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# New Jersey Court of Errors and Appeals

JOHN J. LYDECKER, by PETER  
J. LYDECKER, his next friend,

*Plaintiff,*

vs.

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF PAS-  
SAIC, and THE STANDARD OIL  
COMPANY OF NEW JERSEY,

*Defendants.*

10

## Reasons.

The following are the plaintiff's grounds of ap-  
peal:

20

(1) Because the court directed a judgment of non-suit as to the defendant, the Board of Chosen Freeholders of the County of Passaic.

(2) Because the court directed a verdict in favor of the defendant, the Standard Oil Company of New Jersey, a corporation.

Respectfully,

WARD & MCGINNIS,

*Attorneys of Plaintiff.*

30

*Notice of Appeal.*

## NEW JERSEY SUPREME COURT.

JOHN J. LYDECKER, by PETER  
J. LYDECKER, his next friend,  
*Plaintiff (Appellant),*

vs.

THE BOARD OF CHOSEN FREE-  
10 HOLDERS OF THE COUNTY OF PAS-  
SAIC, and THE STANDARD OIL  
COMPANY, (a corporation of  
New Jersey),  
*Defendants (Respondents).*

**Notice of Appeal.**

To—

20 J. W. DeYoe, attorney of Board of Chosen  
Freeholders of Passaic County, defendant, and  
Pierre P. Garven, attorney of Standard Oil  
Co., defendant.

Take notice that the plaintiff will appeal to the  
Court of Errors and Appeals in the last resort  
of all causes, from the whole of the judgment en-  
tered in said cause in favor of the defendants.

Dated Dec. 17, 1914.

Respectfully,

30 WARD & MCGINNIS,  
*Attorneys of Appellant*

*Complaint.*

## NEW JERSEY SUPREME COURT.

Passaic County.

JOHN J. LYDECKER, by PETER  
J. LYDECKER, his next friend,

*Plaintiff,*

vs.

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF PAS-  
SAIC, and THE STANDARD OIL  
COMPANY, (a corporation of  
New Jersey),

*Defendants.*

10

**Complaint.**

The plaintiff by Ward & McGinnis, his attor-  
neys, complains of the defendants as follows:

20

1. That the plaintiff is an infant, and is a resi-  
dent of the City of Paterson, County of Passaic  
and State of New Jersey, and brings this action  
by his next friend, Peter J. Lydecker, duly ap-  
pointed by the Supreme Court for that purpose.

2. That the defendant, the Board of Chosen  
Freeholders of the County of Passaic, in a munic-  
ipal corporation, charged with the conduct and  
business and administration of the County of  
Passaic and State of New Jersey.

30

3. That the defendant, the Standard Oil Com-  
pany, is a corporation of the State of New Jer-  
sey, with its principal office located in the City  
of Bayonne and State of New Jersey.

*Complaint.*

4. That at the time of the committing of the grievances hereinafter mentioned, there was situate in the City of Paterson, a certain public street or highway, known as East 18th street, which extended in a northerly and southerly direction, through said city, being crossed by a number of other public streets, amongst them, another public street, known as Eleventh avenue, which crossed said East 18th street at right angles.

10 5. That shortly before the committing of the grievances hereinfater mentioned, the defendant, the Board of Chosen Freeholders of the County of Passaic, in the course of exercising its control and management of said road or highway, and for the purpose of laying or settling the dust upon said highway, entered into a contract or agreement with the other defendant, the Standard Oil Company, of New Jersey, whereby the said defendant, the Standard Oil Company of New  
20 Jersey, agreed to oil said road with a preparation known as standard asphalt road oil, or crude oil preparation; that under the terms of said agreement, the Standard Oil Company of New Jersey agreed to protect said road from traffic for at least six hours after placing said oil upon the highway, or for such additional time as was necessary to allow the oil to penetrate in the surface of said road, and it, the said defendant, the  
30 Standard Oil Company of New Jersey, further agreed that it would only oil one side of the road at a time, and leave the other side open to traffic until sufficient penetration of the oil should be attained, so as to allow traffic on the same. That said preparation known as the standard asphalt road oil, or crude oil preparation is an extremely

*Complaint.*

slippery substance, when laid upon the road in large quantities.

6. Plaintiff avers that in accordance with the said agreement or contract before the committing of the grievances hereinafter mentioned, the said defendant, the Standard Oil Company of New Jersey in violation of said agreement, carelessly, negligently and improperly placed the said standard asphalt road oil or crude oil preparation over the entire surface of said road, and laid and placed upon said road over the entire surface thereof, large and excessive quantities of said oil, so that the same did not penetrate, but rendered the entire surface extremely slippery and dangerous to persons using bicycles or other vehicles upon said road, by reason of the fact that such bicycles or other vehicles passing over said road, would, by reason of the excessive quantities of said preparation on the road skid, slip or overturn, and well knowing the premises, carelessly, negligently and improperly failed to close said road to traffic or to warn persons using the road on bicycles or other vehicles of the aforesaid dangerous condition of the said road. 10  
20

7. That the defendant, the Board of Chosen Freeholders of the County of Passaic, well knowing the premises, and well knowing the dangerous and defective condition in which said highway was rendered by the said defendant, the Standard Oil Company of New Jersey, carelessly, negligently and improperly failed to remove said dangerous preparation on the road, and carelessly, negligently and improperly failed to close said road to traffic, and carelessly, negligently and improperly failed to warn or notify persons using 30

*Complaint.*

bicycles or other vehicles of the dangerous condition of said road, and carelessly, negligently and improperly failed to make said road safe, after the same had been made dangerous, as aforesaid by the said defendant, the Standard Oil Company of New Jersey.

8. That by reason of the said careless, negligent and improper conduct of the said defendants, the plaintiff, on the 20th day of August, 1913, while riding along said East 18th street upon a bicycle, and going in a southerly direction, and when he had reached a point at or near where East 18th street is crossed by Eleventh avenue, as aforesaid, the said bicycle, by reason of the slippery and dangerous condition of the said road as aforesaid, caused by the standard asphalt road oil or crude oil preparation being placed thereon as aforesaid, slipped, swerved and over-turned, throwing the plaintiff with great force and violence to the ground, injuring him as follows:

9. Plaintiff's right arm was broken below the elbow, his left arm was broken below the elbow, his spine was injured, his head was cut and bruised, and he was cut and bruised about the entire body, both wrists were sprained, his arms were permanently stiffened by the injuries, and he received a permanent shock to his nervous system, and ever since has been sick, sore wounded, diseased and disordered.

By reason of the premises, plaintiff sustained damage in the amount of \$5,000, for which amount judgment will be claimed.

WARD & MCGINNIS,  
*Attorneys of Plaintiff*

*Answer.*

## NEW JERSEY SUPREME COURT

---

JOHN J. LYDECKER, by PETER  
J. LYDECKER, his next friend,

*Plaintiff,*

vs.

THE BOARD OF CHOSEN FREE  
HOLDERS OF THE COUNTY OF PAS-  
SAIC, et al.,

*Defendants.**Action at Law.*

10

**Answer.**

This defendant, the Board of Chosen Freehold  
ers of the County of Passaic, answering says:

20

First Defense:

The complaint discloses no cause of action.

Second Defense:

(1) As to the statement in the first paragraph  
of the complaint defendant has no knowledge or  
information sufficient whereof to form a belief.

(2) Defendant denies the second paragraph.

(3) This defendant neither denies nor admits  
the third paragraph as it has no knowledge on  
which to form a belief.

30

(4) This defendant admits the fourth para-  
graph.

(5) This defendant admits the fifth paragraph.

(6) This defendant denies the sixth paragraph.

(7) This defendant denies the seventh para-  
graph.

*Answer.*

(8) This defendant denies the eighth paragraph.

(9) As to the statements in the ninth paragraph, the defendant has no knowledge or information sufficient whereof to form a belief.

## Third Defense:

This defendant is not liable to the plaintiff.

(1) Because the said plaintiff did not suffer any injury or loss by reason of any negligence, default or miscarriage on the part of the defendant or any of its agents.

(2) That any injuries or loss suffered by the plaintiff were occasioned by his negligence, default and misconduct.

## Fourth Defense:

(1) The said oil was laid on said street by the said Standard Oil Company under an agreement with this defendant whereby said company agreed to oil said road with Standard Asphaltum Road Oil: that under the terms of said agreement said company agreed to protect said road for traffic at least six hours or for such time as was necessary to allow the oil to penetrate into the surface of the macadam, and that it would only oil one side of said road at a time and leave the other side open to traffic until, in the judgment of the engineer or supervisor, sufficient penetration should be obtained so as to allow traffic on the same, and that this defendant is not liable to the plaintiff for any damage which the plaintiff may have sustained as alleged in said complaint.

## Fifth Defense:

That the defendant in the course of exercising its lawful control and management of said road or highway and for the purpose of settling the dust and repairing said road entered into said agreement with the Standard Oil Company for

*Answer.*

the laying of oil on said road, and it is not liable for any negligence of said company in the performance of said work.

Sixth Defense:

The defendant caused said oil to be laid in the exercise of its lawful control and management of said road for the purpose of laying or settling the dust and preserving and repairing said road in the lawful exercise of the public duty required of the defendant.

J. W. DEYOE,

10

*Attorney of defendant, The Board  
of Chosen Freeholders of the  
County of Passaic.*

A true copy.

WM. C. GEBHARDT,

*Clerk.*

20

30

*Answer of the Standard Oil Company of  
New Jersey.*

NEW JERSEY SUPREME COURT.

Passaic County.

JOHN J. LYDECKER, by PETER  
J. LYDECKER, his next friend,  
*Plaintiff.*

10

vs.

THE BOARD OF CHOSEN FREE  
HOLDERS OF THE COUNTY OF PAS-  
SAIC, and THE STANDARD OIL  
COMPANY OF NEW JERSEY,

*Defendants.*

*Action at Law.*

20

**Answer of the Standard Oil Company of  
New Jersey.**

This defendant, the Standard Oil Company of  
New Jersey, says:

First Defense:

1. As to the statements in the first paragraph,  
it has not any knowledge or information sufficient  
whereof to form a belief.
2. It denies the second paragraph.
3. It admits the third paragraph.
4. It admits the fourth paragraph.
5. It denies the fifth paragraph.
6. It denies the sixth paragraph.
7. It denies the seventh paragraph.
8. It denies the eighth paragraph.
9. As to the statement in the ninth paragraph,

30

*Answer of the Standard Oil Company of  
New Jersey.*

it has not any knowledge or information sufficient whereof to form a belief.

Second Defense:

This defendant is not liable to the plaintiff,

1. Because the said plaintiff did not suffer any injury or loss by reason of any negligence, default or miscarriage on the part of the said defendant or any of its agents.

2. That any injuries or loss suffered by the plaintiff were occasioned by his own negligence, default and misconduct. 10

Third Defense:

1. That said Board of Chosen Freeholders have and at the time complained of had the sole management and control of said road or highway and that in the lawful exercise of its said control and management thereof entered into an agreement with this defendant for the laying of oil on said road.

2. That by virtue of the terms of the contract between the said Board of Chosen Freeholders and this defendant referred to in said complaint, said work of oiling said road was required to be done under the direction and supervision and to the satisfaction of the said Board of Chosen Freeholders and its agents and representatives, and that the work performed by the defendant was done under the direction and supervision and to the satisfaction of the said Board of Chosen Freeholders and its agents and representatives and in a good, workmanlike, efficient, proper and careful manner and in strict compliance with the terms and conditions of said contract. 20

3. That this defendant carried out its said agreement with the said Board of Chosen Free- 30

*Answer of the Standard Oil Company of  
New Jersey.*

holders according to all the terms thereof and is not liable to the plaintiff for any damage which said plaintiff may have sustained as alleged in said complaint.

Fourth Defense:

It objects that the complaint does not allege or disclose any cause of action against the defendant.

10

PIERRE P. GARVEN,  
*Attorney of defendant, the Standard Oil Company of New Jersey.*

A true copy.

WM. C. GEBHARDT,  
*Clerk.*

20

30

*Postea.*

NEW JERSEY SUPREME COURT.

Passaic County.

JOHN J. LYDECKER, by PETER  
J. LYDECKER, his next friend,

*Plaintiff,*

vs.

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF PAS-  
SAIC, and THE STANDARD OIL  
COMPANY, (a corporation of  
New Jersey),

*Defendants*

*Action at Law.*

10

*Postea.*

20

This matter was referred by Hon. James F. Minturn, Justice of the Supreme Court, to the Hon. George S. Silzer, Judge holding the Passaic County Circuit Court, for trial, and the case was tried before Hon. George S. Silzer with a jury on the twenty-fifth day and thirtieth day of November, nineteen hundred and fourteen, in the presence of the counsel of the respective parties at the Passaic County Circuit.

And the plaintiff having submitted his evidence and the court, being of opinion that it was not sufficient to entitle him to recover as against the refendant, The Board of Chasen Freeholders of the County of Passaic, ordered judgment of non-suit to be entered against him.

20

*Postea.*

And the plaintiff having submitted his evidence and the trial proceeding after the submission of the evidence of the plaintiff as against the defendant, The Standard Oil Company, a corporation of New Jersey, and the said defendant, The Standard Oil Company, having submitted its evidence on its part, and the court, being of opinion that the said testimony was not sufficient to entitle the plaintiff to recover, directed a verdict in favor of the defendant, The Standard Oil Company.

10

GEORGE S. SILZER, *J.*

A true copy.

WM. C. GEBHARDT,

*Clerk.*

20

30

*Appearances.*NEW JERSEY SUPREME COURT.  
PASSAIC COUNTY.

|   |                                   |   |    |
|---|-----------------------------------|---|----|
| JOHN S. LYDECKER, by his next<br>friend.<br><br>vs.<br>THE BOARD OF CHOSEN FREE-<br>HOLDERS OF THE COUNTY OF<br>PASSAIC, et als.,<br><br> | Plaintiff,<br><br><br>Defendants, | Before:<br>Hon. George S.<br>Silzer, J., and a<br>Jury. | 10 |
|---|-----------------------------------|---|----|

Paterson, N. J., November 24, 1914.

## APPEARANCES:

MESSRS. WARD & MCGINNIS,  
*For the Plaintiff,*

J. W. DEYOE, ESQ., 20  
*For the Defendant, the Board of Chosen  
Freeholders of Passaic County.*

PIERRE P. GARVEN, ESQ.,  
*For the Defendant, the Standard Oil  
Company.*

(A Jury being selected and found satisfactory,  
they were sworn.)

Mr. McGinnis: This case is simply 30  
brought by John S. Lydecker against the de-  
fendants to recover for injuries; the father,  
Peter J. Lydecker, also has a bill for money  
expended for medical services in the case

*John S. Lydecker—direct.*

and I have spoken to counsel and it is understood that the medical services may be included in the action so as to avoid the necessity of bringing another action.

The Court: You join the father as plaintiff?

Mr. McGinnis: Yes, sir.

Mr. DeYoe: There is no objection.

Mr. Garven: There will be no objection on our part.

10 The Court: Then it will be so ordered.  
(Mr. McGinnis opens for the Plaintiff.)  
(Mr. DeYoe opens for the defendants.)

JOHN S. LYDECKER, sworn as a witness on behalf of the Plaintiffs, testifies as follows:

*Direct Examination by Mr. McGinnis.*

20 Q. You are one of the plaintiffs in this case? A. Yes, sir.

Q. How old are you? A. I was eighteen past.

Q. And you are the son of Peter J. Lydecker? A. Yes, sir.

Q. You received an injury in the Summer of 1913? A. Yes, sir.

Q. On what date? A. On August twentieth.

Q. Where were you living at that time? A. At No. 419 East Eighteenth street.

30 Q. With your father? A. With my father.

Q. On what street did this accident happen? A. On Eighteenth street.

Q. Paterson? A. Paterson.

Q. East Eighteenth street, I understand, runs north and south, is that right? A. Yes, sir.

Q. Do you know where Eleventh avenue is? A. Yes, sir.

*John S. Lydecker—direct.*

Q. Does Eleventh avenue cross East Eighteenth street? A. It did not at that time, but it does now.

Q. It came into it? A. It came into it at that time, but now, it crosses East Eighteenth street.

Q. Then, as I understand it, farther north there is Tenth avenue? A. Yes, sir.

Q. Did you live still farther north than that? A. Yes, sir.

Q. So that when you wanted to come south on East Eighteenth street and along it you would first come from your house to Tenth avenue and Eleventh avenue and so on to Twelfth avenue? A. Yes, sir. 10

Q. What time of the day did this accident happen? A. As far as I can remember, it was around four o'clock.

Q. In the afternoon? A. In the afternoon.

Q. Will you tell us,—you left your house about four o'clock,—will you tell us what happened after that? A. When I left the house I walked out to the gutter and got on my bicycle, crossed the street and when I reached Tenth avenue, I did not notice the oil until I had rode in it, and after I rode into it the farther I rode into it the thicker it got, the thicker the oil got, it got like paste, and as I rode to Eleventh avenue corner I did not notice a puddle of oil, because it had yellow dirt over it and I ran right into it and my bicycle slipped from under me. 20 30

Q. Was there any oil on Tenth avenue? I am trying to find out where you first met the oil? A. Just after I crossed Tenth avenue.

Q. Going towards Eleventh? A. Going towards Eleventh; yes, sir.

*John S. Lydecker—direct.*

Q. What was the character of the oil there? A. It was a light oil, just as though the wagon had just went over it, and when I went on further, the further I went the thicker it got, and it got like paste.

Q. When was it the wheel went from under you? When you fell, how were you riding with regard to speed? A. I was riding about five miles an hour.

10 Q. Just where was it, with reference to Eleventh avenue when you fell? A. My front wheel had just passed the curbstone, the cross-walk, which cross-walk was all oil.

Q. Was there any sand scattered there? A. There was no sand scattered anywheres.

Q. When you fell, what was the character of the fall, easy or hard? A. I don't understand it that way.

20 Q. Did you go down easy or hard when your wheel went from under you? A. I went down kind of hard, because the wheel came altogether from under me quick and made my weight go right over.

Q. What can you say as to what quantity of the street was covered with oil, what part of the street? A. From curb to curb was covered, as for as I can remember.

