. He hasn't any pressure symptoms.

Q. How do you know, did you examine this boy? A. Yes.

Q. When? A. Two weeks before the last trial.

Q. How long was that after his injury? A. Probably I guess, about two years.

Q. You examined him for the first time two years after the accident? A. Yes, sir.

Q. You expected to find pressure symptoms at that time? A. If there were going to be any symptoms at all as a result of that injury they would certainly be present by that time.

Q. Wouldn't you expect pressure symptoms immediately after the injury? A. Yes.

Q. You wouldn't expect them two years after, would you? A. If they continued.

Q. Did he have any then immediately after the injury? A. Not that I know of.

Q. I mean pressure symptoms. A. None that I know of.

Q. From what you heard in the court room do you think he had any pressure symptoms? A. When?

Q. At any time? A. No.

Q. Immediately after the injury? A. No, none whatever.

Q. Immediately after the injury? A. No.

Q. What made him stuporous? A. That was from the result of shock, the trauma.

Q. How long does shock last? A. Oh, a few days or a week or something like that. It may last longer.

Q. Did he have any hemorrhage with the fracture? A. Certainly.

Q. What was that? A. Certainly he had a slight amount of hemorrhage.

Q. Did he have any tearing of the brain tissue with the fracture? A. Not that I know of.

Q. Wouldn't it be possible he did have? A. Well, it is very improbable at the least.

Q. Why is it improbable? A. Because the fracture was so slight in character. In a linear fracture there is no movement of the separate parts, they are simply remaining precisely the same. The only thing is provisional callus is thrown out

as in all cases, and that is absorbed and turns itno bony callus so that the scar in the part is bony; not outside of that.

Q. You cannot tell us whether the brain tissue was injured or not, can you? A. There were no symptoms of it.

Q. Isn't a convulsion a symptom? A. No, not necessarily. I don't know if he had a convulsion anyway.

Q. I am asking you isn't a convulsion a symptom? A. No, not always.

Q. Might not it be? A. It might be.

Q. After an injury to the head? A. Yes, it might be.

Q. What is this callus you were talking about? A. Callus is thrown out between the ends of all bones that are fractured. That is nature's way of healing fractures. It is first called provisional callus; that is soft and changes by nature from provisional to hard or permanent callus. It remains always that way.

Q. Is there a thickening at that particular point where the fracture has occurred? A. No, not in this case.

Q. Not in what? A. Not in this case; not in a linear fracture.

Q. Why is a linear fracture different from any other fracture? A. I mean by that in other fractures of long bones or a depressed fracture of the skull there is motion in the parts, but in a linear fracture there is no motion whatever.

Q. Motion of what? A. Of the bones.

Q. You have no motion in a long bone when it is fractured? A. You do not have motion?

Q. No? A. I should say you do. The trouble is to keep it still.

Q. You have it in the joints, don't you? A. What?

Q. The motion. A. No, if the joints are not injured you have it anyway, but we are speaking of the bones. I am speaking of the long bones, that means the shaft of the bone. For instance, you have these two bones (indicating) broken and it is very difficult to get them in position, so they will be still and heal without any deformity or with some extra amount of callus, and sometimes union of the two bones, but you do not get that in a linear fracture. If you have a linear fracture in long bones you have the same thing.

Q. Can you tell us whether or not this particular linear fracture, whether there was a fracture of the inner layer of the skull? A. The X-ray did not show it. It showed a simple linear fracture, no mention of any other kind.

Q. How does healing take place on the inner layer of the skull? A. Just the same as the outer layer.

Q. Doesn't that form a thickening or a clotting? A. No, not in a linear fracture, in a simple linear fracture.

Q. You do agree that callus is thrown out? A. Certainly, between the ends of the bone, not anywhere else.

Q. You agree there is a hemorrhage that takes place? A. Very slight; you cannot tell; there might be or might not.

Q. On the inside as well as the outside? A. Yes, but that is absorbed the same as any other.

Q. A scar forms there, does it not? A. In the fracture?

Q. Yes. A. Yes, certainly.

DEFENDANT RESTS.

Herman C. Cassini, for Plaintiffs—Recalled—Direct.

HERMAN C. CASSINI recalled in behalf of the plaintiffs in rebuttal.

The Court: What is he going to rebut?

Mr. Cassini: The testimony of Dr. Washington.

Direct examination by Mr. Cassini:

Q. It is a linear fracture that was in this particular case? A. Yes, sir.

Q. Tell us what the healing process was on the inner surface of the skull. A. Why, in a linear fracture you must have a hemorrhage—you cannot have a break in a bone without having a hemorrhage. You cannot have a fissure fracture of the skull bone without having also impairment or a laceration of the dura underneath, and from the symptoms the child suffered there with a convulsion.

By the Court:

Q. Where did you get this idea of a convulsion? I didn't hear any other doctor testify as to it. A. The mother told me.

Q. You did not see it yourself? A. No.

Q. Did she say he had a convulsion? A. Yes, immediately after the first call I made she said he had had a convulsion.

By Mr. Cassini:

Q. Explain what the dura is. A. That is the inner lining membrane of the skull.

Q. With every fracture there is also a scar, you call it, a scar or healing? A. Usually when you have a fracture of the skull you have a callus for-

mation. If you have a hemorrhage inside the brain, that is inside the skull on the inner side of the plates of the skull, then that hematoma is absorbed in time, but there is also left more or less of a thickening. The fact that the child was stuporous for five or six days means that the child suffered more than shock, a concussion of the brain which could not last more than twenty-four hours. You find that many times in an injury to the head that a man is more or less unconscious a few minutes and then comes to, it is only from the degree of damage done to the skull and from the length of time of unconsciousness lasts that we can judge more or less the extent of the injury inside the skull.

Q. Tell us what this callus formation does. A. The callus is thrown out on both sides, on the inside of the plate and on the outside, and after that there is a thickening of the meninges and that is the cause, many times of epilepsy in the future.

Q. Does that press on the brain? A. Yes, sir.

Q. Does that callus press on the brain at all? A. It is a source of irritation to the brain, yes.

Q. Is it true that a linear fracture is of slight consequence? A. It is always serious. Any injury to the head where a fracture is present is always a serious injury.

Q. There was a lot said about the long bones, that the long bones move a great deal, or there is a lot of motion. A. The long bone does not move in the shaft, it is the joints that move. The shaft is standing still all the time the same as the spoke in a wheel. The wheel moves but not the spoke in the wheel.

By the Court:

Q. The spoke moves if it is broken. A. Well, you get——

The Court: This is not rebutting anything.

Mr. Cassini: I just want to prove by this witness that the X-rays do not exist.

The Court: You mean that they do not exist in the hospital?

Mr. Cassini: Yes, that they were destroyed or they got rid of them in some way. With the exception of that I will rest.

Mr. Vanderbilt: I will admit that to save time.

PLAINTIFFS REST.

Mr. Vanderbilt: I respectfully move for a directed verdict on the ground first, no proof of any obligation or liability on the Board of Chosen Freeholders of the County of Essex to maintain the bridge in question.

Second, no proof of any failure on the part of the Board of Chosen Freeholders to maintain the bridge in question.

Third, on the ground that there is not any proof of negligence on the part of the Board of Chosen Freeholders of the County of Essex with respect to the bridge in question.