30 Q. You say you went into a pool of oil that was covered with scumm, and you could not see it. Just describe that a little more to the jury? A. As I rode along from Tenth avenue, going to Eleventh, as I came to Eleventh avenue the cross-walk here, it was kind as if a stone had been sunk in and opened a hole there and there came across the oil wagon and filled the hole up with oil, and

*John S. Lydecker—direct.*

somehow, either something came along and covered that up with dirt, and I expected that to be solid dirt and I rode onto it and I had no knowledge of slipping on that oil, I had rode over more or less of it riding from Montclair to Paterson and back and forth.

Q. Which cross-walk was it, as you come along, would it be the north or the south cross walk? A. The north.

Q. Was there anything to indicate to you that that pool, was there, or that it was dangerous to you? 10

Mr. DeYoe: He has already testified to that.

The Court: Yes. I understood him to say that.

Q. Did you expect, as you rode along, that you were going to fall? A. No, sir. 20

Q. Had you ever ridden on oil roads before? A. Yes, sir.

Q. Did you ever have any trouble before? A. No, sir.

Q. When you fell what next happened to you? A. When I fell I hit the stones and I did not know where I was for a few minutes, just like as though I had been unconscious. When I came to I got up and looked around to see who was there and went over to the saloon to get a drink to kind of take the faint off of me, and I came back and went to pick the wheel up with my both hands and I could not pick it up. This hand (indicating the left hand) hung this way (indicating). And I picked 30

*John S. Lydecker—direct.*

it up with my right hand and went to the sidewalk, and just as I got to the side-walk I fell again against a tree and with that a man came up and picked my wheel up and went up the street with me, just so I could go along, just so I could move, with him along taking the wheel, and as I reached Tenth avenue two boys came along, friends of mine and took the wheel and assisted me, one took the wheel and one went along beside me and helped me.

10 Q. And you went home? A. I went home; yes, sir.

Q. What were you suffering from? A. When I reached home, I did not think what it was first, and took off my coat and fell in a chair and then fell unconscious for about an hour and a half; and when I came to they had sent for a doctor and I said "What is the matter?" And I moved my arm off the armchair and this part dropped down (indicating.)

20 Q. What doctor did you have? A. Dr. Charley Murn.

Q. Dr. Charles Murn has been your particular physician? A. Yes, sir.

Q. Did you suffer any pain from that injury? A. Yes, sir.

Q. How long was it before you were able to use your arm again? A. I should judge pretty near three months.

30 Q. Was it ever completely cured? A. Is it all right now, I mean? A. It is, as far as its use for table, but when I go to work with it it goes against me.

Q. In what respect does it affect you? A. If I go to handle anything, lift up anything, it bothers me.

*John S. Lydecker—direct.*

Q. How does it bother you? A. If I go to pick up something, just as though those two bones just catch together and they chip off, it feels like that.

Q. Have you reported those things to your Doctor? A. I have.

Q. Will you take off your coat now and show it to the jury? A. (The witness does so.)

Q. This is the arm, now show the dislocation, point out where the break was? A. The break was here (indicating) one break about here, and the other break here (indicating). This break is a little chipped out. 10

Mr. McGinnis: The witness indicates on the outside of his arm, about half way between the elbow and the wrist and inside of the arm a little nearer the inside of the elbow.

Q. Is that where the bone is chipped? A. Yes, sir. 20

Mr. Garven: I think the jury ought to see that.

(The witness shows to the jury.)

Q. Will you show how that arm troubles you in use? A. If I go to pick anything up, like that, this bone and this bone gets together, just like chipping off anything with a knife, and that little piece interferes in there. There is a little chip, I should judge, about that size of the bone, and every time I pick up anything and close my wrist and the weight works on it, this here kind of snaps in there. 30

*John S. Lydecker—direct.*

Q. Will you just lift your arm up and hold it up and show what you can do in twisting the arm?

A. I can hold the arm that way (indicating) but I cannot get it over like that. (Indicating.)

Q. That is as far as you can get that one over?

A. Yes, sir. (Showing that the arm will not go forward around.)

Q. And the use of the arm, does it produce pain? Does it produce any pain when you use it? A.

10 Every time I go to use it, it pains.

Q. And that condition, as you find it to day, does it cause you pain? A. It causes me pain right now.

Q. What can you say as to whether there has been in the last three months, has there been any improvement? A. Not at all.

Q. Has there been any substantial improvement after the three or four months of the injury? A. Not at all.

20 Q. Does it interfere with you in any way in closing and opening your hand? A. In closing and opening the wrist, not at all; it is only the one movement.

Q. Have you tried to use the arm? A. I have tried several times, several different times.

Q. Have you reported to Dr. Murn the condition of your arm? A. Yes, sir; I have reported to Dr. Murn often.

30 Q. And have you followed the directions which he gave you? A. He gave me medicine, he gave me stuff to put on the arm and I put it on.

Q. Have you tried to exercise it? A. I have tried to exercise it; yes, sir.

Q. Were you working at the time of the accident? A. Yes, sir; I was working at that time.

*John S. Lydecker—direct.*

Q. What doing? A. I was driving a milk wagon.

Q. For whom were you working? A. I was working with the Fairfield Dairy.

Q. How much did you get a week? A. I got fifteen dollars a week, and commissions and that would make my salary reach about twenty-two dollars a week.

Q. How long have you been out of work? A. I have been out of work ever since the accident. I have tried to go back at it and every time I have tried to go back at it I failed. 10

The Court: What was the date of the accident?

Mr. McGinnis: The twentieth day of August, 1913.

Q. It that right? A. Yes, sir; a year ago last August. 20

Q. Has Dr. Murn been your physician ever since? A. Yes, sir.

Q. In what way have you been unable to work, what has been the trouble? You say when you started to work you failed? A. If I started to work I would be all right until I took up anything with my hand, then the minute I did I would have to stop it, then it would ache me three or four days, and then again it would not bother me, and if a storm should come up it bothers me then. 30

Q. How much money have you earned since, at anything else? A. You mean since the accident?

Q. Yes? A. Well, a very small amount.

Q. Give us the figures as near as you can? A. About three or four dollars, little odd jobs that I could do, run errands, something like that.

*John S. Lydecker—cross.*

Q. You have not had any steady employment by week's wages or day's wages? A. I have had no steady employment, no sir.

The court thereupon adjourned to tomorrow, November 25th, 1914.

Second Day Paterson, N. J., November 25, 1914.

The trial was continued this day pursuant to adjournment.

10

JOHN S. LYDECKER, resumes the stand.

*Direct Examination (continued) by Mr. McGinnis.*

Q. How many years had you been riding a bicycle before this accident happened? A. Four to five years.

*Cross Examination by Mr. Garven.*

20

Q. Where did you say you were working at the time of your injury? A. At the time of my injury I was working for the Fairfield Dairy.

Q. How long had you worked for them? A. About eight months.

Q. That is, eight months prior to August thirteenth? A. Yes, sir.

Q. Is it not a fact that you went there in May, 1913? A. I should judge somewhere around that

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Q. You don't consider it eight months between May and August, do you? A. No, not eight months.

Q. You were mistaken, were you? A. Well, I said I judged about eight months.

*John S. Lydecker—cross.*

Q. What did you say your wages were? A. Fifteen dollars a week.

Q. What were your duties? A. I was getting commissions, I worked for wages and I got commissions and I figured that my wages and commissions came to about twenty-three dollars a week.

Q. When you say "commissions" what do you mean? A. Milk that we sold we got so much on every dollar.

Q. Besides you wages? A. Besides my wages; 10  
yes, sir.

Q. What was the character of your work? A. I had to go there in the morning and hitch up the horses, and load my wagon and go ahead out on my route.

Q. When you say "load up your wagon" you mean put cans on? A. Put milk bottles and cans in the wagon.

Q. Then you would go around and deliver the milk? A. Yes, sir. 20

Q. What do you weigh? A. What do I weigh, at the present time? I should judge about a hundred and fifty-five.

Q. You consider yourself a pretty strong chap don't you? A. Well, not exactly.

Q. What seems to be the trouble with you? A. Well, every time I go to do any work my arm bothers me.

Q. Speaking of the arm that is injured? A. 20  
Yes, sir.

Q. It bothers you in what way? A. Well, when I go to do any work, lift anything with it, or anything like that, it bothers me.

Q. Does it hurt you to take a young lady with the left arm of yours and swing her up some steps

*John S. Lydecker—cross.*

in front of the post office building, as you did yesterday afternoon? A. Ain't you mistaken?

Q. Am I? A. I have my right arm.

Q. Oh, it was your right arm? A. It was my left arm which was broke.

Q. Are you sure it as not your left arm you used yesterday afternoon after you had testified here? A. Yes, sir.

10 Q. There is no difficulty in running up and down the steps, is there? A. No, not with my feet.

Q. And you consider that your arm is not strong enough to enable you to handle a can of milk or take a bottle of milk into a place? A. Well, I could do it with my right hand, but not with my left.

Q. Where did you try to get work since this accident? A. Different places.

Q. Where? A. Well, I tried Diskon's for one.

Q. Who is Diskon? A. On Main street.

20 Q. What kind of work is that? A. That is a delivery wagon.

Q. Trucking business? A. Well, not exactly, it is delivering goods around the streets, that way.

Q. Why didn't you go back to your old business? A. Well, I did not have any wish to go back there, I thought the hours were too long for me, being a young fellow.

Q. Is that the reason you did not go back and inquire for work? A. Yes, sir.

30 Q. I suppose you could have gotten work if you went back there? A. I suppose I could; yes, sir.

Q. You did not make any effort? A. No, sir.

Q. What was you business before you took up the milk business? A. I was in the milk business before that.

*John S. Lydecker—cross.*

Q. Have you been in the milk business since you have been able to work? A. Before I went to the Fairfield Daidy I worked in the Saybrook Farm.

Q. Since you have been working you worked in the milk business? A. No, not since I have been working.

Q. Most of the time? A. Most of the time; yes, sir.

Q. You consider that your business, or did consider it your business up to the time of the accident? A. When I went sick I was in the milk business and after that I came out of that and had another job. 10

Q. Since you have been injured you have made no effort to go back into the milk business, have you? A. Not accidentally, I have not.

Q. Since the time of the accident you have not made any effort to go back into the milk business? A. No, sir.

Q. Why not? A. Well, I judged that the hours was too long, that I could not stand it. 20

Q. That is the only reason you give, is it? A. And lifting the cases in and out bothered me.

Q. This other business you tried to get, you had to lift too didn't you? A. Well, I could do the most of the work with one hand at that business, but I did not succeed in keeping it.

Q. Where else have you tried since then to get business? A. Then I went to George Glover the wood man on Marshall street. I went to work there and my arm gave out on me. I was there a few days. 30

Q. What did you have to do there? A. I had to drive a car and lug wood around.

*John S. Lydecker—cross.*

Q. Drive a car? A. To drive a car and chop wood and carry wood around and my arm got against me after about three days, I should judge.

Q. Then you left did you? A. Yes, sir.

Q. Where did you try since then? A. I tried to go in as a dye worker since then, which is light work and would not bother my left arm, but I did not succeed in getting there.

10 Q. Why not? A. Well, he did not want me, that is all, he did not need anybody at the time.

Q. Then you went where? A. Then I went around and looked around and see if I could not get a job in light work, and there was nothing doing. I tried a few other places in town and did not succeed in getting anything.

Q. These other few places, give us the names of some of them? A. Quackenbush's.

Q. What kind of a business is that? A. That is a drygoods store.

20 Q. You applied for work there, did you? A. Yes, sir; then I applied to different mills.

Q. In other words, there is no work around here for a young man, is that it? A. Well, not exactly. If a young man wants to go into hard labor, where he can, if he is able to get work and to do the work, he can get it, where a young man cannot go into hard labor and he cannot stand the work, his arms gives out, he cannot get it.

30 Q. You did not explain to these men you went out to get work from that you had a broken arm or that your arm bothered you, that you could not use yur left arm, did you? A. No, not exactly.

Q. Did you say anything to them about it? A. Not exactly.

Q. What do you mean? A. I did not tell them about the broken arm.

*John S. Lydecker—cross.*

Q. You went there as a vigorous, strong young man, didn't you, and told them you were able to work? A. No, sir; I did not say that.

Q. Did you just go there and simply ask them for work and if they had a job for you? A. I went and asked them for a job, some light work; that is the way I went to ask them.

Q. Why did you ask them for light work? A. Because I could not do heavy work.

Q. Did they make any inquiry as to why you could not do heavy work? A. They did not ask. 10

Q. They said they did not want you? A. They said they had nothing on hand at the present time?

Q. How long did you say you had been riding a bicycle? A. From four to five years.

Q. Around Paterson I suppose, among a number of oil roads? I suppose around Paterson there are many oiled roads? A. Yes, sir.

Q. And you have ridden over oiled roads a great many times? A. Yes, sir. 20

Q. You had no fear of oiled roads, had you? A. No, sir.

Q. By no way, how far did you live from Tenth avenue to the north? A. I should judge about a half a block or a block.

Q. Those are very long blocks, aren't they? A. That is a very long block, Tenth avenue and Ninth avenue.

Q. What do you say those blocks are in length about, about six hundred feet? A. I should judge something around that, the streets come up, they only come to Eighteenth street, it does not go all the way there, they would not come up to here, they stop, and they were the usual blocks from one street to another but on one side of it it is unus- 30

*John S. Lydecker—cross.*

ually big from one to another, but from Eighth avenue to Ninth avenue it is the usual block.

Q. Between Tenth and Eleventh avenues how long about are the blocks, six hundred feet? A. I should judge not.

Q. About how much? A. I should judge about fifty feet difference.

Q. Around five hundred feet? A. Around five hundred feet.

10 Q. Where did you first get on Eighteenth street? A. I live on Eighteenth street.

Q. And you came out of the house and got on your bicycle? A. I came out of the house and got on the bicycle and rode on down the street.

Q. You live on the east side? A. Yes, sir.

Q. That is the left hand side coming down to the City, is it not? A. Yes, sir.

20 Q. Which side of the street did you come down on? A. I came down the right hand side, the west side.

Q. That is, you crossed over the walk? A. I walked across the walk and got to the other curb and rode along by the curb there.

Q. There is a street railway track in the middle of that street, is there? A. Yes, sir.

Q. What is the ordinary width so far as you can recall? A. Well, it is only a single track there.

30 Q. There was no oil between those tracks, was there? A. I did not take much notice of that. I noticed the oil was all over the road.

Q. You did not take much notice of the oil anyway, did you? A. I did not take notice at all till I had rode into it, I had no fear of falling off, and I seen the oil on the road there and I rode through it and had no fear of falling off before this.

*John S. Lydecker—cross.*

Q. There was oil in front of your house, wasn't there? A. In front of our house? I should judge there was not any oil when I started.

Q. You think not? Had not they been sprinkling? Had not that street been sprinkled all along from in front of your place on? A. Not at our place. After I had come back, my mother says "They are putting the oil out here now."

Q. I am speaking about the time you went out? A. No, sir.

Q. Were they sprinkling the oil when you went out? A. I did not see none of it there; no, sir.

Q. So that, so far as you know they were finished on that street? A. No, so far as I know they might have been, but as far as I know afterwards they did go on and put some oil on the street.

Q. Where did you get onto this oil, how far from your house? A. I should judge about Tenth avenue.

Q. Then when you had crossed Tenth avenue you knew there was oil? A. Yes, sir.

Q. You had ridden over oil a great many times, had you not? A. Yes, sir.

Q. And you continued riding in that oil? A. Yes, sir.

Q. On that block? A. I continued riding, it was light, and the further I went along it began to get heavier.

Q. And did you try to get off onto the tracks? A. I did not.

Q. Did you continue riding right into that oil? A. I kept right in the oil.

Q. That is a Macadam street, is it not? A. I should say it is.

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*John S. Lydecker—cross.*

Q. You know whether it is or not, you know Macadam, don't you? A. Yes, it was a Macadam street.

Q. Since this accident, has there been repairs made on that street?

Mr. McGinnis: Objected to as irrelevant.

(Question withdrawn.)

10 Q. What was the condition of the street at that time? A. The street was in pretty bad condition at that time.

Q. Pretty rough? A. Pretty rough; yes, sir.

Q. You mean by that that the Macadam had worn? A. The Macadam had worn and there was some small holes here and there, and wherever you rode along those gullies or holes were filled with liquid or oil, but there had been some traffic there since the oil wagon went through and dropped dirt off the wheels and it laid on top of this oil and made it look like solid ground all the way across.

20 Q. In other words, you claim this oil was so thin it gathered in these little holes or gullies along that street and puddled there? A. Well, not exactly. I suppose you cannot come along and go just in the holes, but it kind of came along, the wagon I suppose came along, and came along the middle and it ran down this way (indicating) just like it had run out of the hose, ran right in those gullies and holes and gradually the oil all around the sides would run into those holes and fill those holes or gullies up with oil.

30 Q. You had travelled up and down that street a great many times, had you not? A. Yes, sir; it used to be my way of going back and forth to my home.

*John S. Lydecker—cross.*

Q. On a bicycle? A. Yes, sir.

Q. And you knew the condition of the street?

A. I knew the condition of the street; yes, sir.

Q. You knew there were holes in it, did you? A. Yes, sir.

Q. And all along there, all along that block, you knew there were holes in it? A. Yes, sir.

Q. It was a pretty rough street, wasn't it? A. On both sides it was kind of rough.

Q. And you knew a hole when you saw it? A. I knew a hole when I saw it. 10

Q. When you came along with your bicycle, there was plenty of light there, wasn't there, so that you could see? A. It was good daylight, I should judge.

Q. Around four o'clock? A. I should say between half past three and four o'clock.

Q. In August? A. In August.

Q. And you were continuing across Eleventh avenue were you coming on down toward the Railroad? A. My front wheel had just struck Eleventh avenue and there was a hole, I should judge about a foot in diameter, each way, and it must have been about an inch deep, and I did not notice that hole because some oil and dirt had got in it and you could not notice it. 20

Q. What do you mean "an inch deep?" A. The hole must have been an inch deep. I should judge. 30

Q. This hole in the street? A. This hole in the street, where my front wheel had struck.

Q. There were other holes? A. Yes, but this was covered with dirt and oil.

Q. From your experience as a bicycle rider, you did not suppose for a minute that that hole simply

*John S. Lydecker—cross.*

an inch deep would affect you at all in the road?  
 A. If you take a slippery pavement and ride along on it, it don't matter if you only run an inch deep you are down if you get slipping, and you are bound to slip in a hole like that there.

Q. And there were holes all along there? A. There were holes all along there; yes, sir.

Q. Had you slipped before this? A. I judged the holes before this.

10 Q. You had "ducked" in other words, and went around them? A. I had noticed the holes and went around them, as I rode there before, I found most of the way through the principal parts of the street was hollow and I went to get up on the solid ground out of the holes and I never noticed that one at all till I went into it. I did not give it a thought to its being there, I never seen it before as I went along, because when I went along I always noticed where there is holes, so that the next time  
 20 I come along I can keep out of them.

Q. When you struck this particular hole, of course, you fell off your bicycle? A. Yes, sir.

Q. And didn't you know your arm was broken then? A. I did not know nothing for four or five minutes, till I got up.

Q. How many minutes? A. Four or five, I should judge, something like that.

Q. Did you lay on the street four or five minutes? A. I should judge something around that.  
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Q. Was there nobody around there? A. Yes, there were a few people around there, sitting on the stoops and so on.

Q. Did nobody hear any cry from you? A. Yes.

Q. Who? A. Mr. Smith, the bartender of the saloon where I went to ask for a drink of water.

*John S. Lydecker—cross.*

is one, Mrs. Cubby, Mrs. Conklin, Mrs. Williams, Mrs. Brooks.

Q. And you were permitted to lie on that street four or five minutes? A. I should judge so.

Q. Then you went in the saloon? A. I did not go in the saloon.

Q. Where did you go? A. I went over to the saloon side door and asked for a drink of water and he gave me a drink of water; he wanted me to have a drink of whiskey and I refused the drink of whiskey because it was something I could not touch and I came back and picked my wheel up and started to walk off on my feet and I staggered and when I started off I again fell against a tree that stood there. 10

Q. Where were those people? A. Mrs. Conklin and Mrs. Cubby was on the stoop and Mr. Smith was by his door.

Q. Nobody came to help you? A. Not at the present time, and a gentleman came along in a wagon, I did not notice who he was, and he came along and wanted to take me home, and I said I guessed I could get home as far as that was concerned, I only lived a block away. 20

Q. That was how long after the accident? A. After I came from Mr. Smith's where he was right by the saloon.

Q. You were over there about five minutes? A. No, I should not judge that.

Q. Three minutes? A. Something like that. 30

Q. So that, from the time you were injured, until you left Mr. Smith's place, none of those girls came to assist you? A. Nobody came to assist me only this man who went down off the wagon, he was down already and he had hold of the wheel already when I stepped over to pick it up.

*John S. Lydecker—cross.*

Q. Did you show your arm to Mr. Smith? A. Mr. Smith seen my arm drop when he gave me the glass of water, be seen it drop right down. I picked myself up and got on the sidewalk the best way I could and after I got on the sidewalk I again fainted dead away, went unconscious and fell against a tree that stood there, a few minutes.

Q. Who set your arm? A. Dr. Murn.

10 Q. How long after the accident? A. I should judge about an hour or two, as soon as he got there.

Q. So far as you know or saw it was just an ordinary break of the arm? A. I supposed it was one break, the way I noticed it; yes, sir.

Q. You did not know? A. I did not know.

Q. You don't know now? A. I do know now; yes, sir.

Q. What do you know now? A. Both bones were broken.

20 Q. Does that come to you from the doctor? A. Yes, sir.

Q. Just the breaking of the arm, this bone here? A. There is two bones in your arm and they are both broke, this bone here and the elbow bone here.

Q. How old did you say you were at that time? A. Eighteen past.

Q. At that time? A. I was not eighteen at that time.

30 Q. And you say that after a month's treatment or so, you had difficulty with your arm? A. Yes, sir.

Q. And you still have difficulty with your arm? A. Yes, sir.

Q. What is the trouble with it? A. It seems every time I go to lift anything the weight comes

*John S. Lydecker—cross.*

against the bones and they kind of catch one another there.

Q. It feels as though it were not properly knitted? A. It feels as though it was properly knitted, but these two bones lay like against one another and every time I move the arm those bones chip off like, seem to chip off something like little chips.

Q. So far as you know the arm is not properly knitted? A. Well, I don't know anything about that.

Q. Did you ever play football? A. No, sir. 10

Q. Did you ever play baseball? A. I did play baseball prior to the injury and I have not played baseball since.

Q. You are quite an athletic chap, haven't you gone into athletics of any kind since then? A. No, sir.

Q. Why? A. Because I did not want to go into them, lest I fell and I might snap my arm again.

Q. In other words you feel, that, because you had broken your arm a year or two ago, that you cannot enter into any of those games, is that it? A. No, not exactly. 20

Q. Was it because of your arm or the lack of strength or opportunity? A. Well, was not that my arm?

Q. That is what you say? A. Yes, sir.

Q. I understand the trolley runs in front of your place? A. It did at that time. 30

Q. And it ran on along down to Eleventh avenue and beyond that? A. Well, they went out of Governor street and went north up Eighteenth street.

Q. I don't know where Governor street it, is it

*John S. Lydecker—cross.*

the one beyond or south of or beyond Eleventh avenue? A. Beyond. Yes, sir.

Q. And you have seen them sprinkle along there haven't you? A. I did not notice them sprinkle at all.

Q. I don't mean that particular day, but you knew they did sprinkle along there? A. As long as we live there they have not sprinkled Eighteenth street to my knowledge.

10 Q. Have you not ever seen the trolley people sprinkle Eighteenth street? A. Oh, you mean water? Yes, I have seen them sprinkle water.

Q. Didn't you see them sprinkle that day? A. No, sir; I did not.

Q. Is it not the fact that they did sprinkle that day? A. That is something I would not say, because I did not see them.

20 Q. Have you ever seen the street where water had been sprinkled over oil? A. Yes, sir; just like after a rainstorm it runs in a puddle.

Q. Wasn't that the condition of that street that day when you went along there? A. Not that I noticed. I did not notice the holes, I only noticed where my bicycle was going.

Q. You cannot say whether the hole you speak of had water into it or oil? A. Judging by my clothes I should say it had oil in it.

30 Q. You did not fall in the hole, did you? A. Not to go down the hole, but my bicycle went over and it surely splashed over me, splashed over my clothes.

Q. You did not notice it was a hole? A. I did not notice it was a hole.

Q. You say there was something over the surface of it? A. Yes, sir; it was like dirt or scum.

*John S. Lydecker—cross.*

Q. And you don't know whether there was water under that or oil under that, do you? A. No, sir.

Q. How did you make out those commissions that you spoke of? A. Well, I don't just know how they made them up, but they figured them for me if you sold so much milk you got ten per cent., on the dollar, that is about what it figured.

Q. In other words, if you got new customers they allowed you so much? A. No, sir; they did not allow anything on a new customer. 10

Q. How did they allow a commission on orders? A. On the milk sold.

Q. When you first went there you were not paid twenty-two dollars a week, were you? A. I did not say I had twenty-two dollars a week when I went there.

Q. Didn't you say you had an average of five or six dollars a week commissions besides your salary? 20

Mr. Ward: He did not say at first. You have asked him at first.

Q. What were you paid when you went there first? A. When I first went there I got twelve dollars a week and commissions.

Q. What did your commissions amount to? A. I should judge about four, or five or six dollars, something around that. 30

Q. When was it that you were raised to fifteen dollars? A. Oh, that was in about three weeks.

Q. Wasn't that the time when they shut off your commissions? A. No, sir.

Q. Didn't they shut your commissions off? A. No, sir; they did not shut my commissions off.

*John S. Lydecker—cross.*

Q. You remained on their payroll, didn't you from August twentieth to October? A. I remained on the payroll till August twentieth.

Q. And didn't you remain also from that time on until October fifteenth?

Mr. McGinnis: Objected to.

The Court: Why? He is suing, as I understand for the loss of his services from August twentieth, the date of the accident. I understand this question is directed to find out whether he was not paid his wages till October fifteenth?

Mr. Ward: I don't think that makes any difference. We don't know the circumstances of being paid. He did not earn the money.

The Court: He cannot receive it and get it from this defendant too.

Q. You were on the payroll, weren't you till October fifteenth? A. No, sir.

Q. Do you say you were not on the payroll of this Company from the time you were hurt, August twentieth to October fifteenth? A. No, sir.

Q. Are you sure about that? A. I am sure about that. I received my following day, the following Tuesday, August twentieth I fell and broke my arm and the following Tuesday I received my pay and that is all.

Q. Did you go back to the Company at all after you were hurt? A. I have been back to straighten out my books; yes, sir. But not otherwise.

Q. When was that? A. I went back when my arm was broke, I went back to straighten out my books when my arm was broke.

*John S. Lydecker—re-direct.*

Q. Since that time haven't you gone back there for work? A. Not at all.

Q. In other words, after you were injured the only time you visited that company was when you went there to fix your books? A. Yes, sir.

Q. And then you quit the company? A. They did not tell me to call or anything.

Q. You did not ask; you just simply quit the job entirely? A. No, not exactly. I did not tell them I would quit or anything that way.

Q. You did not go back, did you? A. No, sir; I heard they had another man on my route.

Q. You did not inquire for any work, did you, from them? A. No, sir.

10

*Re-direct Examination by Mr. McGinnis.*

Q. Do you know what the trolley company did sprinkle whenever they did sprinkle? A. Yes, sir.

Q. What was it? A. They sprinkled water.

20

Q. And you know what this heavy asphalt oil substance is that is put on the roads that they use for oiling the roads, don't you? A. Yes, sir.

Q. Is that the stuff they put on the streets? A. You mean did they put it on Eighteenth street at that time?

Q. Well, on any of those streets?

Mr. DeYoe: I object to what was put on any other street.

30

Q. On Eighteenth street? A. At that time it was thick pasty like.

Q. After you were injured, could you see what it was that your wheel had gone into and slipped

*John S. Lydecker—re-direct.*

on? A. Why, it looked to me like a puddle of oil, of liquid, of oil.

Q. Could you see afterwards what it was that your wheel had skidded on? A. Oil.

Q. Can you say that from seeing it? Could you see it, yes or no? A. Yes, sir.

Q. Could you see whether it was water or this asphalt oil stuff that they had on the roads, which was it? A. I could not say.

10 Q. Did you notice any water on that road at any place? A. No, sir.

Q. Was there any water around there at all that you could see? A. No, sir.

Q. And, giving your best judgment as to what that stuff was, what would you say that it was?

Mr. DeYoe: Objected to.

Objection sustained; Plaintiff excepts.

20 Q. Not in just the hole itself, but around that depression?

Mr. DeYoe: Objected to as calling for a conclusion on the part of the witness.

Objection sustained; Plaintiff excepts.

Q. Can you say what was on the road there around that spot?

Mr. DeYoe: Objected to.

30 Objection overruled; Defendant excepts.

A. Why, it was an oily paste.

Q. And looking at the scene of the accident afterwards can you tell what it was that your wheel slipped on?

*John S. Lydecker—re-direct.*

Mr. DeYoe: Objected to as calling for a conclusion.

The Court: I don't think there is any proof that he did look at it.

Q. Did you, after this accident see where your wheel had slipped? A. Yes, sir.

The Court: When?

The Witness: Well, about two days after it. A day or so after I went down to have an Xray taken and I came along and I said "There is about where my wheel slipped." I saw where it had slipped like. 10

Q. And this place where you saw where you had slipped can you tell us what it was where your wheel slipped?

Mr. Garven: Objected to. There is no evidence that the condition at that time was the same condition as it was on the day of this accident. 20

The Court: I don't think, in the absence of proof that the conditions were the same, that it can be admissible.

Q. After this accident, I understand that you got up and went to the saloon for a drink of water? A. Yes, sir.

Q. And then you went back and picked up your wheel, is that right? A. Yes, sir. 30

Q. And when you picked up your wheel could you or not see the place where your wheel had skidded or slipped? A. I could if I looked, but I did not take much notice of it then.

*John S. Lydecker—re-direct.*

Q. What was the general character of the ground right around that spot?

Mr. Garven: Objected to. There is no complaint made here about the character of the ground.

The Court: He has already said that there was oil around it.

Mr. McGinnis: I think he said there was an oily, pasty substance around it.

10

Q. You have been asked the size of the city blocks there, how do you mean they are five or six hundred feet, you have not measured those blocks, have you? A. No, sir.

Q. You don't know the exact length? A. I don't know the exact length.

20

Q. Are they anything different from the ordinary city blocks? A. They are, because there from Eleventh avenue to Tenth avenue, the streets come up to them on one side making the ordinary city block and on the other side they are more than the ordinary city block.

Q. You were asked by counsel about having ridden on oil roads for a number of years before that, did you have ever any trouble before riding on oil roads? A. No, sir.

Q. What had been your experience? A. Were they safe or not? A. Well, I always found them safe wherever I rode on them.

30

Q. Examining this road after the accident, as you did two days afterwards, can you say whether or not there was more oil there than usual?

Mr. DeYoe: Objected to, what happened two days afterwards might have been some-

*Peter J. Lydecker—direct.*

thing else. There might have been more sprinkling after that and that might turn out to be a factor in this case.

(Question withdrawn.)

PETER J. LYDECKER, sworn as a witness on behalf of the Plaintiff, testifies as follows:

*Direct Examination by Mr. Ward.*

Q. You are the father of John Lydecker? A. I am. 10

Q. Whereabouts do you live? A. At the present time I live No. 94 Madison street.

Q. Whereabouts were you living at the time of the occurrence of this accident, in August, 1913? A. At 419 East Eighteenth street.

Q. Was your son John living with you at that time? A. He was.

Q. He was a member of your family? A. He was. 20

Q. Whereabouts is that number with reference to Tenth and Eleventh avenues? A. It is about one short block, or an ordinary city block from Tenth avenue, there is Lafayette street and that comes to Eighteenth street and the house is situated diagonally across from Lafayette street on Eighteenth street.

Q. Then, as I understand it you are pretty well to the north end of East Eighteenth street, are you not? A. Yes, sir. 30

Q. Then as you come south along East Eighteenth street you come from the direction of Riverside in this direction towards South Paterson,

*Peter J. Lydecker—direct.*

you come first to what avenue? A. To Tenth avenue.

Q. Then, of course, to Eleventh avenue? A. Then to Eleventh avenue; yes, sir.

Q. Did Tenth avenue cross East Eighteenth street at that time? A. It did.

Q. What about Eleventh avenue? A. Eleventh avenue only came to Eighteenth street.

10 Q. There were trolley car tracks on East Eighteenth street at Eleventh avenue? A. The condition of Eighteenth street—

Mr. DeYoe: When was this?

Mr. Ward: At the time of the accident.

The Witness: At the time of the accident?

Q. Yes. A. In what respect?

20 Q. The condition of the roadbed generally? A. Generally the roadbed was rough, it was here and there in spots with holes.

Q. Somewhat holey wasn't it? A. Yes, sir; kind of worn.

Q. What was the first that you knew about this accident? A. That was when I came home about five o'clock.

Q. Where had you been before that? A. I left the house about two o'clock.

30 Q. What is your occupation or business? A. My occupation at the present time is janitor of the Post Office building here in the city.

Q. And you say that at five o'clock you heard of this accident for the first time? A. Yes, sir.

Q. Where was your son at that time? A. He was in the house.

*Peter J. Lydecker—direct.*

Q. What time did you say you had left the house before that? A. I left the house about two o'clock.

Q. At two o'clock when you left the house, in which direction did you go? A. I went south.

Q. Did you pass Eleventh avenue? A. I passed Eleventh avenue.

Q. At that time did you notice any operations taking place on this rough and hilly road? A. I noticed oil, from Eleventh avenue down to Broadway, in the direction in which I went. 10

Q. That would be from Eleventh avenue south out towards Broadway? A. Yes, sir.

Q. Where was this oil? A. It was all over the street.

Q. Did you notice anything about the putting of this oil on the street? A. Yes, sir.

Q. Will you just tell us what you noticed about that? A. Well, I noticed that the oil was very heavy, it was thicker than usually, more so than usual upon roads that I have been, from Tenth avenue down, not so much near Tenth avenue, but as you got near Eleventh avenue then it became thicker; well, like a paste. 20

Q. Where did this oil start? A. Just this side of Tenth avenue, south of Tenth avenue.

Q. Coming up from Riverside, when you come across Tenth avenue, then you noticed the oil started? A. Yes, sir.

Q. And you say that place was not very thick? A. Not so much of it as it was when we went further down. 30

Q. When you got towards Eleventh avenue, what was the condition there? A. Then it was more like a paste, it was very heavy, I can only

*Peter J. Lydecker—direct.*

describe it as more something like asphalt would be, just mixed up enough to make it kind of oily, watery like, but it was heavy paste, I could describe it, it was just like a thick heavy body of coal tar oil or something that had been put into it like molasses.

10 Q. And you say you noticed that up there at what time, did you notice them putting it on, just tell us about that? A. About ten o'clock in the morning I left the house.

Q. Did you notice them putting it on at two o'clock? A. No, not at two o'clock.

Q. Had you observed any of this condition before two o'clock? A. Yes, sir.

Q. At what time? A. At ten o'clock in the morning.

Q. When you left the house you left it to come downtown did you? A. Yes, sir.

20 Q. Where did you observe any of those conditions at that time? A. I came as far as Governor street and when I reached Governor street I noticed the wagon going from Governor street to Twelfth avenue or towards Twelfth avenue.

Q. Going from Governor street towards Twelfth avenue? A. Yes, sir.

Q. On what street? A. On Eighteenth street.

Q. In which direction would that be, north or south? A. They were going south.

30 Q. Going from Governor street south? A. Yes, sir.

Q. There you noticed that? A. There I noticed it and when I got further down, I noticed that it had all been covered over with oil, very heavy.

Q. That would be one block north of Eleventh avenue? A. South of Eleventh avenue, there I noticed the oil first and the quantity of oil on it.

*Peter J. Lydecker—direct.*

Mr. Garven: I object to this. We are not concerned with what the quantity of oil was up south of Eleventh avenue; this accident happened at Eleventh avenue; they are speaking, as I understand, about some spot a block or two away from the scene of the accident, to the south, where this young man had not even ridden over it.

Mr. Ward: I don't think the objection is well taken, but I don't wish to raise any points that are unnecessary, and I will avoid it. 10

Q. Did you notice the sprinkler there, the wagon? A. What? The oil wagon?

Q. Yes? A. Yes, sir.

Q. Did you notice the oil wagon there? A. Yes, sir.

Mr. Ward: Is there any question about that being the Standard Oil Company wagon? 20

Mr. Garven: I don't know.