Fourth, on the ground that the scene of the alleged accident is outside of and beyond the bridge, and a part of Brighton avenue, at any rate, not a part of the bridge, and therefore beyond the scope or jurisdiction of the Board of Chosen Free-

holders, if they had any jurisdiction, and that I say they have not proved.

I ask for a verdict on the second count because there has been no proof of damages.

The Court: I will deny the motion for the reason that I gave in deciding on the legal question that if this accident happened on the bridge there is liability, but whether or not it happened on the bridge is a question for the jury to determine.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Vanderbilt sums up for the defendant.

Mr. Cassini sums up for the plaintiffs.

Court's Charge.

The Court charges the jury as follows:

MOUNTAIN, J.:

On July 19, 1925, the little boy here, the plaintiff in this case, had an accident. The situs of that accident was a bridge which spans a stream or brook which runs through a portion of the City of East Orange, and this bridge is reached by traveling along Brighton avenue. The structure of the bridge is important in this case, it seems to the Court, because of the resulting question of whether in law the defendant can be held.

The defendant is the body which we know as the Board of Freeholders of Essex County.

We have two photographs of this bridge, which seem to indicate that it was a brown, sandstone

structure, the span resting on two abutments, thrown out on the sides at an angle, I think one of the engineers testified, of ten degrees; not at exactly at right angle to the span itself. The question of whether the accident happened on the bridge or not is a question which I am going to submit to you. You will ascertain, when you examine the photographs, that the bridge apparently had fence of iron on each side of it and we were told that this iron fence was imbedded in the floor of the bridge. We were given a definition, as I recall it, by the City Engineer of East Orange, as to an abutment and an approach. The defendant contends that the accident did not happen on the bridge, that is, that there was no negligence on behalf of the defendant, because the hole in question was beyond the abutment, not on the bridge itself, and that the accident happened not under the fence itself but a continuation of this fence and that it was through this hole that this little boy fell.

The plaintiffs, on the other hand, allege that that is not so; that the fence in question was a part of the fence that crossed the bridge and that it was under this fence that the accident happened. Just how much importance you are going to put on this fence, I do not know, and I say that for this reason, that while I am going to leave the questions of fact to you as to whether or not this accident happened on the bridge as a result of the bridge being out of repair, I call your attention to the fact that you may find that this fence was not in a state of disrepair. I have no recollection of hearing any testimony indicating that the fence, or the supporting rods that hold it, were out of repair, but that underneath the fence in some way, either by virtue of the elements or by virtue prob-

ably or possibly of the energy and natural inclinations of some small boys this hole was gradually dug out.

If the accident happened on the bridge and if the defendant was negligent because it allowed the bridge to remain in a state of disrepair, under certain conditions you may find the defendant liable. Ordinarily to charge the defendant with liability it would have to appear, for instance,—taking a bridge over navigable waters where a Board of Freeholders built the bridge and maintained it, if it was claimed, for instance, that a plank in the bridge had become broken, before you could charge the Board of Freeholders you would have to show negligence, and to show that, you would have to show that this plank had been broken for such a length of time that in the exercise of reasonable care and after a reasonable observation made in the exercise of that care they would have seen or detected the hole, or the broken plank and would have fixed it, and if it existed in a state of disrepair for an unreasonable length of time and was not fixed a jury might presume that no observation had been made to ascertain whether it was there or not, or if an observation had been made no action had followed. Was the Board of Freeholders of the County of Essex negligent in this case? You may find that to a large degree that depends on whether you are going to find, first of all, that this accident happened on the bridge. If it did not happen on the bridge your verdict must be for the defendant, because under the law the defendant is not liable for the condition of the approaches to this bridge. I do not know whether you have examined these photographs carefully, but they are puzzling. You have the unique question of what is a bridge, when is a bridge and is this a bridge.

A witness called on behalf of the plaintiffs, Mr. William T. Penn, on cross-examination testified that the hole was in the approach to the bridge; the hole was not in the main bridge property. Another witness, Mr. Moffitt, said that the hole was under the fence which was the approach to the bridge. There was testimony indicating that this hole was large enough for a man to slip through under the fence, but there was testimony, as I say, indicating that there was nothing the matter with the fence. Mr. Moffitt told us that the difficulty seemed to have been with the hole under it.

Mr. Williger od, the City Engineer of East Orange, said that there was no approach to this bridge, and there was testimony that this was originally built under conditions something like this: That on one side there was a sandstone cliff and on the other side a railroad embankment and that the span was made from the sandstone cliff to the railroad embankment, but rested on abutments. Mr. Williger od was asked what an abutment was and he testified that it was an artificial structure designed to support a span. When asked what an approach was he said it was an artificial structure leading from the normal surface of the ground to the margin of the bridge and said in his opinion there were no approaches to this bridge.

The plaintiff in this case has the burden of proof, the burden of proving that the defendant was negligent. If you find that this accident did not happen on the bridge the defendant should be exonerated. If you find that the accident happened on an approach, or off the bridge, although it has been said there was no approach to this bridge, the defendant should be exonerated.

Court's Charge.

You have a peculiar question here because of the situation, as you will see from the photographs, that the structure was not exactly out of repair, but that the structure, or a part of it, if it was a part of the bridge, was in a state of disrepair, resisted as I say on the other side by the claim that this was no part of the bridge whatever and therefore there was no liability. The testimony was that this was filled up, by Mr. Willigerod, acting as a citizen when he heard of and saw the opening in question.

If the defendant is entitled to your judgment you will bring in a judgment for the defendant. If you find for the plaintiff then this little boy is entitled to damages for the proximate and natural result of the defendant's negligence, that is, damages naturally and proximately resulting therefrom. He is entitled to damages for the bodily injury he has sustained and the effect of that injury upon his health as to degree and probable duration, and for the pain and suffering which he has had or will have as a result of the negligence of the defendant. The father, who is a co-plaintiff in this case, of course, cannot recover unless the boy can, and if you find for the boy, then the father's measure of damages would be the diminution of the wage earning ability of his son.

If I have misquoted any of the testimony in your opinion, you must take your own recollection of what the witnesses have said, because you have to determine all questions of fact, and if I have not narrated the testimony correctly you must ignore what I have said and take your memory of what the witnesses have said.

(The jury retires.)

Mr. Vanderbilt: I respectfully pray an exception to that part of your Honor's charge where

your Honor said that the situs of the accident was a bridge.

Exception noted as ground of appeal.

I respectfully pray an exception to that part of your Honor's charge which submitted to the jury the question of whether the accident happened on the bridge.

Exception noted as ground of appeal.

I respectfully pray an exception to that part of your Honor's charge which dealt with the fence liability, which might be fastened on the county as a result of the fence being out of order.

Exception noted as ground of appeal.

Mr. Cassini: I respectfully pray an exception to that portion of your Honor's charge as to whether this accident happened on the bridge, the condition of the approach to this bridge and to that part which refers to the opening under the fence.

Exception noted as ground of appeal.

Exhibit D-1.