Q. What did you notice, if anything, about that oil sprinkling wagon and sprinkler? A. This, that the way the sprinklers were in the back of it, where the sprinkling part of it was at the end, it seemed to be as though it was clogged up, and it made it come out in streams. I noticed that particularly, as I noticed that where the wagon had went on the streams followed it just along as though it had been poured on. 30

Q. You mean in places? A. No, right along.

Q. It was not the whole width of the street? A.

*Peter J. Lydecker—direct.*

Not the whole width of the street that way, only just where they went.

Q. Like a pool following the sprinklers? A. Yes, sir.

Q. About how wide was that? A. Well, I should judge about two or three inches in width and there was about four of them, four streams.

Q. How far apart were those four? A. Well, I should judge about eighteen inches to two feet.

10 Q. At two o'clock did you notice any wagon there? A. Not at two o'clock.

Q. At five o'clock when you returned home, did you notice any wagon there? A. I did not notice any wagon at five o'clock.

The Court: What was the hour when you saw this wagon?

The Witness: About ten o'clock in the morning, when they commenced below Governor street to oil.

20 Q. At two o'clock how far has this oil reached in your direction? A. To Tenth avenue.

Q. And when you returned at five o'clock was there any change, any additional oil, on that roadway? A. At five o'clock?

30 Q. Yes. I mean not on the place that had been covered before that, but were any additional parts of the road oiled? A. When I returned at five o'clock I noticed it on the other side of Eighteenth street, there was a little thin scattering of oil along above Tenth avenue as though the wagon had gone that way but not sprinkled.

Q. That was after five o'clock? A. Yes, sir.

Q. And from Tenth avenue did that extend past

*Peter J. Lydecker—direct.*

your house or not, what you have just described to the jury? A. What is that?

Q. You have just stated to the jury that at five o'clock when you returned you noticed that an additional part of the road had been affected by the oil from Tenth avenue up, you said. Now I ask you did that pass your house? A. That past the house, but on one side of the street, opposite.

Q. Did you find your boy home? A. I found the boy home.

10

Q. And did you ask him to tell you the facts or did you become familiar with the facts of the accident at that time? A. Why, I asked him questions.

Q. Just answer my questions. Were you told about the accident at that time? A. Only that he had his arm broken.

Q. Were you told how it had happened and where it had happened? A. Not at that time.

Q. How soon afterwards? A. Well, probably, about six or seven o'clock in the evening.

20

Q. Was it still light at that time? A. Yes, sir.

Q. Did you, or not, go down to the place where this accident had happened? A. I went down to the place where the accident had happened.

Q. And as you approached, just as you approached Eleventh avenue, the place where the cross-walk would be; that would be the northerly cross-walk, on the right hand side of the road, did you notice anything there? A. Why, all I could notice was, that it seemed that it had been oiled, and that it was like a scraper had been shoved over the road to get it scraped out as anyone would be slipping or anything of that sort, it made a kind of a mark.

30

*Peter J. Lydecker—direct.*

Q. Where did you notice that? A. Just by the crossing. Where the crossing would be at Eighteenth street and Eleventh avenue.

Q. What do you mean by a scraper? How large were those marks? A. Oh, it was just a mark about three or four inches, just like that and it went out.

Q. Where was that mark? A. Just where the crossing from Eleventh avenue would be across  
10 Eighteenth street.

Q. Where the mark was, did you notice anything with reference to the roadbed and roadway and conditions there? A. What?

Q. Where that mark was, that you have just told us about, did you notice anything about the roadway or the condition of the roadway there?

Mr. Garven: Objected to as immaterial,  
20 irrelevant and incompetent. There is no evidence that connects that spot with the place of the accident so far as I know.

The Court: I understand from the testimony that there is some identity between that place and the place the boy mentioned.

Mr. Garven: The only identity I see is that there is a scraping mark as he calls it at this side of the street, three and a half hours after the accident.

30 The Court: At the point where the boy says he fell.

Mr. Garven: Even so, this man went down there two hours after the accident; nobody showed him the spot and we don't know what the condition was in the meantime.

*Peter J. Lydecker—direct.*

The Court: He is telling us what he saw at the place the boy described as the same place he fell or from which the jury may infer was the same place. I will admit it.

Defendant excepts.

A. I noticed that the roadway had a great deal of oil around it and over it, I noticed that when I went down.

Q. You have described a place where you noticed some scraping of the road there, will you tell us the condition that you noticed? A. Why, I noticed about this place that had been scraped, or that it seemed some kind of a shaved out place down there that it was very heavy oil, thick. As though a person had taken a stick or anything and had just shaved one spot, that is as it looked to me.

10

Q. What about the condition of the road, aside from the oil at that particular place, was it level or not? A. No, sir.

20

Q. Describe all that, won't you please? A. The road is rounding, and where this was, the place was covered very heavy with like a muck, I can only describe it in that way.

Q. Like muck you say? A. Yes, sir.

Q. And you say that was pushed to one side? A. Yes, sir.

Q. Was the place where that was, level or even?

30

Mr. Garven: Objected to as leading.

Objection sustained.

A. That was a hollow.

Q. Won't you please tell us just what you found,

*Peter J. Lydecker—direct.*

what you saw? It was a hollow, just describe that to the jury, describe the situation there?

Mr. Garven: What is this? I object to that characterization. I have not heard him say anything about a hollow at all, and it is unfair for counsel to stand here and try to coach the witness that way when he is on the stand; I certainly object to it.

Mr. Ward: It is on the record.

10

The Court: Let us see what the record says.

(The record is read.)

The Court: He may answer this question.

A. I went down to that place, I went over there through the oil to try to get as little as possible onto me to examine just, as near as I could judge, from what the boy described, where he had fell, and when I came there, I noticed that there was a spot, about eighteen inches, I should judge, about, well, kind of oval in shape, and it was about an inch in depth, probably less, but there was a depression, and in that depression it was full of stuff, thick, it did not look like oil, exactly, but more like a gas oil, but in one part of that I noticed where it had been shoved up to the top, then, I came further and went directly from there to the sidewalk and tried to cross the street and had to go up Eleventh avenue some way to get out of the oil. That is all I can tell you.

20

30

Q. At two o'clock when you went down, was there any water on that road at all? A. No, sir.

Q. At five o'clock when you came back, was there any water at all on the road? A. No, sir.

Q. At seven o'clock when you went back was

*Peter J. Lydecker—direct.*

there any water on the road at all? A. No, sir; there had no water been sprinkled on that road that day.

Q. Do you know how much your boy was earning at the time that this accident occurred?— A. He was getting fifteen dollars a week and he was paid a commission besides.

Q. Have you any personal knowledge as to how much that commission amounted to? A. Yes, sir; when I went with him to the Company and asked. 10

Q. That answers it, yes. How much? A. It would average about seven dollars a week.

Q. What did the boy do with this money? A. He gave me the money, all excepting what he kept for his pocket, his lunches and things of that sort.

Q. How much was that each week that he kept for himself for his lunches etc.? A. About three dollars.

Q. About three dollars a week? A. Yes, sir.

Q. Do you know how long he had been working earning that much? A. Well, he had been working there from the spring up until the time of the accident. 20

Q. And you don't know the exact number of days? A. I could not say the exact date.

Q. At the time of the accident, you called in a physician, I believe, Dr. Murn, who treated the boy and attended to his arm? A. Yes, sir.

Q. Have you received any bill from Dr. Murn? A. Dr. Murn has not presented me with a bill, but I have asked what his bill is. 30

Q. Do you know how much the amount is?

Mr. DeYoe: Objected to. He has not got it.

*Peter J. Lydecker—direct.*

Q. Has Dr. Murn told you how much his charges are? A. Yes, sir.

Q. How much is his bill?

Mr. DeYoe: Objected to. Dr. Murn is the one to testify as to what his charges are, not what he has told this man. If he has got the bill it is proper evidence. If he has not, it is not proper.

10 Objection overruled; Defendants except.

Q. How much is it? A. Well, he told me it would be something around about two hundred dollars.

Q. Have you had any other medical treatment for your boy? A. Only what Dr. Murn has given.

Q. Do you know of any other things that were done for your boy aside from Dr. Murn? A. Yes, we had ex-rays taken of the arm.

20 Q. Have you paid for them yet? A. I have not yet.

Q. Who took the ex-rays? A. Dr. Gordon.

Q. Have you received any bill from Dr. Gordon?

A. I have received a bill from Dr. Gordon.

Q. How much is that?

Mr. DeYoe: Objected to. In the first place it is not paid, and, in the second place, the bill is the best evidence.

30 Objection overruled; Defendants except.

A. Ten dollars.

Q. Were there any other expenses that were incurred by you in or about the treatment of this boy? A. Yes, I was obliged to hire someone to help and assist his mother in the care of him.

*Peter J. Lydecker—direct.*

Q. Who was that? A. Mrs. Cordine.

Q. Is she in Court? A. She is not in Court; no, sir.

Q. Is his mother here? A. His mother is here.

Q. How many weeks did you employ this woman? A. To work?

Q. You say you had to employ someone to assist his mother? A. Yes, sir.

Q. Just tell us fully why that was? A. Because his mother was not able to attend to him and to do her housework. 10

Q. Did he require great attention or not? A. He did require great attention.

Q. How long was this woman with you? A. This woman was there off and on about a month.

Q. You mean she was not employed regularly? A. Well, she did not come to stay at night.

Q. Have you paid her for that? A. I paid her partly on it.

Q. How much have you paid her? A. I paid her twenty-five dollars. 20

Q. When you went down at two o'clock in the afternoon past this place that you have described and along this road that had been oiled, did you see any barriers erected there? A. No, sir.

Q. Or anything to prevent driving or warn traffic as to the condition of the street? A. No, sir.

Q. When you came back at five o'clock did you see any barriers there? A. No, sir. 30

Q. Or anything to warn traffic or keep the street clear? A. No, sir; there was not.

Q. And at ten o'clock was there anything of that kind there? A. No, sir.

Q. And at seven o'clock was there anything of that kind there? A. No, sir.

*Peter J. Lydecker—cross.*

*Cross Examination by Mr. Garven.*

Q. What is your business? A. I'm the janitor of the United States Post Office.

Q. And you have been janitor for some time, I presume? A. I have been there five years.

Q. And that requires your attention most of the time, doesn't it? A. Yes, sir.

Q. What day of the week was it this accident happened? A. I could not tell you now what day.

10 Q. It was one of the week days wasn't it? A. Yes, sir.

Q. It was not Sunday? A. No, sir; it was on a week day.

Q. What time did you leave the house that morning? A. I left the house about a quarter to ten.

Q. And it is quite some distance from your house to this post office? A. Yes, sir.

20 Q. Do you generally walk? A. I do.

Q. About what time did you get into the building and report for work? A. I was not working at that time.

Q. You mean on that particular day you were not working? A. No sir; I had not worked for a month, I had left the post office.

Q. And you came out of your house in the morning and you walked down the street and you saw them sprinkling, is that it? A. Yes, sir.

30 Q. And you have described, as I understand it, that the machine seemed to be clogged up, what do you mean by that? A. That the whole sprinkler was not working as it ought to work, that is the whole of the sprinkler seemed, towards the end, as if it was clogged like, and the oil was running

*Peter J. Lydecker—cross.*

down at the end, running in a stream instead of sprinkling over.

Q. But it was liquid that was coming out of there, wasn't it? A. Yes, thick liquid.

Q. I suppose you stood by and took particular notice of it? A. No, I saw it only as I passed on down the street, the wagon was ahead of me.

Q. Where were you going down? A. I was going down then to the telegraph office.

Q. What time did you go back home? A. About a little after one. 10

Q. And then you came out of the house again at two o'clock? A. Yes, sir.

Q. Where did you go then? A. I went down to the telegraph office again, to get into communication with the Soldiers' Home at Vineland.

Q. Then you came back at five o'clock? A. Then I came back at five o'clock.

Q. When you came into the house, is it possible your family did not tell you how the accident happened? A. My wife said to me that John has broken his arm and has fell off his wheel, that is what I asked at the time, I did not ask any questions. 20

Q. Didn't you ask him how it happened? A. Not at that time I did not ask him. I asked him later.

Q. Didn't it seem strange to you that they did not tell you how this accident happened, whether by a trolley car or slipping from his machine or what not? A. She says he fell off his wheel. My wife told me that when I first came in. 30

Q. Then how did you come to get the information two hours afterwards? A. Because, at the time the boy was in so much pain he could hardly

*Peter J. Lydecker—cross.*

talk anything, and after the doctor had been there and set his arm, why then I could talk to him.

Q. Then you asked him how it happened? A. Then I asked him how it happened.

Q. Then you went down? A. Then I went down to see about where it was.

Q. Did he tell you just where that happened? A. He told me it happened just on the crosswalk of Eleventh avenue and Eighteenth street.

10 Q. When you speak of the scraping, I suppose you found that scraping over a considerable distance, didn't you? A. No, sir.

Q. How much? A. Just about where I said; right where this depression was it looked on one side of it as if someone had taken a stick or something and had scraped out a place about three inches or four inches in width.

20 Q. Eighteenth street is one of your main streets, is it not, in this town? A. Eighteenth street is one of the main streets.

Q. You knew the accident happened around 3:30 or 4 o'clock in the afternoon? A. I could not tell you what time it happened.

Q. You got home at five o'clock and the accident had happened then? A. I got home at five o'clock and it had happened then.

Q. There were a great many wogans that ran along that street during that time? A. Not a great many, no, sir.

30 Q. It is one of your main streets, is it not? A. It is one of our main streets, but not at that hour.

Q. There is considerable traffic there? Not at those hours.

Q. Between 3:30 and 7 o'clock? A. There is not so much traffic as earlier in the day.

Q. There is considerable traffic though? A. There is considerable traffic; yes, sir.

*Peter J. Lydecker—cross.*

Q. Why is it that you took particular notice of the quantity of oil that was being spread there between ten and eleven o'clock in the morning, when you notice this? A. From this fact. That I had been on the Rural Delivery Service, I had been a Rural Delivery carrier for eight years and I had rode over roads that had been oiled and—

Q. How long ago? A. Oh, about five years ago when I was on that work—

Q. Were they spreading oil—

Mr. Ward: Let him answer your original question.

Mr. Garvin: I think he has answered it.

Mr. Ward: No, he was going on to explain why he seen it. Now just finish.

The Witness: And on the roads that had been oiled that I had rode over I had never seen as great a quantity of oil put on as there was on this street at that time.

Q. Do you mean to say that five years ago they were spreading oil over roads? A. They were; yes, sir, in some cases.

Q. Are you sure about that? A. I am sure of it; yes, sir.

Q. Are you just as sure of it, of that testimony as you are of the other testimony you have been giving here this morning? A. Yes, sir; I am sure of it.

Q. Don't you know that the spreading of oil on roads has only been going on two or three years? A. I beg to differ with you, I rode over a road in Totowa borough that had oil put onto it.

Q. How long ago? A. Five years ago.

Q. Are you sure of that? A. I am sure of it.

*Peter J. Lydecker—cross.*

Q. You were riding a bicycle during that time?

A. No, sir; I was not riding a bicycle.

Q. What were you doing, driving? A. Yes, sir; driving.

Q. You have never been in the oil business, have you? A. No, I have never been in the oil business.

Q. You don't know what it is they uses to spread on streets, do you? A. I don't know what it was they spread on the street any more than it was oily and sticky.

Q. It looked like oil? A. Yes, sir.

Q. It was liquid, however, wasn't it? A. Yes.

Q. The street, at that time, was in pretty poor condition, wasn't it? A. The street at that time was in need of repair.

Q. When you say in need of repairs, the street had been washed out and a part of the macadam torn up, etc.? A. Only from the usual traffic.

Q. And the wear and tear of the weather? A. Yes, sir.

Q. So that there were roughnesses there and depressions and things of that kind in the street? A. Yes, sir.

Q. And it did need sprinkling? A. Yes, it did need sprinkling.

Q. You have no complaint about that? A. No, sir.

Q. You have never been in the oil business? A. No, sir.

Q. You don't know whether the Standard Oil company or whatever company it was was doing that scraping, or that oiling, was doing it in accordance with the contract made with the Board of Freeholders? A. I do not; no, sir.

Q. You don't know whether that oil was spread

*Peter J. Lydecker—cross.*

on there in a proper way and by the proper methods? A. I could not say that it had been spread by any proper method.

Q. You have not had any experience with oil, have you? A. No, I have not had any experience.

Q. You said that there was no water put on that street that day, how do you know? A. I did not see any.

Q. Is that the only reason? Is that your answer? A. Yes, sir.

10

Mr. McGinnis: At this stage, before we call out physician, by arrangement with counsel, I want to offer for formal proof the contract entered into between the Board of Chosen Freeholders of the County of Passaic and the Standard Oil company, bearing date August twenty-eighth, 1913, for the oiling of various streets and roads in the county, including East Eighteenth street, Paterson.

20

Mr. Garven: We have no objection to that.

Mr. McGinnis: It is also stipulated between counsel that this contract, although dated August twenty-eighth was actually awarded on the thirtieth of July, 1913, to the defendant the Standard Oil company and that in accordance with that award, the Standard Oil company proceeded to do the work before the contract was actually signed.

30

Mr. DeYoe: Of course, the question of the competency of the contract as legal evidence, we object to.

Mr. McGinnis: The contract was award-

*Dr. Charles Murn—direct.*

ed on the thirtieth of July and after this contract was awarded and before it was signed, the Standard Oil company proceeded to do the work.

Mr. DeYoe: They proceeded to do the work under these specifications.

The Court: That was previous to the time of the accident, was it?

10 Mr. DeYoe: Yes, that was previous to the time of the accident. The competency, of course, we do not admit, the legal effect of it.

The Court: Yes; I understand that.

Admitted and marked "Plaintiff's Exhibit P-1" of this date.

DR. CHARLES MURN, sworn as a witness on behalf of the plaintiff, testifies as follows:

20 *Direct Examination by Mr. McGinnis.*

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

Q. And a surgeon also? A. Yes, sir.

Q. How long have you been such? A. For six years.

Q. And you are a graduate of what institution? A. Of Columbia College, New York.

Q. Do you remember John Lydecker? A. I do.

30 Q. It has been testified that he received a broken arm? A. Yes. I saw him on August twentieth, 1913, I think that is the right date, and he had a fracture of both bones of the forearm, at different levels; the fracture of the radius was about at the juncture here and the middle third, and then the ulnar running about the middle of the

*Dr. Charles Murn—direct.*

bone and that is a comminuted fracture, and comminuted fracture means that there is a small piece or small pieces of bone broken off altogether by the fracture, it is not just a complete fracture.