(*Opposite*) ☞

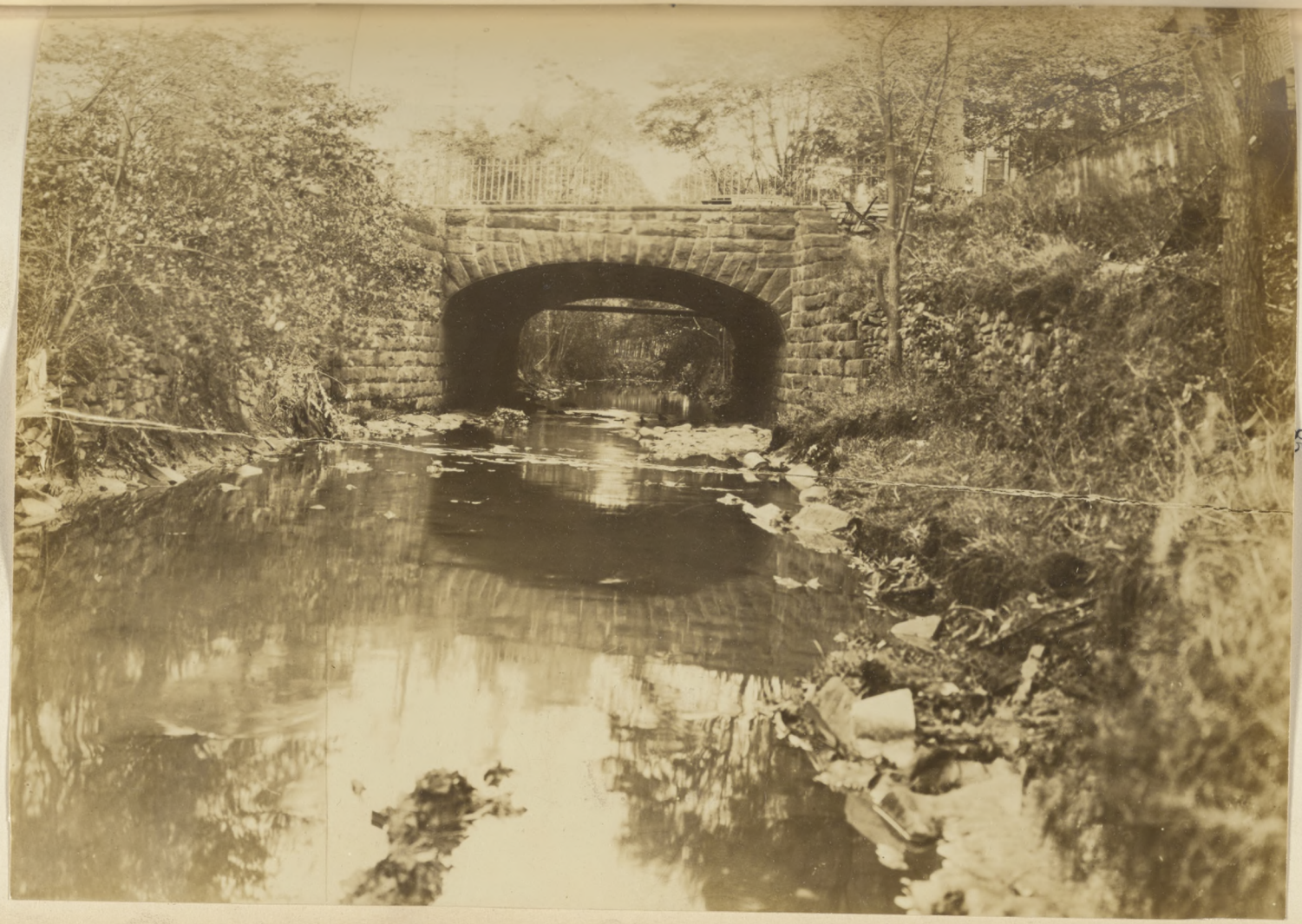

Exhibit D-2.

(*Opposite*) ☞

New Jersey Court of Errors and Appeals

PAUL MULLEN, an infant, by Christopher Mullen, his next friend, and CHRISTOPHER MULLEN, individually, *Plaintiffs-Respondents,* *vs.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX, *Defendant-Appellant.*	Action at Law. On Appeal from the Supreme Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement of Case.

Plaintiff, Paul Mullen, while walking on the approach to a bridge located on Brighton Avenue in the City of East Orange fell and was injured. This action was then instituted by plaintiff Paul Mullen, an infant through his next friend, and plaintiff Christopher E. J. Mullen, his father, seeking to recover damages for the injuries thus sustained.

The complaint alleges and the answer admits that the City of East Orange is the owner of the highway known as Brighton Avenue. The complaint further alleges that, under an act of the legislature of New Jersey, defendant is required to maintain all bridges within the county.

The defendant moved for a dismissal of the complaint on the ground that the facts contained in the complaint did not constitute a cause of

action (S. C., p. 14). The court permitted plaintiffs to amend their complaint to read as follows: "That the Board of Chosen Freeholders by virtue of an act of the legislature are required to erect, rebuild, repair and maintain the bridge and its approaches over Brighton Avenue in the City of East Orange, County of Essex" (S. C., p. 16, l. 40 to p. 17, l. 3). The defendant then renewed its motion to dismiss, which was denied (S. C., p. 17, l. 40).

The evidence in the case consists solely of testimony as to how and where plaintiff Paul Mullen was injured and the extent of his injuries. Plaintiffs' evidence proved that Paul Mullen was on the approach to a bridge on Brighton Avenue, a public highway in the City of East Orange, when he slipped and fell underneath a guarding fence. There was no conflicting testimony as to where the accident happened since all of plaintiffs' witnesses who saw the accident testified that it occurred at a point marked (x) on the photographs introduced in evidence as Exhibits D1 and D2 (S. C., pp. 85, 86). These photographs conclusively show that the accident happened on the approach to the bridge as distinguished from the bridge itself. Mr. Penn, a witness for plaintiffs, testified that the accident occurred on the approach to the bridge (S. C., p. 28, ll. 10-20) as did Mr. Moffitt, another witness for plaintiffs. The latter on direct examination testified as follows:

> "Q. Was there a hole or opening in the bridge, was there? Yes or no. A. Not to the bridge, no.
>
> Q. Where was this hole? A. The hole was under the fence, it was the approach to the bridge" (S. C., p. 35, l. 38, to p. 36, l. 13).

No evidence was introduced to show when the bridge was built or who built it. No evidence was

introduced to show who maintained it other than evidence by plaintiffs' witness, Moffitt that the City of East Orange filled the hole under the fence shortly after the accident (S. C., p. 37, ll. 5-10; p. 41, ll. 10-18). The City Engineer of East Orange testified that under his direction the foreman of the road department of the City of East Orange filled the hole with stones (S. C., p. 55, ll. 37-40). There was absolutely no evidence to connect the County of Essex with the bridge.

Although there was considerable testimony to show the extent of the injuries of Paul Mullen there was absolutely no evidence of damage to Christopher Mullen, his father. There was no evidence of any expenditure by Christopher Mullen, and since Paul Mullen was 2½ years of age at the time this action was brought (S. C., p. 6, ll. 25-30) Christopher Mullen's loss of his son's earnings may be disregarded.

Defendant moved for a nonsuit and subsequently for a directed verdict on the grounds that (1) plaintiffs failed to prove that defendant was under any duty with reference to this bridge; and (2) since the accident did not happen on the bridge but occurred on the approach to the bridge, the defendant was under no liability in any event.

As to the second count in which the father, Christopher Mullen, sought damages, the motion for a directed verdict was based on the additional ground that no damages were proven. The trial court denied the motions and submitted the case to the jury. The jury returned a verdict in favor of Paul Mullen in the sum of $3,000 and in favor of Christopher Mullen in the sum of $400.

The matter is now before the court on the appeal of defendant, The Board of Chosen Freeholders of the County of Essex.

Specification of Grounds of Appeal.

The grounds of appeal relied upon by defendant and set forth in the petition of appeal (S. C., pp. 1-3) are as follows:

1. The trial court erred in denying defendant's motion for a non-suit on the ground that there was no proof that the defendant was under any duty or obligation to maintain or repair the bridge (S. C., p. 65).

2. The trial court erred in denying defendant's motion for a non-suit on the ground that the accident did not happen on the bridge (S. C., p. 65).

3. The trial court erred in refusing to direct a verdict in favor of defendant on the ground that there was no proof that the defendant was under any duty or obligation to maintain or repair the bridge (S. C., pp. 78, 79).

4. The trial court erred in refusing to direct a verdict in favor of defendant on the ground that there was no proof that defendant was negligent or wrongfully neglected to maintain or repair the bridge (S. C., pp. 78, 79).

5. The trial court erred in refusing to direct a verdict in favor of defendant on the ground that the accident did not happen on the bridge (S. C., pp. 78, 79).

6. The trial court erred in refusing to dismiss plaintiffs' complaint (S. C., pp. 14-18).

7. The trial court erred in refusing to direct a verdict in favor of defendant as to the second count on the ground that there was no proof of damages (S. C., p. 79).

POINT I.

The Trial Court erred in refusing to (a) dismiss the complaint as failing to state facts sufficient to constitute a cause of action, (b) nonsuit plaintiffs or direct a verdict in favor of defendant on the ground that the evidence failed to disclose any duty on the part of defendant to maintain or repair the bridge.

Under the common law of this country a county is under no duty or obligation to construct, maintain or repair bridges.

> "In the United States there is no common law obligation resting upon quasi corporations, such as counties, townships and New England towns, to repair highways, streets or bridges within their limits, and they are not obliged to do so unless by force of statute" 4 *Dillon, Municipal Corporations,* sec. 1688.

The rule has been repeatedly recognized by our Courts.

> *State* v. *Inhabitants of Hudson County,* 30 N. J. L. 137 (Sup. Ct. 1862);
> *Whitall* v. *Freeholders of Gloucester,* 40 N. J. L. 302 (Sup. Ct. 1878);

Indeed, our Courts have held that not only is there no duty upon the county to construct or repair bridges at common law, but further, that in the absence of statute a county has no power to build bridges.

> "Freeholders as such have no right to build bridges but must derive their power in this respect from the legislature. *Allen* v. *Freeholders,* 2 Beas. 68." *Dashe* v. *Board*

of Chosen Freeholders, 79 N. J. L. 43 (Sup. Ct. 1910).

See also,

McKinley v. *The Chosen Freeholders of Union County,* 29 N. J. Eq. 164, 168 (Ch. 1878).

The New Jersey legislature early conferred the power upon counties to construct and maintain bridges and imposed some duties with respect to their maintenance. Even under these statutes however, our Courts have held that in the absence of an express statutory enactment or necessary implication no civil action may be brought for injuries resulting from a county's failure to maintain a bridge which it has constructed.

Cooley v. *The Chosen Freeholders of Essex,* 27 N. J. L. 415 (Sup. Ct. 1859); *Spencer* v. *Freeholders of Hudson,* 66 N. J. L. 301 (E. & A. 1901).

In view of these authorities, whatever cause of action plaintiffs might have must be based upon the express terms of a statute. The sole statute which is pertinent and the one upon which plaintiffs, of necessity, rely is the County Home Rule Act, P. L. 1918, C. 185, ss. 1301, 1305, 1309.

Plaintiffs introduced no evidence to indicate that the county built or ever maintained the bridge in question. Indeed, the only evidence on those points shows that the City of East Orange and not the county maintained this bridge. Since there was absolutely no evidence to indicate that the county built or ever maintained the bridge, defendant moved for a non-suit and directed verdict (SC pp. 64-67; pp. 78-79). These motions were denied, the trial court in effect construing P. L. 1918, C. 185 as imposing a duty upon the

county to maintain all bridges regardless of who built or maintained them.

A reading of the pertinent sections of the statute demonstrates the fallaciousness of the trial court's conclusion. Section 1301 of the act (P. L. 1918, C. 185) provides that "Every board of Chosen freeholders *shall have power* to build and construct * * * and to maintain * * * bridges * * *." Section 1309 provides that "where the boards of chosen freeholders of a county * * * *are chargeable by law* with the construction, erection, rebuilding or repair of any viaduct or bridge and the said board or boards shall wrongfully neglect to perform their duty in that behalf by reason whereof any person or persons shall receive injury or damage in his, her or their persons or property, such person or persons may bring an action at law against said county or counties and recover judgment to the extent of all such damage sustained as aforesaid."

The statute does not compel the county to build bridges, but merely confers a power to do so. The statute does not impose liability, for failing to maintain *all* bridges within the county but only imposes liability for neglect of duty where the county is "*chargeable by law* with the construction, erection, rebuilding or repair."

In *Locke* v. *Board of Chosen Freeholders of Atlantic County* 158 Fed. 216, (D. N. J. 1908) the court dismissed a complaint because it failed to state facts which would constitute a county "chargeable by law", obviously being of the opinion that the mere existence of the bridge did not render a duty upon the county to maintain it. In our case plaintiffs' complaint failed to state any facts which would render defendant "chargeable by law" with the maintenance of the bridge, yet the trial court, refused to dismiss the complaint upon the motion of defendant (S. C., p. 14.) It is

submitted that the ruling of the trial court was clearly erroneous.

In the *Locke* case the court said (p. 217):

> "The most cursory reading of the section however, shows that at least two things must exist to establish liability as against a board of chosen freeholders, for failure to repair a bridge. First, that it is 'chargeable by law' with such repair; and, second, that it shall 'wrongfully neglect' to repair the bridge. In the declaration in the present action there are no facts alleged from which it may be inferred that the defendant, the board of chosen freeholders of Atlantic County, is in anywise 'chargeable by law' with the repair of the bridge. Such chargeability should be not only proven in the case, but averred in the pleadings. Neither are there any averments from which it can be inferred that there was any 'wrongful neglect' on the part of the defendant in the performance of the statutory duty imposed upon it by the section above quoted. The averments should be such as to show, not only that the bridge was out of repair, but that the board of chosen freeholders knew, or were chargeable with knowledge, of its want of repair. These two principles are settled by the construction given to the statute by the Supreme Court and the Court of Errors and Appeals of the state of New Jersey in *Spencer* v. *Freeholders of Hudson,* 66 N. J., L. 302, 49 Atl. 483, *Creighton* v. *Freeholders of Hudson,* 70 N. J., L. 350, 57 Atl. 370, and *Mattlage* v. *Freeholders of Hudson and Bergen,* 72 N. J. L. 31, 60 Atl. 195. The demurrer must be sustained."