Q. Do you say in this particular fracture there were small pieces broken off? A. I say, the fracture, especially that of the radius, I think the ex-ray will show, there is what we term a comminuted fracture, a comminution, in other words, a piece of bone separated from the rest of the bone. That is really one of the main causes of trouble in the fact that his arm is not exactly straight and the fact that he has got some loss of motion. 10

Q. It is more than simply a break across the bone? A. Yes, sir.

Q. Will you give us the names of those bones again? A. The radius and the ulna.

Q. Which is the radius? Which bone is the radius? A. On the outside, extending.

Q. The small one? A. They are both the same size, more or less. 20

Q. The one on the outside is the radius? A. Yes, sir; and the one on the inside is the ulna.

Q. Were you present when these Xrays were taken? A. I was when the first one was.

Q. Examine them and see which you were present at? A. These Xrays were taken about two days after the accident and the arm was put in splints. I had it Xrayed to see how it was. This here is the piece of bone that is separated from this bone, and you can see the line fracture around here, and the line fracture here and the fragments of separated bone. This is the radius and that is the ulna. That is all there is to be seen in this one. This is the same thing, taken the same day, 30

*Dr. Charles Murn—direct.*

only the arm held in a different position. In order to get a good Xray, you should have two views, one this way and the other that way. There is that piece of bone separated, and that is after the arm was put in splints and we considered that was all right in that condition. That is straight enough to leave it alone. If it was interfered with too much, he might have that bone separated altogether and it would die and he would have to have an operation to remove the bone. Any time he may have trouble with that.

10

Q. The arm was set then, was it not? A. Yes, sir. This is another Xray. Those Xrays are taken about four and a half weeks after the accident and you can see here this little piece of bone is still separated and it has set in the muscles and tendons and he has a certain amount of angulation. Through the pull on the muscles that angulation and this little piece of bone prevents the action of pronation. And these two bones catch together and that causes that lack of motion. I think that is all there is to that. That is another view. Both bones come together, so much that where you see his arm this bone here is fairly straight, we had it bent this way, and up here is where the little piece of bone touches it.

20

Mr. Ward: I have the physician who took the Xrays here, do you require him? Otherwise I will offer these now. I offer them in evidence.

30

Q. Which picture did you show the jury first?  
A. This one.

Mr. Ward: I offer it in evidence.

*Dr. Charles Murn—direct.*

Admitted and marked "Plaintiff's Exhibit P-2" of this date.

Q. And the one marked 8-22-13 that was the one you next showed to the jury and explained, the second one? A. Yes, sir.

Mr. Ward: I offer it in evidence.

Admitted and marked "Plaintiff's Exhibit P-3" of this date.

10

Q. And the large picture was the third, which you stated had been taken about a month afterwards? A. Yes, sir; I think the date is there. September seventeenth.

Q. That is marked 9-17-13? A. Yes, sir.

Mr. Ward: I offer this picture in evidence.

Admitted and marked "Plaintiff's Exhibit P-4" of this date.

20

Q. Has Lydecker been under your care since then? A. Yes, sir.

Q. What condition do you find present in the arm at this time? A. At this time he has a loss of pronation, the motion of pronation.

Q. What do you mean by the loss of pronation? A. The loss of ability to turn his hand down this way. (Indicating).

Q. When you say "this way" you mean? A. Well, if the hand was held up, he could not turn it over. That is, you have got to hold the shoulder still; the motion is not supposed to occur in the shoulder.

30

Q. That is, if he held the shoulder still and has his upper arm close to the body he cannot turn

*Dr. Charles Murn—direct.*

his hand over completely? A. Yes, he cannot pronate the hand complete.

Q. What is that caused by? A. That is caused by that fragment of bone, the ends of the bones get together as one bone and rub over one another and they catch and that limits the motion.

Q. In other words, the bones are not so far apart as they naturally would be, is that correct?

A. The angulation of that small piece of bone causes a limitation of motion.

10 Q. What is this angulation caused by? A. That is caused by the fracture not being set in a straight line, or the muscles have pulled it out of place, like there had not been complete union there.

Q. To what extent does that interfere with the use of his arm, in your opinion? A. Well, it makes the arm weak to have the bone angulated that way.

20 Q. Is that painful or not? A. It is painful. Every time he tries it. Yes. It is painful for a time. The pain ought to go away from it eventually.

Q. In the lifting of things, does that affect his ability to lift at all? A. It must have at first. I don't know how it is now.

The Court: Does this small piece of bone come in connection with anything?

30 The Witness: It must have some blood supply. You cannot seem to tell that from the Xray, but if the blood supply had been completely cut off it would have acted as a foreign body.

The Court: It is not joined to the rest of the bone in any way?

*Dr. Charles Murn—direct.*

The Witness: Probably only with the periostium. It must join it with the periostium, otherwise he would have had more trouble with it.

Q. It must be attached to the bone? A. It must be attached by a membrane between the two bones, otherwise we would have had a lot of trouble with it.

Q. Otherwise it would become dead? A. It would become dead and probably he would have needed an operation to remove it. 10

Q. Is the danger of that past now? A. I could not say that, because there is always infection liable to lie at the seat of the injury.

Q. This fragment of bone that you have indicated to the jury and the position in which it is now in which the Xray discloses it to be in September, 1913, is there any danger of infection taking place in that arm due to that? A. No, not due to the accident, no. 20

Q. Due to the condition of the bone? A. Well, if he got an infection from some other cause, at some other place, it might go to that bone, that would be one of the weak spots that it would pick out.

The Court: On account of the lack of nourishment?

The Witness: Yes. On account of there being an injury there. 20

Q. What have you to say as to whether or not that condition is permanent? The loss of pronation? A. The loss of pronation is permanent. His ability to lift and use his arm will improve.

Q. That will improve gradually as time goes on? A. Yes, sir.

*Dr. Charles Murn—cross.*

Q. Taking into consideration the fact that this accident happened over a year ago, and considering the fact that he still has difficulty in lifting and in using that arm, what would you say as to whether or not that condition is apt to remain always present? A. No. I think it will improve. He will be able to lift almost as good as with the other arm.

10 Q. You say "almost." Will it ever be as good as it was before? A. Well, with an angulation it cannot be as good as it was before, the deformity there.

Q. Mr. Lydecker testified that he had not received your bill, but that you told him your bill would be two hundred dollars. I understand from you there is some mistake about that? A. Yes, sir.

20 Q. Will you explain what your bill is and how that mistake arose? A. I don't really remember saying two hundred dollars, but if I did, I must have meant if an operation was necessary. It might come to that amount. My bill does not amount to any more than about, including testimony and everything I did, to about seventy-five dollars.

Q. Was there an operation contemplated at one time? A. Well, we thought it might be necessary on account of this piece of bone.

30 Q. And then it would have amounted to about two hundred dollars? A. Yes, sir.

*Cross Examination by Mr. Garven.*

Q. How long have you been a practicing physician? A. For six years.

Q. During that time I presume you have set a great many arms where bones were broken,

*Dr. Charles Murn—cross.*

haven't you? A. Well, not a great many, I cannot say.

Q. How many? A. About ten or fifteen.

Q. While you were studying I suppose you saw them very often set bones in the arm? A. In the hospital, yes; I had lots of cases in the hospital.

Q. And it is not very dangerous work, very difficult work? A. No, sir.

Q. I presume, on many occasions, you have seen breaks similar to this? A. Yes, sir.

Q. And you have attended the patient and set the bone? A. Yes, sir.

Q. And those patients, you have never heard that they had permanent injury as a result of that? A. Yes, sir.

Q. Permanent injury has resulted? A. I have seen some cases that I have not really attended, only the fact of being in the hospital at the time they were there, and they have had deformity just the same way.

Q. I am speaking of a break similar to this? A. No two breaks can be just alike.

Q. Somewhat similar? A. Well, being similar, they must be entirely similar.

Q. When the two bones are broken in an arm you don't consider it a very difficult job to set those bones, do you? A. Why, there is often a lot of trouble with them, yes.

Q. You mean physical trouble, is that it? A. No. A lot of difficulty in holding them in position. Lots of them perhaps have to have a plate to hold them together, with things like that, operations.

Q. When you speak of a plate, you mean inserting a plate and holding them together? A. Yes, sir; it is done now-a-days very often.

Q. Upon the arm? A. Upon the arm, yes, sir.

10

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*Dr. Charles Murn—cross.*

Q. Don't you know they only use that on the joints? A. I certainly do not know it. They use it in the long bones.

Q. Have you ever known a case that way? A. I certainly have known of cases where they have had to work with an arm plate.

Q. That is in case it is broken more than one place, is it not? A. No, sir.

Q. Just one break? A. Yes, sir.

10 Q. How do you account for this bone not being in its proper place at the present time after you have set it? A. Well, at the first Xray it was not absolutely in line.

Q. Why not? A. Because we could not get it any more in line.

20 Q. Why not? A. Well, I will tell you. I consulted with the physician that takes the Xray plate and asked his opinion, whether we should take that down and try to get it in true apposition and he said he thought it would be better left alone, that it was in as fair line as you could get. At that time the arm looked straight to look at it, it did not have this angulated appearance until the last week.

Q. Might that not be due to a knock or something else that he got in it unknown to you? A. That cause the angulation?

Q. Yes? A. Oh, yes, it might be due to that.

30 Q. So far as you know, you believe that that bone was properly set? A. Yes, sir.

Q. And in its place? A. Yes, as near as it could be.

Q. And if it had been the arm would be straight wouldn't it? A. If it had stayed there the arm would be straight.

Q. This loss of pronation, I see that you seem

*Dr. Charles Murn—cross.*

to limit it to here the arm is against the body; how about extending the arm this way and turning over? A. That is pronation, that is supination; that motion is not lost at all that you are doing now, if he has his arm up this way. Supination occurs between the two bones of the forearm. He could not do that (indicating). If he moves his shoulder around, you can move your shoulder around without moving your forearm at all. He can do that.

Q. Can he turn his hand and arm around this way? A. He certainly can turn his arm back. That is not the motion that is lost. 10

Q. I see he is not doing that way, take his arm and hand? A. I should not think he should have, no.

Q. This small piece of bone, I suppose, can be taken out of there and all this trouble eliminated, couldn't it? A. Well, if it was my arm I would not take it out.

Q. But if the man says that he is suffering with pain and he is not able to use the arm properly, can you give us any special reason for that? A. Because of the angulation and because maybe that small piece of bone is rotting a little bit. 20

Q. Then would you continue to have that bone of that character in your arm, when an operation would take it out without much trouble? A. Yes. Because an operation on the bone might run over a couple of years before it was better again.

Q. In your opinion, this young man has practically got now all his strength back in that arm, hasn't he? A. I should think it ought to be strong yes. 30

Q. There is nothing very serious about this

*Dr. Charles Murn—cross.*

break, is there? A. No, I don't consider it serious.

Q. And there is no reason, so far as you know, that he should not have at this time just as much strength as he ever had? A. Not just as strong. Pretty near as strong.

Q. How long a time do you think it will take for him to get back the strength of the arm of a young man of eighteen years old who weighs a hundred and fifty-five pounds? A. How long  
10 from now do you mean?

Q. No, from, take August twentieth, 1913? A. Well, after this time I should judge that his strength should be pretty near as good as it was in the beginning unless that small piece of bone acts as an irritant. If that is acting as an irritant it may be quite a while before he has his full strength yet. You see, when he uses his muscle it may be pulling right on that little piece of bone,  
20 right near it; there may be a little muscle attached to that and the result comes from there.

Q. Was not that broke down further? A. The break on the radius, the one where the little piece of bone is from, is about the juncture of the middle of the upper third. The break of the ulna is just a little lower.

Q. Is it your opinion that extension sort of scrapes the bone on the other side? A. The bones all meet or else that little piece gets between.

Q. Is it not a fact that those two bones are absolutely stationary? A. Why certainly.  
30

Q. How can they grate together? A. What do you mean? How can they grate together? They are not stationary if you hold one bone straight, why this bone moves, that joint between them

*Dr. Charles Murn—re-direct.*

comes right over. No, they are not stationary; you take an Xray in that position the bones will be crossed, the bones will appear crossed.

Q. His ability to lift, of course, has not been impaired at all, has it? A. Has not been interfered with?

Q. No? A. Well, if that piece of bone is being the cause of an irritation then it is interfered with.

Q. You have not advised an operation for that, have you? A. No, I have not seen the man I guess for about a month or two months. 10

Q. Has he complained to you about the condition of his arm? A. Yes, sir.

Q. When? A. When he came and told me the trouble was on the side, well, some three or four months since, I guess, I really prescribed nothing for it. I thought he might massage it.

Q. You considered that the pain would wear away eventually, did you? A. I think so, yes.

Q. And he would be just as strong as ever, is that right? A. Yes, sir. 20

*Re-Direct Examination by Mr. Ward.*

Q. The setting of this arm, under the conditions that you found there, was that or not as good a union as you could expect? A. I think it is as good as you could expect.

Q. Under all the circumstances? A. Yes, sir.

Q. And is the alignment of those two bones as good as you could get under all the circumstances? A. I think it is. You might interfere, and try to set those bones several times, and eventually cause the death of that piece of bone and have an awful lot of work there. 30

*Dr. Charles Murn—re-direct.*

Q. In other words, it is dangerous to fool with it? A. Yes. It was better left alone.

Q. Something was said about, perhaps, if he had knocked his arm or hand, that might have caused this lack of alignment? A. Yes.

Q. This lack of alignment might have come and probably did come from perfectly natural causes, did it not, there in the setting of that arm? A. Yes, sir.

10 Q. In other words, it is one of the complications of the break, is that correct? A. Yes, sir.

Q. And naturally so? A. Yes, sir.

Q. Yesterday he testified that he could turn his hand around this way all right (indicating) but he said that it seemed difficult when he held it up, he had some difficulty in getting it all the way over like that. Now, can you examine that and see whether or not that is so? A. He can turn it all over if he turns his shoulder over.

20 Q. By turning the shoulder back? A. Yes, sir.

Q. But, still, when you turn now, as I naturally stand here, without moving my shoulder and turn my hand back, I use the bone of my shoulder and my wrist, is that correct? A. Yes, sir.

Q. And he cannot use those bones naturally between his elbow and his wrist? A. He has not got the same limitation.

30 Q. If he stood up with one hand over that way (indicating) he could move the shoulder, is that right? A. Yes, that is a motion you very seldom use.

Q. If the small piece of bone that has been mentioned here were acting as an irritant, would that cause pain or not? A. It would cause pain.

Q. That would be one of the natural symptoms, would it not? A. Yes, sir.

*Alexander Smith—direct.*

ALEXANDER SMITH, sworn as a witness on behalf of the Plaintiff, testifies as follows:

*Direct Examination by Mr. Ward.*

Q. Where do you live? A. No. 528 East Eighteenth street.

Q. What is your occupation? A. Silk twister at the present time.

Q. What was it in August, 1913? A. At the time of the strike I was working as a bartender.

Q. At what place? A. Corner of Eleventh avenue and Eighteenth street. 10

Q. On which corner? A. On the south corner of Eighteenth street.

Q. That would be the southwest or the southeast? A. The southeast corner.

Q. Did you see John Lydecker on the twentieth day of August, 1913 at the time of this accident, or the time it is supposed to have taken place? A. I did.

Q. What time was it when you first saw him? A. I should say between half past three and four o'clock. I would not exactly say the time, because I was busy at the time, early in the afternoon, I was busy in between off and on. 20

Q. How did you happen to see him at that time? A. There was a slackness in trade, nobody coming in and I happened to step outside, it was pretty warm, and I stepped outside, they have a side door, and alongside of the side door there is a cellar door for letting beer down and I came down and sat down, and I saw a young man, I did not know him at that time, I saw him coming down the street on a bicycle, and he was coming on very slow, at a very slow rate, and the wheel slipped from under him, and down he went, naturally. I did not go over because I had nobody in the place, 30

*Alexander Smith—direct.*

and I have seen this slip and thinking nothing of it, I let it go. Then he came running over to me holding his hand like this, and asked me to please give him a drink of water. The young man was white and I thought a drink of whiskey might revive him, and he says "No, I want nothing but water." I gave him a glass of water and when I went and took the glass from him, like that—when he took the glass from me, he took the water and drank a little and the glass shook in his hands and I said, "Is your arm broke?" "You want to see to it." With that he went over and somebody came and I had to go back.

10 Q. You say you saw him coming down Eighteenth street? A. Yes, sir.

Q. That would be from the north toward the south? A. Yes, sir.

Q. You say that when he got to a certain position you saw his wheel slip? A. Yes, sir.

20 Q. Where was that? A. Right at the corner of Eleventh avenue and Eighteenth street.

Q. Right at the corner? A. Just about the corner, I should judge, probably about as far as here to there. (indicating.)

Q. Not where the cross-walk is? A. There is no specified cross-walk.

Q. Suppose there was a cross-walk? There is supposed to be a cross-walk? A. The front wheel would almost touch the front cross-walk on the north side.

39 Q. Did you notice the condition of the road at that time? A. I had ought to.

Q. Just tell us about that if you will? A. Why, if you want me to go into the detailed part of it, the way I came to notice it was that they had scrubbed the barroom floor and oiled it the night

*Alexander Smith—direct.*

before and in the afternoon the oil man came down and he says—

Q. Not what he said. A. This is the way I am trying to fetch the way I remember the condition of the road if you want me to tell that.

The Court: Just tell what happened.

Q. Not what was said, what happened? A. Somebody says, "What kind of a road are you got?" And I says, "Ain't that a nice condition of a road, cleaning up and gentlemen coming across the street to the saloon." 10

Q. Did you observe the condition of the road then? A. I did; yes, sir.

Q. What was the condition of the road itself? A. It was very ugly in my opinion.

Q. With reference to other roads that you have seen oiled, what have you to say? A. I think it was heavier oiled than any road that I have ever seen. 20

Q. And this spot where John Lydecker's wheel slipped, can you tell us the character of that spot there? A. Well, in that section of that street, from Eleventh avenue, going north, there is quite enough holes there, I should judge, taken from the traffic, all the way, heavy trucks had wore it down, probably a place like that, some bigger and some smaller, and the oil seemed to just lay right in them.