Plaintiffs failed to prove when the bridge was built, who built it or who maintained it. It may be that the City of East Orange built and maintained it under powers conferred by the New Jersey Municipalities Act, P. L. 1917, c. 152, p. 370, last amended in P. L. 1927, c. 10. Indeed, the

only evidence in the case as to who maintained the bridge indicated that the City of East Orange did (S. C., p. 37, ll. 5-10; p. 41, ll. 10-18). It may be that the bridge was originally built by a private corporation, a municipality, the State or even an individual. In any event, regardless of who might have built or maintained the bridge, it is evident that plaintiffs have failed to prove that the defendant was under a duty to construct or maintain this bridge or that the defendant violated any duty owed to plaintiffs.

> "The ordinary rule must be applied to boards of freeholders regarding the building of bridges, that is, a breach of duty must be demonstrated by proof." *Hahn* v. *Freeholders of Hudson,* 78 N. J. L. 712 (E. & A. 1909).

In order to render a county "chargeable by law" with the repair or maintenance of a bridge it must be shown that it built or maintained it. Defendant has failed to find a single instance in which a county was held liable without proof that it had constructed, repaired or maintained a bridge. On the contrary in every case in which liability was imposed upon a county, the Court has expressly pointed out that under the evidence there presented it appeared that the county had built or maintained the bridge and had accordingly become chargeable with its maintenance.

If the legislature had intended to impose liability upon counties for *every* bridge it would have said so and would not have limited liability to cases where the county is "chargeable by law" with the maintenance of the bridge. To impose liability in this case upon the county would nullify the limitation imposed by the legislature.

> "In construing this statute, which creates a liability that did not exist at common law,

> it should be remembered that grants of power to municipal and public bodies, which are out of the usual range, or which may result in public burdens, are to be construed with reasonable strictness. They are, at least, not to be construed beyond their fair and reasonable meaning. 1 Dill Mun. Corp. 91.
>
> And certainly the plain, fair meaning of the statute creating the liability in question limits it to cases of defects in bridges with the erection of which the county freeholders are chargeable by law." *Spencer* v. *Freeholders of Hudson,* 66 N. J. L. 301, 306 (E. & A. 1901).

An imposition of liability in this case would, in effect, nullify the long line of New Jersey cases which hold that even where a county is responsible for the maintenance of a bridge it is not liable unless it knows or is chargeable with knowledge of a defect in the bridge.

> *Mattlage* v. *Board of Chosen Freeholders,* 72 N. J. L. 50 (Sup. Ct. 1905);
> *Creighton* v. *Board of Freeholders of Hudson,* 70 N. J. L. 350 (Sup. Ct. 1904).

Admittedly there is no evidence to show that defendant knew of any defect that may have existed in the bridge. Nor was there any evidence to charge defendant with knowledge unless the rule of the trial court that the mere existence of a bridge, of which the county may not be aware, renders it responsible for injuries resulting from defects therein, be approved. Such a doctrine would not only override the express terms of the statute, but would overrule fundamental principles of law with respect to the liability of *quasi* municipal corporations, such as counties.

It is respectfully submitted that the trial court erred in refusing to (a) dismiss the complaint as failing to state facts sufficient to constitute a cause

of action; (b) non-suit plaintiffs or direct a verdict in favor of defendant on the ground that the evidence failed to disclose any duty of defendant to maintain or repair the bridge.

POINT II.

The Trial Court erred in refusing to nonsuit plaintiffs or direct a verdict in favor of defendant on the ground that the accident did not happen on the bridge.

Assuming that defendant is under a duty to maintain and repair the bridge in question, nevertheless plaintiffs should have been nonsuited or a verdict directed in favor of defendant on the ground that the accident did not happen on the bridge. Plaintiffs, defendant and all of the witnesses were in entire agreement as to where the accident happened. Exhibits D1 and D2 (S. C., pp. 85, 87) indicate quite clearly that the accident did not happen on the bridge but occurred on the approach to the bridge. All of plaintiffs' witnesses who saw the accident testified that plaintiff, Paul Mullen, slipped at the point marked (x) on Exhibit D1 and D2 and an examination of those exhibits clearly shows that the accident happened on the approach to the bridge as distinguished from the bridge itself.

In order to ascertain whether there is a duty imposed upon the county to maintain an approach to a bridge we must look to the pertinent statute. It is indeed true, in the absence of any legislative declaration, that "bridge" may be construed so as to include the "approach" thereto. But the statute upon which plaintiffs, of necessity, base their claims expressly defines "bridge" and leaves no room for construction. Section 1315 (P. L. 1918, C. 185, p. 613) provides as follows:

> "Whenever the term 'viaduct and bridge' or 'viaducts and bridges' is used in this article, the same shall be construed to include any and all approaches to such viaducts and bridges, except when and where such approaches are a public road, street, avenue or highway."

Plaintiffs' complaint sets forth (S. C., p. 6, ll. 32-37) and defendant's answer admits (S. C., p. 10, l. 30) that the approaches are a public highway and the evidence is to the same effect. Section 1309 allows a civil action for neglect of a county to repair a "bridge" which, as above stated, is defined in Section 1315 as excluding the approaches, where as in our case, they are a public highway. Accordingly the statute imposes no liability in this case.

In earlier statutes in force in this state and in statutes in force in other jurisdictions the legislatures have seen fit to confine liability to the "bridge", excluding responsibility for the "approaches" thereto. Under such statutes the courts have given full effect to the expressed legislative declarations.

> "Although the term bridge may include the approaches, yet, in the statute of March 8th, 1888, it is not employed with so broad a meaning. That statute requires the counties connected by the bridge to bear the expense of construction and maintaining 'the bridge' and indicates that thereby is intended the structure reaching from one side of the stream to the other, with its proper foundation or abutments, while the expense of constructing and maintaining the 'approaches' is imposed upon the towns, townships or municipalities in which they lie, and they are defined to be whatever is 'necessary to connect the bridge with the public roads or streets at either end thereof, or to make such roads or streets conform to the grade of the bridge.' Plainly, in

this law, the bridge and the approach are distinct things.

It is also evident, from the language last quoted, that when the legislature passed this act it contemplated that there should be a street or road at either end of the bridge before the approach was constructed, and yet it did not bind the counties to build the bridge only where its ends would rest on streets or roads previously existing. Under these circumstances, it seems reasonable to conclude tha the legislature expected the municipalities to use their powers of opening streets and roads, in order that they might be able to construct the approaches, in case there were no street or road already opened at the ends of the bridge. Such powers were appropriate to the duty imposed, and when these proceedings were taken there was no other adequate authority.'' *Township of Kearny* v. *Ballantine,* 54 N. J. L. 194, 197 (E. & A. 1891.)

'' 'The word ''bridge'' when used in a statute, may or may not include its approaches, according to the context and the circumstances of each case.' Phillips *v.* East Haven 44 Conn. 36, 40; City of New Haven *v.* N. Y., N. H. & H. R. R. Co., 39 Conn. 128, 130; New Haven and Fairfield Counties *v.* Milford, 64 Conn., 568, 573, 30 Atl. 768. As it is used in section 174, *supra,* its context clearly shows that it was not intended to include the approaches to the bridge''. *City of Stamford* v. *Town of Stamford,* 124 Atl. 26 (Conn. 1924).

It is respectfully submitted that the Trial Court erred in refusing to nonsuit plaintiffs or direct a verdict in favor of defendant on the ground that the accident did not happen on the bridge.

POINT III.

The Trial Court erred in refusing to direct a verdict in favor of defendant and against plaintiff Christopher Mullen on the ground that he failed to prove any damages.

The second count of plaintiffs' complaint sought to recover damages for the father, Christopher Mullen, because of the injuries to his son. There was no evidence that plaintiff, Christopher Mullen, expended any money because of his son's injuries. In fact the only evidence in the case as to any expenditures is the testimony of Genevieve Mullen that she paid a doctor's bill (S. C., p. 58, ll. 19-23). There is no evidence as to the amount of that bill and her payment certainly was not an expenditure by Christopher Mullen.

It appears from the complaint that Paul Mullen, at the time this action was instituted in March, 1926, was 2½ years of age (S. C., p. 6). The accident occurred in July, 1925, at which time Paul Mullen was approximately one year and ten months of age (S. C., p. 7, ll. 15-25).

There was no proof of any actual loss of services, and in view of the child's age it is evident that no services could have been lost. Under these facts it is clear that the father, Christopher Mullen, was not entitled to recover and the trial court should have directed a verdict in favor of defendant and against plaintiff Christopher Mullen.

The leading case on the proposition that where an infant is too young to render services, his father, in the absence of proof of any expenses is not entitled to recover is *Hall* v. *Hollander,* 4 B. & C. 660, 107 Eng. Reprint 1206 (1825). In that case the defendant negligently injured plaintiff's child, an infant two and one-half years of age.

Plaintiff, the father, brought an action against defendant for his damage resulting from the injury to his child. The King's Bench comprised of Bayley and Holroyd, J. J. and Abbott, C. J., concurred in a judgment of nonsuit against plaintiff on the ground that since a child of that age is too young to render services, plaintiff's action could not be maintained. The opinions of the Justices are pertinent.

> "Bayley, J. I am of opinion that the nonsuit in this case was right. It has been contended that the action is maintainable on two grounds; first, for the loss of the services of the child, and secondly, for the expenses incurred by the father, in consequence of the injury sustained by the child. With respect to the first ground I apprehend that the gist of the action depends upon the capacity of the child to perform acts of service. Here it is manifest that the child was incapable of performing any service. The authorities upon this point are all one way. In the cases which have been cited, the child being capable of performing acts of service, and living with the parent, would naturally be called upon to perform some acts of service; and it was, therefore, held, that the services might be presumed, and that evidence of it need not be given. In *Weedon* v. *Timbrel* (5 T. R. 357), both Lord Kenyon and Ashhurst, J. say, that the loss of service is the gist of such an action as the present, and that the plaintiff must give some proof of acts of services, in order to support the allegation in the declaration, although very slight evidence is sufficient; and in a case of Satterthwaite *v.* Duerst (b) it was held that an action for debauching a daughter could not be maintained by a father, unless she was his servant, and that the action could not be maintained on the ground of expense having been incurred in providing for her during her confinement. In this case, too, it was proved

that the father did not necessarily incur any expense, if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as a cause of action the obligation of the father to incur that expense.

"Holroyd, J. It was not established by evidence at the trial that the father was necessarily put to any expense; the Court are, therefore, not called upon to give any opinion upon his right to recover such expenses. It is clear that in cases of taking away a son or daughter, except for taking a son and heir, no action lies, unless a loss of service is sustained. *Gray* v. *Jefferies* (Cro. Eliz. 55), *Barham* v. *Denner* (*ib.* 770). The mere relationship of the parties is not sufficient to constitute a loss of service. The reasoning in in all the modern cases shows that some evidence of service is necessary; none could be given in the present case, the nonsuit was therefore, right.

Abbott C. J. It is a principle of common law that a master may maintain an action for a loss of service, sustained by the tortious act of another, whether the servant be a child or not; and when the foundation of the action once existed, Courts of Justice have allowed all the circumstances of the case to be taken into consideration, with a view to the calculation of the damages. Here we are required to go further, and to hold that the action is maintainable, although no service was or could be performed by the child, and that too, upon a declaration alleging the existence of the relation of master and servant, and the loss of the services of such servant. Such a decision would not be warranted by any former case, the nonsuit, therefore, ought not to be disturbed."

The decision in the *Hall* case was recognized as the law of New Jersey in *Ogborn* v. *Francis,* 44 N. J. L. 441, 447 (Sup. Ct. 1882) where the Court held that in the absence of proof of loss

of services a father may not bring an action because of the seduction of his daughter. The Court speaking through Chief Justice Beasley said:

> "That the loss of service forms the *gravamen* of an action by a parent for an injury to his child, is fully and variously illustrated in the English decisions. The principle was exhibited in a striking form in the case of *Hall* v. *Hollander,* reported in 4 B. & C. 660. The action was in trespass for driving carelessly a carriage against the plaintiff's son and servant, as the declaration alleged, whereby the father was deprived of the services of his child and put to expense in the care of his hurts, but it being shown on the trial that the child was only two years old, and therefor incapable of occupying the *status* of servant, the plaintiff took nothing by his action. Of course, the decision would have been opposite, if, as is claimed in the present case, the elements of a legal claim were to be constituted out of the relation of parent and child, the minority of the child and an injury to the latter."

Since plaintiff, Christopher Mullen, failed to prove any damages either in the nature of expense incurred or loss of services the trial court should have granted defendant's motion for a directed verdict.

It is respectfully submitted that the judgment in favor of plaintiffs be reversed with instructions that judgment be entered in favor of defendant.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Attorney for and of counsel with
Defendant-Appellant.

New Jersey Court of Errors and Appeals

PAUL MULLEN, an infant, by CHRISTOPHER MULLEN, his next friend, and CHRISTOPHER MULLEN, individually, *Plaintiffs-Respondents,* *v.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ESSEX, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court.

BRIEF OF PLAINTIFFS-RESPONDENTS.

Statement of Case.

Plaintiff, Paul Mullen, while walking southerly over a bridge on Brighton Avenue in the City of East Orange suddenly came to the end of the bridge where there was a large opening into which he fell, rolling into the brook and falling a depth of from 10 to 20 feet, as the result of which he sustained a fracture of the skull.

An action was then instituted by plaintiff, Paul Mullen, an infant, by his next friend, Christopher E. J. Mullen, and by Christopher E. J. Mullen, his father, individually, to recover damages for the injuries sustained by Paul Mullen. This suit was instituted against the City of East Orange and in the alternative against the Board of Chosen Freeholders of the County of Essex. On April 24, 1928, the Hon. WORRALL F. MOUNTAIN non-suited the

plaintiffs in so far as the City of East Orange was concerned because it was in no way responsible for the repair and maintenance of said bridge or for the erection or rebuilding of same.

The evidence in the case is very clear and positive with reference to how and where the plaintiff, Paul Mullen, was injured and the extent of his injuries. Plaintiff's evidence also established that Paul Mullen was on the bridge when he fell through the hole (see State of Case, line 30, p. 26, to line 10, p. 27).

Mr. Penn and Mr. Moffitt are both laymen and are not competent to testify whether or not the place where the accident occurred was the bridge or an approach. The testimony of the City Engineer of East Orange, who was well qualified as an expert, says that there was no approach to this bridge; that the accident happened on the bridge itself (see State of Case, pp. 54 and 55).