Q. In those places? A. In those places, right where that was the oil seemed to lay. 30

Q. And in this particular place too? A. Yes, sir.

Q. Can you tell us whether there was one where his wheel slipped? A. I did not go over to look at it.

Q. You did not notice that? A. No, sir; because I was busy at my own business.

*Alexander Smith—direct.*

Q. What was the character of that oil? Wrat have you to say about that? A. It seemed to be like a paste, heavy. Of course, I am no judge of that part of the business. I don't know what oil is and what it ain't.

Q. When did you first notice that? A. My attention was called to it by some customer coming in the saloon.

Q. At what time about? A. I should judge that would be around three o'clock, around that time.

10 Q. Did you see them put the oil down or not? A. I certainly did, I happened to be going down the cellar with something and I saw the wagon.

Q. What time was that? A. I should judge around half past two or three o'clock, I would not swear to the minute.

Q. It was after dinner? You are sure of that? A. It was after dinner, I am positive.

Q. You have dinner hour from twelve to one o'clock? A. It was after that; yes, sir.

20 Q. I suppose between twelve and one you are a little rushed, or aren't you? A. More so than other hours; yes, sir.

Q. Was it after that rush or not? A. It was after that rush; yes, sir.

Q. You saw this wagon going along putting the oil down? A. I saw it going past; yes, sir.

Q. Did you see any barriers or anything to prevent the traffic from going through there? A. None whatever.

30 Q. Were there any? A. No, sir.

Q. Was there anything to warn anybody or persons coming along that road of the condition of the road? A. No, sir.

Q. When you saw this wagon, between two and three o'clock, this sprinkler, going along the road,

*Alexander Smith—cross.*

did you observe about as to the sprinkler itself?

A. Well, I noticed the oil, whatever it may be, I don't say whether it was oil or what it was, I noticed part of it was coming out pretty heavy, I saw this wheel, I would not say faucet, but something like a stream, I would not say just it was the faucet or anything like that, but it seemed to be not sprinkling, whether it was this faucet or not, I don't know, but it seemed to be different parts coming pretty heavy like a short stream coming along the rails, you could see some parts of it where it had did it. 10

Q. Before that street was oiled had it been sprinkled or watered, had any water been put on that day? A. No, sir.

Q. What have you to say as to whether it was dry? A. It was a dry street before it was touched, because I remember it was pretty dry and I went over it in the morning when I went to work and it was dry then.

Q. What have you to say as to whether there was any watering done after that oil was put on? A. No water to my knowledge; no, sir. 20

*Cross Examination by Mr. Garven.*

Q. When you noticed this sprinkler, were the horses running or walking? A. No, sir.

Q. What? A. They were going at the ordinary gait, walking along, just the same as at any other time, I suppose; they was not running; no, sir. 30

Q. Were they walking? A. They were walking; yes, sir. They were not standing.

Q. Which were they, walking, running or standing? A. They were walking.

Q. Are you sure about that? A. Positive.

*Alexander Smith—cross.*

Q. Very positive? A. Certainly I am positive.

Q. Don't you know that was an automobile sprinkler they used? A. Not to my knowledge, no; I don't know.

Q. Did you say there was horses? A. I did not see what they were. I said the thing was going. I did not see whether it was horses or not.

Q. Didn't you say the horses were walking? A. Well, there was horses walking; yes, sir.

10 Q. Don't you know it was an automobile sprinkler? A. No, I do not.

Q. What time of the day was it that you saw this sprinkler going by your place? A. Well, I should judge around half past two or three o'clock, somewhere around that.

Q. In which direction was it going? A. It was going north.

Q. On which side of the street was it? A. It was on that side of the street, that was on the east side of the street.

20 Q. On the right hand side going up? A. On the right hand side going up; yes, sir.

Q. Did you see them coming down? A. No, sir; I was busy at the time, I did not.

Q. What side of the street was the boy when you saw him? A. On the right hand side coming down, you could not call it the right, right about in the middle of the road, I guess.

30 Q. How do you know it was sprinkled over there? A. How do I know it was sprinkled over there?

Q. Yes. A. I saw it with my own eyes.

Q. You did not see the sprinkler down there, did you? A. No, sir; I was busy.

Q. Did you see more than one sprinkler with horses? A. No, sir.

*Alexander Smith—cross.*

Q. You spoke about someone coming into your saloon and dragging this oil? A. Yes, sir.

Q. Was that that afternoon or the night before?  
A. That afternoon; it was scrubbed the night before.

Q. In the morning did the people drag it in?  
A. No, sir.

Q. Was that oil sprinkled in the morning or in the afternoon? A. In the afternoon, as far as I can remember.

Q. You do remember, don't you? A. It was not sprinkled when I went to work in the morning, I know that for certain. 10

Q. You did see the sprinkler going up in the afternoon? A. I saw it going past there in the afternoon.

Q. There had not been any sprinkling before that had there? A. Not to my knowledge; no, sir.

Q. In other words, you did not see any sprinkling around ten o'clock in the morning, did you?  
A. No, sir; I did not, I was too busy. 20

Q. You were in a position where you could see, weren't you? A. No, sir; I was not.

Q. You testified you did see.

Mr. Ward: I object.

Objection overruled.

A. I said when I happened to go down in the cellar, I had to go down in the cellar, I saw the sprinkler, that was in the afternoon. 30

Q. That was the time you saw the boy, wasn't it? A. No, I did not say that, I said I was doing that when I saw the sprinkler and I saw the boy when I came out to sit down and there was not much doing.

*Alexander Smith—cross.*

Q. Prior to the time you saw the boy did you go out and sit down and rest? A. No, sir; I did not.

Q. It was a pretty warm day? A. Yes, sir.

Q. Are you sure you did not go outside between twelve and two o'clock? A. Not only to go out for my dinner.

Q. And you went to dinner at what time? A. I had a room in which there was oil, then, I dragged it over into my own house.

10 Q. Where was that? A. Below Eleventh avenue.

Q. Around Twelfth avenue? A. Yes, sir. No, a block this way from Twelfth avenue, on Governor street. I live right on the corner.

Q. What time did you go to lunch? A. After one o'clock.

Q. By that time they had not reached Eleventh avenue had they? A. I did not notice.

20 Q. You walked along the street? A. I walked along down Eighteenth street to pretty near Governor street and crossed over that way.

Q. Did you notice whether they were sprinkling between the tracks or not? A. Well, as far as my knowledge goes, from Governor street to Eleventh avenue was sprinkled between.

Q. They were sprinkling the whole street? A. Yes, sir.

Q. With oil? A. I don't know what you all it.

30 Q. What do you call it? A. I would call it oil.

Q. Do you mean to say between the tracks there was oil? A. They were sprinkling right across; yes, sir.

Q. All the way up to Eleventh avenue? A. I don't know all the way up, I would not say that.

Q. In front of your place? A. In front of my place; yes, sir.

*Alexander Smith—cross.*

Q. Do you mean to say there was oil between the tracks in front of your place? A. Yes, sir; there was oil between the tracks; yes, sir.

Q. You are certain of that? A. Yes, sir; to the best my knowledge, I do; to the best of my knowledge, I believe there was.

Q. You are pretty certain about it, aren't you? A. Well, I am pretty certain; yes, sir.

Q. That oil between the tracks extended right on beyond Eleventh avenue north? A. I had no occasion to go there. 10

Q. You could see? A. I could see part ways; yes, sir.

Q. How far could you see? A. You could see all the way up if you were looking for anything.

Q. Were you looking for anything particular? A. No, sir; I was not I had all I could do to look out for my own business.

Q. You were not paying much attention to this sprinkler, were you? A. No, sir; I was not, only I remember my wife called my attention to it and said "What do you think of that oil, look at my floor?" That is all I can remember, about the floor, that is how I can remember the oil was there at that time. 20

Q. You never saw a road oiled any different than this did you? A. Well, it was very thick.

Q. You never saw a road oiled that was not thick, did you? A. I saw a road since that was not so thick, over on Graham avenue, in front of the Freeholder's house. It was pretty well taken care of over there. I remember that when I passed to go to work. 30

Q. You know the wagons that they use for sprinkling water, don't you? A. Water carts, we call them.

*Elizabeth Williams—direct.*

Q. Yes? A. Yes, sir; I know them.

Q. You did not see this oil squirting out like that did you? A. No, sir.

Q. You did not expect to see that did you?

A. I did not expect anything because I was not looking very much for it.

Q. It looked to you to be pretty thick? A. It certainly did; yes, sir.

*Re-direct Examination by Mr. Ward.*

10

Q. Over the top of this oil was there any sand scattered along, loose sand, fresh sand? A. No, sir; none whatever.

ELIZABETH WILLIAMS, sworn as a witness on behalf of the Plaintiff, testifies as follows:

*Direct Examination by Mr. Ward.*

20

Q. Where do you live? A. No. 478 East Eighteenth street.

Q. Did you live there in August, 1913? A. Yes, sir.

Q. Do you remember the day of this accident? A. I remember the day very well.

Q. Did you see the accident? A. Yes, sir; I did.

Q. What time of the day was it, as near as you can tell us? A. It was after dinner, I cannot tell you any more definite.

30

Q. You mean after twelve or one o'clock? A. After the lunch hour; yes, sir.

Q. What was the first you saw of Lydecker, this day, I mean? A. I was up on my porch and I saw him passing down, and all of a sudden I saw his wheel slip pretty near under him and I saw him fall.

*Elizabeth Williams—direct.*

Q. Whereabouts was it he fell? A. It was on Eighteenth street near Eleventh avenue.

Q. What side of the street was he on? A. On the right hand side.

Q. You saw his wheel slip from under him? A. Yes, sir.

Q. And you saw him fall? A. Yes, sir.

Q. Did you see the condition of the road at the place where he fell? A. No, sir; I did not.

Q. Do you know whether or not the road was oiled that day or not? A. Yes, sir; I am positive it was oiled that day. 10

Q. When had you first noticed that? A. After the lunch hour, we were sitting out on our porch and I saw the wagon passing.

Q. At this place where he fell? A. They started up there and were coming down and it passed by our house.

Q. They started towards the Broadway end? A. I presume they did, I did not look all the way up. 20

Q. In that direction? A. Yes, sir.

Q. And they were working up towards Riverside? A. Yes, sir.

Q. They were working north? A. Yes, sir.

Q. They were working from the south to the north? A. Yes, sir.

Q. Will you describe to the Court and Jury the condition of that roadway after they had worked the oil out on it? A. Well, it was very heavily oiled, and the reason I remember it, I says to my mother who was sitting there, I says that they have not even left a place— 30

Mr. Garven: I object to this.

*Elizabeth Williams—direct.*

Q. Just what happened. A. Well, I explained that that the cross-walks were not sanded and I said—

Mr. Garven: I object.

Q. Not what you said, just what happened. The road at the cross-walk where he fell was it or where the cross walk would be if there were any cross-walks to be there? A. Yes, sir.

10 Q. What was the condition of the road right there? A. Where he fell?

Q. Yes? A. It was very heavily oiled.

Q. And can you tell us what the general condition of the road was, I mean with reference to whether it was good or bad or was worn, along there at that time? A. No, sir; I could not.

Q. When was it you first noticed this road was being oiled or was oiled? A. That day.

Q. About what time? A. After the lunch hour.

20 Q. Did you or not actually see the oil being put on? A. Yes, sir; I did.

Q. About what time was that? A. That I could not say, I know it was after the lunch hour.

Q. About how long before this boy was hurt? A. Well, this boy was hurt about four o'clock somewheres around there.

30 Q. About how long before that was it that you had seen this wagon or wether it was putting on the oil? A. Well, I should say about two or half past two.

Q. A couple of hours before, roughly speaking? A. Yes, sir.

Q. Will you tell us whether or not you observed anything about the manner in which that oil was being put on? A. Well, I did; yes, sir; I noticed

*Elizabeth Williams—direct.*

that it was coming out of one end of the wagon more rapidly than it was on the other.

Q. When you say one end of the wagon, can you tell us whether it was a wagon or an automobile?

A. No, sir; I could not.

Q. When you looked at it and observed this condition, at what part of the vehicle were you looking? A. Right at the back.

Q. You say you noticed oil was coming out? What was coming out, what was there, what do you remember coming out? A. It seemed to be as if it was running nice in some places and some was coming out in little streams and the other was running right out.

10

Q. When you say some places it was running right out, what do you mean by that? A. On the other side it was not running finely at all.

Q. Did you see any sand or anything, after this road had been oiled, did you see any fresh sand or anything spread over there? A. No, sir.

20

Q. Was any spread over? A. No, sir; there was not any.

Q. Was that street sprinkled that day with water? A. No, sir; I am almost positive it was not.

Q. There was no water put on so far as you know? A. No, sir.

Q. This oil that you have described, was that all the way across the road or just put on the sides?

A. It was all the way from curb to curb.

Q. From the car tracks over? A. Yes, sir.

30

Q. Was there any between the car tracks, so far as you know? A. I could not say that.

Q. Have you seen other oiled roads? A. Well, I have; yes, sir.

Q. And as compared with the average oiled road, that you have seen, what have you to say as to the condition of this road, Eighteenth street?

*Elizabeth Williams—cross.*

Mr. DeYoe: I don't think she is an expert to testify as to the different kinds of oiled road. We will have to ascertain that before she can be allowed to answer.

Objected to.

Objection sustained; Plaintiff excepts.

Q. What have you to say as to the manner in which this oil was put on that road?

10 Mr. DeYoe: Objected to. She has stated it was heavy.

The Court: Yes. She said it was heavily oiled, did you not say that?

The Witness: Yes, sir.

*Cross Examination by Mr. Garven.*

Q. Where do you say you live? A. No. 478 East Eighteenth street.

20 Q. That is how far from Eleventh avenue? A. Well, it is in between the block, between Eleventh avenue and Tenth avenue.

Q. About how far, do you know? A. I could not say, it is not very far.

Q. Four or five houses? A. Oh, yes.

Q. More than that? A. No. I think about four houses, but then there are some empty lots between.

30 Q. You were nearer Tenth avenue than Eleventh? A. No, just exactly the same.

Q. In the middle of the block? A. Yes, sir; in the middle of the block.

Q. On which side of the street is your house located? A. On the left hand side going up Eighteenth street.

Q. The boy fell down on the opposite side? A. On the right hand side.

*Elizabeth Williams—cross.*

Q. In other words, taking Broadway as a basis, starting from there, your house was on the left hand side going north? A. Yes, sir.

Q. And the boy fell at Eleventh avenue and Eighteenth street on the right hand side, on the opposite side altogether from the house you were living in? A. Yes, sir; going towards Eleventh avenue.

Q. Maybe I have not got it just right; your house is located on the left hand side going up from Broadway north? A. Yes, sir; towards Tenth avenue. 10

Q. And the boy, was he on the same side of the street that your house is located on or on the other side, I am speaking of the tracks? A. It is on the same side.

The Court: On the same side?

The Witness: On the other side.

Q. Nearest the saloon side? A. Yes, sir; nearest the saloon, that would be on the left hand side going up; no, he was on this side going up, it was on the same side; yes, sir. 20

Q. The same side you lived on? A. Yes, sir.

Q. Are you sure about that? A. I am sure of it now.

Q. And you cannot say whether or not that was automobile truck? A. No, sir; I could not say that.

Q. Didn't you notice on the rear end of this truck, or tank, a canvass? Which prevented persons from seeing that oil? A. No, sir; there was not any then. 30

Q. Are you sure about that? A. I am positive about that, because I remarked it how the oil was coming out.

*Elizabeth Williams—cross.*

Q. Is it not a fact that there was a canvass which reached almost to the ground and prevented the oil from scattering about? A. I know it did not prevent us from seeing it.

Q. You simply saw it from underneath there didn't you? A. No, because I could not see just how they were fixed around there.

10 Q. What do you mean fixed? A. They had just like a little point going and as the oil was coming out some of them was coming out faster than the other ones, it came out in a pool.

Q. It was the same kind of a sprinkler as you see on a water surinkler? A. Something like that, but not exactly, I don't think it was.

Q. Wasn't it a bar run right across? A. No, as near as I can remember I think it was something on the end of it.

20 Q. Wasn't it a bar running right across the rear end of the truck and the oil coming out there? A. No, sir; I think there was something on the end of it.

Q. You are not sure about that? A. I am sure the oil was coming out in a stream.

Q. You are sure the oil came out? A. Yes, I am sure of that.

Q. Because you saw oil left on the surface? A. I saw it come out more on one side than it did on the other.

30 Q. Was not that due to the fact that one half of the rear end had been shut off on account of the narrowness of the street? A. Oh, no, sir; it was not shut off.

Q. Was it dripping or just ordinary flowing? A. It was coming out in a very small stream on one side, but more on the other.

*Elizabeth Williams—cross.*

Q. You are sure you did not see a canvass on it at that time? A. No, sir; I did not notice a canvass.

Q. Of course, there are no cross-walks on that street, are there? A. On Eighteenth street?

Q. Yes, down there at Eleventh avenue and Tenth avenue? A. There is cross-walks at Tenth avenue.

Q. Cross-walks? A. To cross over, certainly.

Q. I am speaking of stones running from one side of the street to the other? A. Oh, no; not that way. 10

Q. In other words, there are no cross-walks at Tenth avenue or Eleventh avenue isn't that so? A. No there is no flagging.

Q. There is no flagging going across the street? A. No, sir.

Q. And the oil was laid just as much on that particular point you speak of where the flagging might have been laid as well as the other part of the road, is that right? A. It went all the way over. 20

Q. All the ways along? A. Yes, sir.

Q. You took particular notice of this sprinkler, didn't you? A. No, I did not take particular notice of it.

Q. It was just passing notice? A. Yes, because I was sitting on my stoop sewing, and I noticed it was not working right, that is the way I thought it was, that is the reason I can remember so well. 30

Q. Was it going very fast? A. No, it was not going very fast.

Q. Can't you remember whether that was a horse driven wagon or a motor? A. No, sir; I cannot.

Q. You cannot recall that? A. I cannot recall it. Of course, I had it in my mind that it was a

*Elizabeth Williams—cross.*

horse wagon but I cannot think just how it was because I don't remember which it was, I cannot say that because I don't know.