The testimony in this case is that the boy fell through a hole or opening at the end of the bridge. There is no conflicting testimony as to the exact location of the accident; that has been pointed out more or less in the photographs, D-1 and D-2 (see State of Case, pp. 85 and 86). These photographs clearly show that the accident happened on the bridge because the fence is part of the bridge and extends to a point five feet beyond the brownstone structure where the fence is imbedded, and the side wings of said bridge or the brownstone step formation deflects from a right angle to the south something between five and ten degrees, so that (see State of Case, p. 54) if a line were drawn from the end of the sandstone step formation to the end of the fence it would form a straight line, so that the fence was erected when the bridge was constructed (see State of Case, pp. 85 and 87, Exhibits D-1 and D-2. Testimony of Mr. Willigerod, State of Case, p. 64).

Mr. Willigerod, the City Engineer of the City of East Orange, testified that he had filled up the hole, not in the performance of his duty as City Engineer of East Orange, but as a private citizen and of his own free will in the same motive and spirit that he would get out of a car and move a boulder from the middle of the road if he saw one there (see State of Case, p. 55, lines 24 to 29; p. 56, lines 21 to 40).

The testimony showed that the plaintiff, Paul Mullen, received a linear fracture of the skull (see State of Case, p. 30, lines 26 to 30; p. 68, lines 28 to 32).

POINT I.

The trial court did not err in refusing to (a) dismiss the complaint as failing to state facts sufficient to constitute a cause of action, (b) nonsuit plaintiffs or direct a verdict in favor of defendant on the ground that the evidence failed to disclose any duty on the part of defendant to maintain or repair the bridge.

It is well settled that no liability existed at common law for the non-repair of a bridge by a County, the only remedy being by indictment. *Freeholders of Sussex* v. *Strader,* 3 Harr. 108; *Cooley* v. *The Chosen Freeholders of Essex,* 27 N. J. L. 415 (Sup. Court, 1859); *Spencer* v. *Freeholders of Hudson,* 66 N. J. L. 301 (E. & A., 1901).

This immunity from liability at common law was invaded by an act of the legislature passed in 1860 which regulates the liability of townships and counties for failure of duty with regard to the erection, rebuilding or repair of any bridges.

The Bridge Act of 1860 (P. L. 1860, p. 285; C. S. 304, Sec. 9) provides that:

"9. Action against Township or board of freeholders for neglect to repair bridge.—Sec. 1. That in all cases where a township or board of chosen freeholders of a county are chargeable by law with the erection, rebuilding, or repair of any bridge or bridges, and the said township or board of chosen freeholders shall wrongfully neglect to erect, rebuild, or repair the same by reason whereof any person or persons shall receive injury or damage in his or their persons or property, he or they may bring his or their action of trespass on the case against said township of said board of chosen freeholders, as the case may be, and recover judgment against them to the extent of all such damage sustained as aforesaid, which said judgment shall be paid by the township or county, as the case may be."

Although the above section of the Bridge Act of 1860 was repealed in 1918 (P. L. 1918, p. 694), nevertheless the legislature provided in the same year (P. L. 1918, p. 604, Sec. 1301) as follows:

"Every board of chosen freeholders shall have power to build and construct, or acquire by gift, purchase or condemnation, and to maintain and operate, and widen when necessary, viaducts and bridges (including drawbridges) in their respective counties, when and where the public convenience requires; *and also to keep all viaducts and bridges wholly within their respective counties in repair and in safe condition for public travel.*"

Also, Sec. 1309, page 609, P. L. 1918 provides that:

"In all cases where the board of chosen freeholders of a county, or boards of chosen freeholders of two or more counties, are chargeable by law with the construction, erection, rebuilding or repair of any viaduct or bridge, and the said board or boards shall wrongfully neglect to perform their duty in

> that behalf, by reason whereof any person or persons shall receive injury or damage in his, her or their persons or property, such person or persons may bring an action at law against said county or counties and recover judgment to the extent of all such damage sustained as aforesaid. If, however, it shall be necessary to close any viaduct or bridge and stop travel over the same on account of necessary repairs, or on account of the same being unsafe for public travel, there shall be no liability on the part of any county or counties for damages by reason of the closing of such viaduct or bridge."

Thus it can readily be seen that Section 9 of the repealed act of 1860 has been virtually recopied into the laws of 1918, the only change being in the elimination of a township from liability, but leaving the liability as it was with reference to the board of chosen freeholders. Also, for the same reason, the repealer has in nowise affected the innumerable cases decided prior to 1918 in actions against the board of chosen freeholders for neglect in constructing, erecting, maintaining and repairing of bridges.

In *Ripley* v. *Chosen Freeholders of Essex and Hudson,* 40 N. J. L. 45 (Sup. Ct., 1878) the Court held that this statute of 1860 places the responsibility for an injury to any person or persons for the wrongful neglect to erect, rebuild or repair any bridge or bridges upon the Township of a board of chosen freeholders of a county and by virtue of said statute the courts have not only permitted the action but have rendered verdicts therein. The act of 1860 is a remedial statute and it should be construed to give remedy by action for all injuries to persons or property for the safety of which the duty of rebuilding or repairing a particular bridge is by law cast upon the municipal

body. The right of action is not limited to such injuries as happen to persons or property passing or being carried over the bridge.

By virtue of Sec. 1301 of the Bridge Act (P. L. 1918, p. 604) the Board of Chosen Freeholders of the County of Essex is chargeable by law with construction, erection or repair of any viaduct or bridge. The latter portion of the Bridge Act, Sec. 1301 (P. L. 1918, p. 604) reads:

> *"and also to keep all viaducts and bridges wholly within their respective counties in repair and in safe condition for public travel."*

Lock v. *Board of Chosen Freeholders of Atlantic County,* 158 Fed. Rep. 216 (D. N. J. 1908) states that the averments should be such as to show, not only that the bridge was out of repair, but that the Board of Chosen Freeholders knew or were chargeable with knowledge of its want of repair. There are these averments in plaintiffs' complaint (see State of Case, p. 7, Paragraph 5; Amendment, p. 16, line 40; p. 17, lines 1 to 3).

In *Creighton* v. *Board of Chosen Freeholders of Hudson,* 70 N. J. L. 350; 57 Atl. 870 (Sup. Ct., 1904), the Court held:

> "In order to prove a legal liability arising upon the board, therefore, it was necessary for the plaintiff to show not only that the bridge was out of repair, but in addition, either that the board of freeholders had knowledge of its condition or at least that it had been out of repair for so long a time that the board was chargeable with notice of that fact; for unless they had or should have had, such knowledge, they were not guilty of any wrongful neglect in failing to make repair. No attempt, however, was made either to show that the board was aware of the existence of the defect or that it had existed for so long a time that if inspections of the bridge had been made at

> reasonable frequent intervals, it would have been discovered before the accident occurred."

Indeed, the evidence in this case showed (see State of Case, p. 22, lines 23 to 25; p. 37, lines 9 to 10, and p. 27, lines 35 to 40, and p. 28, lines 1 to 8) that the bridge was out of repair and that it had been out of repair for so long a time that the Board of Chosen Freeholders of Essex was chargeable with notice of that fact.

In the case of *Freeholders* v. *Hough,* 55 N. J. L. 628, the Court held that the open and notorious continuance of a dangerous condition of the access of a bridge for over two weeks before the injury was sufficient to warrant the charging of authorities with notice thereof the same as if they had received actual notice.