Q. You did see how it was going simply along there slowly? A. Yes, it was going slowly.

Q. But you have no idea as to its speed? A. No, I have no idea.

Q. Was it going faster than a man could walk? A. Not if he is in a very great hurry I suppose.

Q. I mean an ordinary walk? A. An ordinary walk?

10 Q. I am speaking of an ordinary walk, was this going faster than that? A. Well, I think it was going a little faster than that, but it was not going fast, just passing.

Q. You think it was going faster than a man could walk? A. I think so; yes, sir.

Q. Faster than you could walk? A. Well, if I am in a very great hurry I can make some good time sometimes.

20 Q. And did you notice whether there was any oil between the tracks? A. I did not.

Q. You do not recall that? A. No, I do not.

Q. Have you ever noticed that Public Service sprinkler with which they sprinkle their tracks along there in front of your place? A. Yes, sir; they do.

Q. They did that day? A. They did not that day.

30 Q. Why not? A. I don't know, I suppose on account of putting the oil on.

Q. This oil was not laid until the afternoon? A. Oh, well, I am speaking of the afternoon.

Q. You mean that they did not water their tracks that afternoon? A. Yes, sir.

*Georgiana Conklin—direct.*

*Re-direct Examination by Mr. Ward.*

Q. Were there any barriers there? A. No, sir.

Q. Or anything to prevent traffic from passing on that street that day? A. No, sir; there was not.

GEORGIANA CONKLIN, sworn as a witness on behalf of the Plaintiff, testifies as follows:

*Direct Examination by Mr. Ward.*

10

Q. Where were you living in August, 1913? A. At that time I was living at 528 East Eighteenth street.

Q. On which side of the street was that? A. On the right side going down towards Broadway.

Q. That would be the west side, the downtown side? A. Yes, sir.

Q. Do you remember seeing John Lydecker that day? A. Yes, sir.

20

Q. About what time was it when you saw him? A. I should say between three and four o'clock.

Q. Will you just describe to the Court and Jury what you saw there? A. Well, I was sitting on the front stoop at the time and I happened to be looking up that way and I saw his wheel slip and saw him fall, and I did not see him coming along until he fell.

Q. Looking up towards which way? A. Towards Eleventh avenue, and I saw the wheel slip and he fell.

30

Q. Just whereabouts was that wheel when it slipped and when Lydecker fell? A. Well, about from here to there from the cross-walk. (Indicating.)

*Georgiana Conklin—direct.*

Q. From here to the chair, (indicating) two or three feet, from the corner? A. To the cross-walk.

Q. On which side of the street was Lydecker?  
A. On the right hand side.

Q. On the right hand side going down towards Broadway? A. Yes, sir.

Q. What was the condition of the road there?  
A. Well, I should say it was very thick.

10 Q. Thick with what? A. Thick with oil, after it was oiled.

Q. Do you know when that oil was put on? A. I know it was put on in the afternoon, what part of the afternoon I don't know.

Q. Did you see them putting it on? A. No, sir; I did not see that.

Q. When did you first notice the oil? A. I don't know what time, I think it was after dinner I noticed it.

20 Q. Some time after one o'clock? A. Yes, sir.

Q. When had you seen, do you know when you last saw the road in its natural condition without the oil being on it? A. Early in the morning.

Q. Was that road sprinkled that day with water? A. No, sir.

Q. Was any water put on that road that day at all? A. No, sir.

Q. Before this accident happened to Lydecker, did you see any water on that road? A. No, sir.

30 Q. The place where he fell, can you tell us what there was there at the place where he slipped? A. Well, I cannot tell exactly.

Q. What you saw, just what you saw? A. I know it was thick like molasses.

Q. What was thick like molasses? A. This puddle.

*Georgeana Conklin—cross.*

Q. Was there a puddle there? A. Yes, sir.

Q. Was that the place where he fell? A. Yes, sir.

Q. Do you know what the condition of that road was, generally speaking, I mean the road itself, whether it was bad or good condition, before the oil was put on? A. Well, I should say it is bad.

Q. In what respect? A. Why, there is rutsand holes like on both sides of it all the way along there.

10

*Cross Examination by Mr. Garven.*

Q. Do you live near Tenth avenue or Eleventh avenue? A. Near Eleventh avenue.

Q. Between Tenth and Eleventh avenues? A. No, between Eleventh and Douglass.

Q. That is to the south of Eleventh avenue, this way? A. Yes, sir.

Q. About how far down? A. Well, about six houses down.

20

Q. Are there any vacant lots between? A. No, sir.

Q. That is what? Two or three hundred feet? A. I cannot just say.

Q. Further than from here to the postoffice building? A. A little further.

Q. You knew young Lydecker, didn't you? A. No, I did not know him, I would not know him again if he had not come to ask did I see him fall, and then I remembered it.

30

Q. When he fell from the machine, did you go off your porch and go out there? A. Yes, sir; I did, I went out and asked him if he was hurt.

Q. Where was he then? A. He was up then, standing up.

*Georgeana Conklin—cross.*

Q. Was he over there by the saloon? A. No, he had not gone over there yet, I had run out, I guess, he did not see me though.

Q. Was he lying down or standing up? A. He was standing up, he had picked himself up.

Q. How long did he lie down there, do you know? A. Three or four minutes I should think.

Q. As much as that? A. Yes, sir.

Q. You are sure about that, are you? A. No, I am not so sure.

10 Q. Didn't he pick himself right up, right after he fell down? A. No. I don't think he did.

Q. Did he get up before you got there? A. Yes, sir.

Q. And you started there immediately after he fell down, didn't you? A. Well, it is quite a ways, to walk up, it is a ways to go up there.

Q. Did he show you the arm? A. He said he was hurt on the arm.

20 Q. Then what did you do? A. I did not do anything. He walked over towards the saloon.

Q. You spoke to him, didn't you? A. Yes, sir.

Q. Then what did he do? A. He walked over towards the saloon.

Q. And you walked home? A. I went home.

Q. I understood you to say you did not notice them sprinkling along there that day? A. Yes, sir.

30 Q. You are sure it was done in the afternoon? A. I know it was done in the afternoon, on account of it being so wet.

Q. What do you mean by "wet"? A. So thick and heavy the oil which was just fresh onto it like.

Q. That is why you know it was laid that afternoon? A. Yes, sir.

Q. Had you been out in the morning? A. Yes, sir.

*Mary Briggs—direct.*

Q. And it had not been laid in the morning? A. No, sir.

Q. Do you know anything about the oil between the car tracks, did you notice that? A. No, I know it was laid altogether over the whole road, from cross-walk to cross-walk.

Q. You did not notice whether the trolley men had wet between the tracks? A. No, sir; they had not.

Q. Had you been out on the porch? A. Yes, sir. 10

Q. For how long? All day? A. No, in the afternoon.

Q. After you got through with your work? A. Yes, sir.

Q. But you were not out in the morning? A. I had been out in the morning.

Q. What time did you go out on the porch? A. I went out on the porch I guess about a quarter to three.

Q. You cannot say that prior to that time the trolley company had not sprinkled along in there? A. I could easily see if there had been any water on. 20

Q. When you went out you saw oil there, didn't you? A. Yes, sir.

Q. Did you expect to see water on? A. I did not expect to see anything.

Q. You could not tell whether it was oil or water, could you? A. It looked like oil. 30

MARY BRIGGS, sworn as a witness on behalf of the Plaintiff, testifies as follows:

*Direct Examination by Mr. Ward.*

Q. You live on East Eighteenth street I suppose? A. No, sir; I was at my brother-in-law's

*Mary Briggs—direct.*

on East Eighteenth street.

Q. Who is your sister-in-law? A. Mrs. Williams.

Q. She is the lady who testified just now? A. Just now testified; yes, sir.

Q. Were you sitting on the porch with her? A. Yes, sir; I was sitting on the front porch.

10 Q. Please tell the Court and Jury what you saw of this accident? A. I was sitting on the porch and I saw this young man come down and I noticed him because he rode so carefully, I knew it was oily, because crossing over from the other side over to my sister-in-law's I knew I had wet feet and I did not want to walk on the carpet. I saw this young man riding so carefully that I watched him, so when he got near the cross-walk of Eleventh avenue I saw his wheel go from under him and down he went, and I did not care to look any more because I knew he must be hurt how he fell, the wheel went out from under him and fell right from under him.

20 Q. What was the condition of the road? A. Like a thick paste, it was terrible, it looked dreadful.

Q. Below Eleventh avenue? A. No, between Tenth and Eleventh, I was on my sister-in-law's porch on the right hand side.

30 Q. Had he passed you or was he coming towards you? A. He just passed me going down before he fell, is the reason I watched him.

Q. You say the oil was very thick there? A. Yes, sir.

Q. And at the place where he fell it was very thick also? A. Yes, sir.

Q. Did you notice anything else about the spot where he fell? A. Well, I noticed in different

*Mary Briggs—direct.*

places in the road, it was puddles like, but I could not say there was one where he fell.

Q. At different places there were puddles? A. Yes, sir.

Q. You cannot tell whether there was one where he fell? A. No, I could not say.

Q. Did you go down there? A. No, sir; I did not, I stayed on my sister-in-law's stoop.

Q. Do you know how long you had been at your sister-in-law's place? A. I guess it must have been about a half an hour before the accident, I should judge. 10

Q. With referenc to the corner of Eleventh avenue, can you tell us just where he fell? A. He fell on the right hand side, right near the curb, it was not very far from the curb, at least it did not look so. Right on the cross-walk, right near to it.

Q. Where the cross would be if there had been a cross-walk there? A. Yes, sir; right near where it was on East Eighteenth street. 20

Q. Was there any sand there, any sand sprinkled or anything of that sort? A. No, sir.

Q. Were there any barriers there to warn traffic? A. No, sir; nothing of the kind.

Q. Was there anything there to prevent people going down along that street? A. No, sir; nothing at all.

Q. You did not see the oil put on? A. No, sir; I did not see the oil put on.

Q. Was there any water in that street? A. No, sir. 20

Q. And you did not see any water? A. No, sir; I did not see any water at all, it was so much of a paste.

Q. After the fall of the plaintiff, did you see what became of him? A. After he fell, a little

*Mary Briggs—cross.*

while after, I could not just say how long, we were talking there, and he came up and his arm was hanging down and of course I guess he was hurt and we asked him and he said, yes, he was hurt. And he went right on up, that is the last I saw of him.

*Cross Examination by Mr. Garven.*

10 Q. You would not say the street had not been sprinkled that day with water? A. I would not say whether it had or not, but I say I did not see it.

Q. You were sitting on the porch with Mrs. Williams? A. Yes, sir; on her front porch.

Q. Weren't you sitting there when this sprinkling wagon went by? A. No, sir; I had not seen it.

Q. You did not get off the porch after this boy fell? A. No, sir; I stayed right on the porch.

20 Q. Mrs. Williams' house is in the middle of the block? A. Yes, sir.

Q. Up near Eleventh avenue? A. Like in between, as much one way as the other.

Q. And they are quite long blocks too, aren't they? A. Well, quite long, just like a regular block, I should think, I did not take any notice in regard to that.

30 Q. You could not tell whether that was a thick paste down there at Eleventh avenue or not could you? A. Well, it looked like it very much. All over the street was bad as far as I could see.

Q. It was oil on there wasn't it? A. Well, more oil, yes, there was pasty spots too, and of course there might have been oil mixed with it, but it looked like pasty stuff, and it was terrible. I know, because I put my foot into it and I felt it.

*Mary E. Cubbe—direct.*

Q. But it was fresh? A. Yes, it was fresh.

Q. It was heavy oil? A. Yes, sir.

Q. And very thick? A. Yes, sir.

Q. You could not tell whether it was any thicker down there than it was up around Tenth avenue could you? A. No, not so much, but it was thick enough up there, I did not have to go down there to see.

Q. But it looked alike to you all along there?

A. Yes; I felt it when I put my foot in it

10

MARY E. CUBBE, sworn as a witness on behalf of the Plaintiff, testifies as follows:

*Direct Examination by Mr. Ward.*

Q. Where did you live in August, 1913? A. No. 524 East Eighteenth street.

Q. On which side of the street is that? A. That is on the right hand side going down towards Broadway.

20

Q. That would be the westerly side? A. On the west side; yes, sir.

Q. The downtown side? A. Yes, sir.

Q. How near to Eleventh avenue is that? A. Just about a half a block, a half of a small block down.

Q. Towards Broadway or towards—? A. Going towards Broadway.

Q. Going from north to south you first strike Eleventh avenue and then your house? A. Yes, sir.

30

Q. Your house is nearer Broadway than Eleventh avenue, is that correct? A. Yes, sir.

Q. Did you see John Lydecker that day? A. Yes, sir; I did.

*Mary E. Cubbe—direct.*

Q. Where abouts? A. I looked outside as he fell. I did not see him while he was riding down East Eighteenth street, but I looked out just in time to see him fall.

Q. Did you see the place where he fell? A. I know just where the place was but I did not go out to look at it.

10 Q. Did you notice anything about this place where he fell? A. I know that there was hollows in the road but I don't know exactly about the place where he fell.

Q. Do you know whether or not there was any hollows in the road? A. It was covered with them.

Q. And what was in those hollows? A. You could not see the hollows, they were filled even with oil.

Q. And you say you could not see whether there was a hollow where he fell or not? A. I cannot say if there was.

20 Q. After he fell, did you see what happened? A. Yes, he got up and turned around, just like that (indicating) and just looked down at the wheel, and he held his arm down and his wheel still laid on the ground and then he walked towards the saloon and before he walked to the saloon I walked up and spoke to him.

Q. Did you see Mrs. Conklin? A. I sat with Mrs. Conklin on the stoop.

30 Q. When you walked up to this place, or walked up where he was, was his wheel in the road there? A. I saw his wheel.

Q. Could you see whether or not there was a hole there? A. No, I did not.

Q. You did not notice that? A. No, I did not notice it.

*Mary E. Cubbe—direct.*

Q. Right there where he fell, what was the condition of the road with reference to oil? A. It was very, very thick with oil, more so than I have ever seen it. It had not been oiled before in six years and I think that was the reason they put such an extra dose on it that time.

Q. They wanted to make a good job of it? A. That is what I thought.

Q. How long had you been on this porch before that? A. I had been there from about two o'clock.

Q. Did you notice them putting the oil on? A. 10  
I did.

Q. What time did you notice that? A. They were putting it on when I came out.

Q. About what time was that? A. From two to half past two I should judge.

Q. What kind of a vehicle did they have? A. I think there was a man sitting with a lever, as far as I can remember, I could not say positively.

Q. What was the man and what was the lever on? A. On the wagon that was putting oil on the 20  
street.

Q. Do you know whether it was a wagon or was an automobile? A. I think it was an automobile, as far as I can remember.

Q. Someone seemed to be pulling the lever? A. Yes, as well as I can remember.

Q. Did you notice anything about the place from which the oil was coming? A. Well, it seemed to come thicker from one part of the wagon, or whatever it was, than it did from another, it seemed 30  
as if some parts might have been clogged on the back part of this machine from all appearances.

Q. And where this oil came out thicker than it did at other places, how did it come out in those places where it came out so thickly? A. It seemed

*Mary E. Cubbe—cross.*

to run down like a faucet goes, of course, not so much, but thicker on one side than it was on the other.

Q. It seemed to run out like a faucet? A. Yes, sir.

Q. You mean the stream from the inside? A. Yes, sir; the stream from the inside.

Q. Did you see any barriers there or anything to prevent traffic from going along there? A. There was nothing in the way.

10 Q. Nothing to prevent travel on that road? A. No, I did not see anything.

Q. Was there any water on that road? A. No, sir.

Q. Had there been any on that day? A. No, sir; not that day.

*Cross Examination by Mr. Garven.*

20 Q. Where did you live? A. No. 524 East Eighteenth street.

Q. I suppose you were sitting out on the porch all day long, morning and the afternoon? A. All the afternoon.

Q. Not the morning? A. Not the morning.

Q. What time did you go out there in the afternoon? A. From two to half past two, between two and half past two o'clock.

30 Q. You don't know whether any sprinkler went up along that road before that? A. I know the road was dry when I went out there.

Q. Did a sprinkler come up afterwards? A. No; only the oil wagon was running along there at the time I was out there.

Q. And you saw a man sitting on the rear end? A. Yes, as well as I can remember.

*Mary E. Cubbe—cross.*

Q. Pulling a lever? A. Yes, sir.

Q. Are you sure about that? A. I think so, I am not positive, but that is as well as I can remember.

Q. You remember a man with a lever? A. I am not positive about it. As well as I can recollect it seemed to me there was a man at the end of the wagon there with a lever.

Q. You do remember there was a man pulling a lever? A. There was a man on it doing something but I cannot just tell what he was doing, that is as well as I can remember. It seemed to me he was working some kind of a lever.

10

Q. You distinctly recall a lever? A. Yes, sir.

Q. Are you sure of that? A. That is as well as I can remember, I am not positive.

Q. Then you don't want to say there was any lever or was a man with a lever? A. No; not surely I would not say.

Q. What was it that especially attracted your attention there that day? A. I was there on the stoop on account of the baby being sick; it was warm weather and I noticed the road was very thickly oiled, because the children were dragging it back and forth into the house.

20

Q. The machine had gone by in the meantime? A. It was going up and down East Eighteenth street at the time.

Q. How many machines were there? A. One machine.

Q. Driven by horses? A. I am not positive, I could not say, I don't think so.

30

Q. Do you think it was a motor? A. I think it was a motor.

Q. Didn't you notice on the back of the motor a canvass covering so as to keep the oil from flying about? A. No; I did not notice any.

*Mary E. Cubbe—cross.*

Q. Will you say it was not there? A. No, I would not say it was not there, but I did not see it there.

Q. Had this place in front of where you were, been sprinkled when you came out on the porch?

A. What do you mean? With oil?

Q. Yes? A. Yes; it had been sprinkled with oil.

Q. And the machine was where? A. It was going up towards Eleventh avenue from Broadway.

10 Q. And it had sprinkled one side of the street?

A. Yes, sir.

Q. And was continuing on up in which direction? A. Up the street to Eleventh avenue.

Q. It was beyond Eleventh avenue when you first saw it, wasn't it? A. No, it was going up from Governor street to Eleventh avenue when I first noticed the machine.

Q. On the opposite side of the street from that that you were on? A. On the opposite side of the street.

20

Q. That is, the right hand side going from Broadway.

Q. That tank car went right on up didn't it? A. Yes, sir.

Q. It went on up the hill? A. I could not tell you how far it went. I noticed it while it was in front of my house. Every time I looked up at it I noticed it. But I don't know how far it went.