With reference to the Bridge Act of 1860, Sec. 9, the Court stated in *Murphy* v. *Board of Chosen Freeholders,* 57 N. J. L. 245 (Sup. Ct., 1894):

> "Under this statute the defendant would be liable for neglect in the erection or rebuilding of said bridge and also under this act liable for any negligent want of repair, or for any neglect to keep the same in safe condition for public travel. The defendant as a public corporation was bound to build, rebuild, and keep in repair this bridge with a view to the safety of persons and property and its liability for damages ensued whenever it neglected the duty imposed upon it by the statute."

The present Statute imposed the duty on the Board of Chosen Freeholders to build and construct or acquire by gift, purchase or condemnation and to maintain and operate, and widen when necessary, viaducts and bridges (including drawbridges) in respective counties and when and where public convenience requires, and also to

keep all viaducts and bridges wholly within their respective counties in repair and in safe condition for public travel. (Chapter 185, Laws of 1918, Section 1301.) (By virtue of Section 1309, Chapter 185 of the Laws of 1918, p. 609.) It provides that in all cases where the Board of Chosen Freeholders of a County, or Boards of Chosen Freeholders of two or more Counties are chargeable by law (and so they are by virtue of Sec. 1301) with the construction, erection, rebuilding or repair of any bridge or viaduct, and the said board or boards shall wrongfully neglect to perform their duty in that behalf, by reason whereof any person or persons shall receive injury or damage in his, her or their persons or property, such persons or person may bring an action at law against said county or counties and recover judgment to the extent of all such damage sustained as aforesaid.

In view of the fact that the responsibility for injuries to persons or property was placed upon the Board of Chosen Freeholders by reason of the Bridge Act with its supplements of 1860, Section 9, which said section was subsequently repealed in 1918 and in the same year Chapter 185 of the Laws of 1918 became operative because the language of Chapter 185, Laws of 1918, is practically the same language used in the original Bridge Act with its supplements. Therefore, the cases hereinabove mentioned are still to be followed by the Courts of our State, even though there have been no similar cases or decisions on this particular point after the passage of the Bridge Act of 1918, known as Chapter 185. For this reason the Board of Chosen Freeholders are chargeable and responsible for the injuries received by this plaintiff.

It is respectfully submitted that the trial court did not err in refusing to (a) dismiss the complaint as failing to state facts sufficient to consti-

tute a cause of action; (b) non-suit plaintiffs or direct a verdict in favor of defendant on the ground that the evidence failed to disclose any duty of defendant to maintain or repair the bridge.

POINT II.

The trial court did not err in refusing to nonsuit plaintiffs or direct a verdict in favor of defendant on the ground that the accident did not happen on the bridge.

The testimony is clear as to the exact location of this accident; that has been shown by the photographs, Exhibits D-1 and D-2 (State of Case, pp. 85 and 86).

These photographs show very clearly that the accident happened on the bridge. As seen from Exhibits D-1 and D-2 the railing on the bridge is a continuous one, of the same material and construction as the rest of the bridge, and the hole marked (X) on the exhibits shows the accident to have taken place on the bridge.

The side wings of the bridge are not at right angles with the bridge (see State of Case, p. 50, lines 1 to 18; also p. 64, lines 10 to 17), so that a straight line can be drawn connecting the end of the side wings of the bridge and the end of the fence (see State of Case, pp. 85 and 87, Exhibits D-1 and D-2; p. 44, lines 1 and 10).

There was no approach to this bridge. This is clearly pointed out (State of Case, p. 55, lines 8 to 10; p. 65, lines 18 to 20; p. 54, lines 33 to 39). *The reason that there was no approach to the bridge was because there was no occasion to have an artificial structure to carry one from the highway to the bridge structure* (State of Case, p. 54, line 40; p. 55 lines 1 to 10; p. 63, lines 17 to 23).

In the case of *Darville* v. *Board of Chosen Freeholders of the County of Essex*, 90 N. J. L., page 617 (E. & A., 1917), the plaintiff fell from a county bridge by reason of the giving way of an iron rail and in that case the Court refused to grant defendant's motion for non-suit, as well as a motion to direct a verdict. Defendant contended that the rail in question was not placed there by the county and that at the time of the injury the plaintiff was not upon the public thoroughfare, but was upon private property adjoining the bridge, upon which was the rail. The Court left these questions to be decided by the jury. The Court said in the above case:

> "The production by the defendant of the plans for the construction of the bridge might have thrown light upon the question of the original construction, and have shown the presence or absence of the rail in question, but the failure to produce it left the question open, assuming the *locus in quo* to be private property, whether, during an interim of years since the original construction, the defendant may not have assumed the added responsibility, and imposed the corresponding liability upon itself by accepting permission, tantamount to a license from the adjoining landowner, to keep and maintain the rail as part of the structure, a legal status which the jury might reasonably infer in fact existed in view of the acts of supervision and maintenance, which the proof showed the defendant exercised over the entire structure.
>
> "The liability of defendant being entirely statutory (Pamph., L. 1860, p. 285; Comp. Stat., p. 304, par. 9); Maguth *v.* Freeholders of Passaic, 72 N. J. L. 226; Freeholders of Sussex *v.* Strader, 18 *Id.* 108, the trial court properly left these questions to the jury, premising its comments upon the situation, with the fundamental considerations. That the defendant's liability was conditioned upon their answer

> to the inquiries whether the rail in question was part of the bridge, and whether the plaintiff at the time of the accident was upon defendant's property, or upon private property, over which the defendant assumed no responsibility and exercised no control."

In *Norton* v. *County of Bergen,* 7 Misc. Rep. 683 (not officially reported) (Sup. Ct., 1929), the Court held that the question of wrongful neglect on the part of the defendant in respect to the construction or repair of the bridge was a question of fact for the determination of the judge since he was sitting without a jury.

It is respectfully submitted that the trial court did not err in refusing to non-suit the plaintiffs or direct a verdict in favor of the defendant on the ground that the accident did not happen on the bridge and leaving this fact for the determination of the jury.

POINT III.

The trial court did not err in refusing to direct a verdict in favor of defendant and against plaintiff Christopher Mullen on the ground that he failed to prove any damages.

The second count of plaintiffs' complaint sought to recover damages for the father, Christopher Mullen, because of injuries to his son. The father is entitled not only to the money he has already paid out, but also for the moneys he will be obliged to expend in the future as stated in the bill of complaint. The evidence given by Genevieve Mullen that she paid a doctor's bill (State of Case, p. 58, lines 1923) was sufficient. Payment by her is certainly an expenditure by the husband who supports her and tenders money to her for the payment of bills.

The case of *Ogborn* v. *Francis*, 44 N. J. L. 441 was one brought for the seduction of plaintiff's daughter.

It is well settled that the gist of the action in such cases is the loss of services of the child. But in this case the father seeks to recover not only the moneys he has expended, but the moneys he will have to expend in the future to cure his son as a result of this accident. He also sues not only for the loss of services at the present time, but also for the loss of services that he will lose in the future.

The Court was correct in refusing to direct a verdict in favor of the defendant when it realized the injury that the plaintiff's boy had received and the jury should properly consider what reasonable expense the father would in all probability have to incur without limit as to time, certainly until the majority of the infant, and perhaps even after that, if the child should not be restored to health and should be dependent upon his father's aid.

It is respectfully submitted that the judgment in favor of the plaintiffs be affirmed.

Respectfully submitted,

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Plaintiffs-Respondents.