Q. How many times did it pass your house? A. It passed quite often.

30

Q. Sprinkling? A. I could not say whether it was sprinkling every time, but the road was very thick.

Q. Don't you know that there is only about nine feet between the gutter and the rail and that

*Mary E. Cubbe—re-direct—re-cross.*

it is only necessary to go over that once? A. Well, it must have been gone over more than once for that road.

Q. Eh? A. I think they went over it more than once for that road.

Q. That road was in such bad condition that it needed to be gone over more than once, it needed more than one coat? A. It certainly did.

Q. Had you ridden over it before? A. No, I had not; I had walked over it.

Q. You had seen it the day before? A. I did; 10  
yes, sir.

Q. And you thought it needed more than one coat? A. I did; yes, sir.

*Re-Direct Examination by Mr. Ward.*

Q. Do you think it got more than it needed?  
A. I certainly do.

*Re-Cross Examination by Mr. Garven.* 20

Q. Was there any oil between the tracks? A. From what I can remember I think it was oiled right straight across.

Q. Might it not have been water between the tracks? A. There was no water between the tracks; whatever covered it was right across the road.

Q. You are sure it was between the tracks?  
A. Yes, sir, sure. 30

Plaintiff Rests.

Mr. DeYoe: If the court please, I move for a non-suit in this case on behalf of the county.

*Mary E. Cubbe—re-cross.*

I think the law is well settled in this state that a municipal corporation cannot be held for negligence in the performance or neglect to perform any public work.

The claim in this case, as set up in the declaration is, that we were negligent. It charges us with negligence and from our negligence incurred the injury to this person.

10 This was a public highway, a street, and the county was charged with the duty of keeping it in repair, and, according to the evidence, the means by which they were keeping it in repair is an established method, one witness testifying that for at least the past six years they have been doing this class of work.

20 This was in a public place, a public highway, and the rule is, in the absence of a statute, action will not lie against a municipal corporation at the instance of an individual who sustains special damage in consequence of the negligence of such corporation in the performance of a public duty.

I cite the case of *Bisbane vs. Asbury Park*, (80 N. J. L., 418).

The Court: What about the cases which apply to active wrong doing?

30 Mr. DeYoe: Active wrong doing is where a trespass is committed on personal property. *Kehoe vs. Liverpool*, that is a case of active wrong doing.

The Court: Does not active wrong doing apply to whatever is done to the streets?

*Mary E. Cubbe—re-cross.*

Mr. DeYoe: No, sir. There we are engaged in the performance of our duty. Active wrong doing applies where any wrongful act is committed.

I have the cases collected here, and I cite; Sussex vs. Stratton, (3 Harrison).

Livermore vs. Freeholders, (5 Dutch, 241).

Pray vs. Jersey City, (32 N. J. L., 394).

Wild vs. The City of Paterson, (42, N. J. L., 406).

10

Mr. McGinnis: Have you read the Murphy case?

Mr. DeYoe: That is an entirely different case, there is a case of private nuisance, it is creating a private nuisance.

The court: What do you do with the case of Hart vs. Board of Freeholders?

Mr. DeYoe: They held there the first count was not good for the reason that it did not charge them with the commission of an unlawful act, it was in the performance of a public duty and so that count was not good. The second count in the declaration, which it was held was good, charged the corporation with committing an unlawful act; and that is the point in that case, and that is the point also in this case.

20

The Board of Freeholders was in the performance of a public duty and therefore it cannot be held in this case.

30

Mr. Garven: I move the court for a nonsuit on behalf of the Standard Oil Company on the following grounds:

1. That the plaintiff contributed to his own injury.

*Mary E. Cubbe—re-cross.*

2. That there is no evidence of negligence on the part of the defendant the Standard Oil Company.

10 3. That the defendant, the Standard Oil Company, without negligence on its part, performed its contract according to the terms thereof, under the specifications and requirements of the Board of Freeholders of this county, and under the direction of the County Engineer and Supervisor.

4. That the Standard Oil Company, as the agent of the Board of Chosen Freeholders, and having no discretion in the matter, is not responsible in damages for any negligence arising from the improper laying of oil on the surface of the road.

20 5. That the negligence of the Standard Oil Company, in the discharge of its duties under this contract with the Board of Chosen Freeholders may not constitute the basis of an action in behalf of the plaintiff.

The last point I would like to emphasize somewhat. Your Honor has asked whether or not a certain point has ever been brought up in other cases, and, particularly that one which refers to wrongful acts. I have a case here which I will cite just in a moment, but I want to call your Honor's attention to this, as Mr. DeYoe has ably said, there is this distinction, there must be a wrongful act on the part of the defendants; not a negligent thing of itself, but a wrongful act.

30

The Court: Aren't you in a different position than the county in that particular?

*Mary E. Cubbe—re-cross.*

Mr. Garven: Absolutely not.

The Court: It seems so to me.

Mr. Garven: I can refer you to a case which I think sustains that position under these motions that I have made, that is, as agent of the board and acting entirely under the discretion of the board, that we are not responsible.

The Court: Does your contract provide that?

Mr. Garven: It does, absolutely, and I deem it prudent for me to call it to your Honor's attention. 10

The Court: That said you should put up barriers.

Mr. Garven: Only at certain places, on certain conditions. The specifications which are a part of the contract, read that all the work done under this contract shall be done under the direction of the Board of Chosen Freeholders of the County of Pas- 20  
saic, the County Engineer and Supervisor and to their satisfaction.

The Court: Do you think that would excuse you from negligence if you were negligent?

Mr. Garven: As to third parties?

The Court: Yes.

Mr. Garven: There is no question about it.

(Counsel argue motion, Mr. Garven cit- 30  
ing Seymour vs. Long Dock.)

Mr. Garven: What I want to emphasize further is this other point: Here is the Board of Freeholders which has charge of that road there is no denial that they had a right to repair it: that cannot be denied

*Joseph A. McGrath—direct.*

Assume for the moment that instead of sprinkling oil on there they had started to dig it up—

The Court: I will assume that the sprinkling of the oil was lawful.

10 Mr. Garven: Therefore, doing that act we were doing a lawful act, and if the plaintiff's contention is correct, we were doing it in a negligent manner. That certainly does not make either one of them liable, according to these cases that have been called to your Honor's attention. I cite the case of Town of Union vs. Durkers ( 8 or 9 Vr.).

(Counsel argue motion, plaintiff citing, Condict vs. Jersey City, (46 Vr.).)

(Counsel for Standard Oil Company citing Stiles vs. F. R. Long Co., (41 Vr. 302.).)

20 The Court: I will deny the motion of the Standard Oil Company and will grant a non-suit as to the Board of Freeholders. (The Standard Oil Company excepts.) (The plaintiff excepts.)

JOSEPH A. McGRATH. sworn as a witness on behalf of the defendant, the Standard Oil Company, testifies as follows:

*Direct Examination by Mr. Garven.*

30 Q. Where do you live? A. At no 312 Lafayette street, Newark, New Jersey.

Q. Are you employed by the Standard Oil Company? A. Yes, sir.

Q. How long have you been in their employ? A. Two years.

*Joseph A. McGrath—direct.*

Q. What was your employment on August twentieth, 1913? A. Helper on a road oiler.

Q. Did you do work on East Eighteenth street, Paterson? A. Yes, sir.

Q. Can you recall the particular day you started to work? A. Yes, sir; I can.

Q. What day was it? A. Well, it was about the middle of August, I won't say the middle, towards the latter part of August.

Q. Last year? A. 1913; yes, sir.

Q. Were there any other helpers there? A. 10  
Yes, sir; there was.

Q. Who? A. One car besides the one I was on.

Q. Who was operating that car? A. Mr. LeBoer.

Q. How many cars were there altogether on that work? A. Two cars.

Q. What were you doing along that street? A. Along what street?

Q. East Eighteenth street? A. We were oiling 20  
it.

Q. What time of the day did you start to oil it? A. In the afternoon.

Q. You cannot recall the particular date, can you? A. No, sir; I cannot.

Q. Who was with you at the time? A. A man by the name of McCarthy.

Q. Who was with the other man? A. Mr. LeBoer and Mr. Foley.

Q. Who was Mr. Foley? A. He was a helper 30  
with Mr. LeBoer.

Q. What kind of wagons did you have? A. Motor vehicles.

Q. Motor trucks? A. Yes, sir.

Q. Two of them? A. Yes, sir.

*Joseph A. McGrath—direct.*

Q. Just tell the court and jury at the point you started and what you did along that street? A. In regard to the oiling?

Q. In regard to the oiling. A. In the afternoon we started to oil on East Eighteenth street from Broadway, on the right hand side going towards River street.

10 Q. That is north? A. Yes, sir. From Broadway we started to River street, the right hand side, going north. The car that I was on was oiling a strip six feet wide nearest to the curb and we ran short of oil that day and we got as far as, well, I should judge, about near Ninth avenue, beyond Tenth avenue, I should say a half mile, or a little over a half mile from Broadway.

20 Q. On which side of the street? A. On the right hand side going north. The measurements for that space there would not take a strip of two cars, but we had to cut one car's sprays in half, which would be three feet.

Q. Which car was that? A. The car that Mr. LeBoer was operating, he was the man that laid the three foot strip of oil, and we got, as I say, a little beyond Tenth avenue, I should judge, and that day we ran short of oil; we were carting oil from in the city and we ran short of oil and we had to wait for our oil, and the next day we had to take it from another station to complete that street.

30 Q. How far up East Eighteenth street did you go altogether? A. The complete job?

Q. Yes? A. It was from Broadway to the river.

Q. And that took you past Eleventh street, didn't it? A. Eleventh avenue, yes, sir; it did.

Q. And the next day, did you say that you completed the work? A. The next morning; yes, sir.

*Joseph A. McGrath—direct*

Q. Up on the right side and down on the left?

Mr. Ward: Objected to as leading.

A. We continued on the right hand side of the street; yes, sir.

Q. What about the left? A. Later in the day we finished the left.

Q. Can you recall when you laid it on the left hand side? A. Well, I done part of the work. You see there was two cars on that street.

Q. Tell what you did? A. We laid the strip that was next to the gutter, the six foot strip, and Mr. LeBoer looking after the three foot strip part of it which I had nothing to do with. 10

Q. Do you know who the County Engineer was at that time? A. Yes, sir; I do.

Q. Who was it? A. Mr. Ferguson.

Q. Did you see him while you were sprinkling that road? A. See Mr. Ferguson?

Q. Yes. A. On what date may I ask?

Q. On any date that you were sprinkling the road? A. Yes, sir; I did see him one day. 20

Q. What day was that? A. The second day when we finished the street.

Q. Did you receive any instruction from him? A. Yes, sir.

Q. What?

Mr. Ward: Objected to as irrelevant. This was the second day.

The Court: After the accident?

Mr. Ward: We don't know that. 30

Mr. Garven: The sprinkling of the street, the second day they were on the job.

The Court: Was that before or after the accident?

The Witness: I did not know the acci-

*Joseph A. McGrath—direct.*

dent had happened. I did not know anything about the accident.

Mr. Ward: He testifies they got down to Ninth street, which is beyond this, the first day; and then on the second day he saw Mr. Ferguson.

The Witness: The next morning.

Mr. Garven: They got down the right hand side one day and then the following day when he did the other side he had this conversation. That is the testimony as I understand it. Now, I ask if he received any instructions and what they were.

10

The Court: He says on the second day, and the question is whether this was before or after the accident.

Mr. Garven: We cannot tell. We never heard of the accident until they brought suit.

20

The Court: I will admit it. I think it is some evidence of the relationship between the parties. What effect it will have is something else.

Mr. Ward: The weight of it will go to the jury?

The Court: Yes.

30

Q. What were those instructions? A. Mr. Ferguson told us we would have to go back and touch up a part of the road that we had done the day before, as the work was not satisfactory and there was not enough oil on that road, as it was a very dusty road and needed more oil as it was not satisfactory the way it stood.

Q. That is the part of the roadway from Broadway up to Eleventh avenue? A. No. We done that the first day.

*Joseph A. McGrath—direct.*

Q. What did you do then? A. After we received our instruction?

Q. Yes? A. We went back. At least I did not, the other car did, went back, according to instructions and went over this first application with a light spray.

Q. Did you see the inspector there? A. Yes, sir.

Q. What is his name? A. McDonald.

Q. Where was he during the first or the second day? A. He would ride on one car and give instruction and we would go that street and he would show the way to where that street was. 10

Q. We are talking about East Eighteenth street now? A. East Eighteenth street, he was on either one of the two cars all the time the work was being completed.

Q. He was the inspector on the job? A. Yes, sir.

Q. Did he leave while you were oiling that street? A. No, sir; he did not. 20

Q. Did you receive instructions from him? A. Yes, sir.

Q. Did you carry out those instructions? A. Yes, sir.

Q. How long, previous to this time, had you been sprinkling streets? A. In Paterson?

Q. No, anywheres? A. Three months.

Q. Did you understand the mechanism if there is any, of that vehicle? A. Yes, sir; I did. 30

Q. What is there about that for turning on and turning off the oil? A. Why, that is just what the lever is there for, the sprays, and it is worked right from the seat.

Q. Did you have any trouble with your apparatus that day while you were sprinkling? A. No, sir.

*Joseph A. McGrath—cross.*

Q. Where is the seat where the helper sat? A. On the right hand side of the driver.

Q. Was there anything on the back part of your machine, any canvas or anything of that kind? A. Yes, sir; there was.

Q. For the purpose of—? A. Of holding the sprays, to keep the wind from hitting the sprays.

Q. Where was that canvas? A. On the spray box, on the back, about two inches above the level of the ground.

10 Q. And it extended how far up? A. About fourteen inches, fourteen to sixteen inches.

Q. How low down is the spray? A. The spray is about one foot from the ground.

*Cross Examination by Mr. Ward.*

Q. Are you still working for the Standard Oil Company? A. Yes, sir.

20 Q. You are working in Newark now? A. Yes, sir.

Q. Have you the same position? A. No, sir. I have had an increase since the last year.

Q. That is, you are not working on the—? A. I worked last summer on the sprays but the season is over now.

Q. You are not working on sprayers any more? A. Not at present; no, sir.

Q. And you say that you were the helper? A. Yes, sir; I was.

30 Q. And you operated the lever? A. Yes, sir.

Q. These were automobile sprayers? A. Yes, sir.

Q. How large a tank was there on each? A. What do you mean? The capacity of the tank? Yes? A. I don't know.

*Joseph A. McGrath—cross.*

Q. You don't know that? A. No, sir; I don't know the capacity.

Q. Didn't you assist in operating those? A. Yes, sir; I did, but I did not know the capacity.

Q. Do you know now the capacity? A. No, sir; I do not.

Q. How long altogether were you working on them? A. Two years.

Q. Two years altogether? A. Yes, sir.

Q. Didn't you get the oil from these two stations? A. Yes, sir.

10

Q. Didn't you know how much oil you were getting? A. No, sir. I never measured that, nor I never seen them measured.

Q. You did not know how much oil you were getting at a time? A. No, sir.

Q. Did you have any idea of how much oil you were to use on any particular part of the road? A. Yes, sir; I did.

Q. Well, how much? A. Do you mean to the square yard?

20

Q. Yes? A. I don't know that; no, sir.

Q. So you don't know that? A. I did not know what quantity of oil to use, but we were given our instructions so much per mile, per hour.

Q. What is that? A. The way we received our instructions to go to work would be so many miles an hour for that contract; but we never knew what gallons per square yard was laid on that road.

Q. You never had any instruction about that? A. Not by the gallon; no, sir.

30

Q. This lever that you worked, that shut off and turned on the supply of oil? A. Yes, sir.

Q. And you could not tell just how much oil you were letting over the roads on each square yard could you? A. No, sir; that was to the man that was driving.

*Joseph A. McGrath—cross.*

Q. Just answer the question. You could not tell that, could you? A. No, sir.

Q. Did you place your lever at a certain place in regulating the oil? On this day in August when you were on East Eighteenth street, did you place your lever at a certain place? A. There is only one way to place your lever, and that is to bend it all the way.

Q. So that you bent the lever all the way? A. Yes, sir.

10 Q. And gave the full flow of oil? A. Yes, sir; we always did.

Q. And the lever is only used then not to regulate the amount of oil that you put on the road, but to turn the oil off and put it on, is that correct? A. Yes, sir; that is so.

Q. So that, with this lever, you do not control the amount of oil that is going on the roads? A. No, sir.

20 Q. And when you got up to this place on East Eighteenth street you had, of course, some oil in your tank, did you not? A. What place was that?

Q. I mean this street about which we are talking, I mean East Eighteenth street? A. You mean that we had oil left when we got as far as Eleventh avenue?

30 Q. No. When you started at Broadway and East Eighteenth street to go north on East Eighteenth street, at that time, of course, you had oil in your tank to sprinkle, did you not? A. Certainly; yes, sir.

Q. Did the instructions say that you pass up and down there more than once? A. No, sir; we went up once.

Q. You went up once? A. Yes, sir.

Q. To Ninth street? A. I say, about Ninth street.

*Joseph A. McGrath—cross.*

Q. So that on that day you had oil from Broadway to Ninth avenue, or about Ninth avenue? A. About Ninth avenue; yes, sir.

Q. Then, did you turn around and come back? A. Not oiling; no, sir.

Q. Did you come back at all? A. I would not say that we came back to Ninth avenue, for I was a total stranger in town and that was the first day I came here.

Q. You could not tell? A. No, sir.

Q. Was it at Ninth avenue, or about at Ninth avenue that you discovered that your oil was out? A. Yes, sir.

Q. How could you tell that? A. With our pressure guage.

Q. So that when the oil was all out you had a pressure gauge which would show you that? A. Correct; yes, sir.

Q. And it did not show you until you got to Ninth avenue? A. That is the helper's business, to keep looking back to see if the oil is flowing. 20

Q. Did you look back? A. Yes, sir.

Q. And you saw it was flowing all right until you got to Ninth avenue? A. Yes, sir. That is the helper's place to watch that oil.

Q. And it was flowing just as freely as ever? A. When I got to the end of it?

Q. So that up to the time that you got to about Ninth avenue it was flowing just as freely as ever?

A. No, sir; I won't say that. As you go along and your car or tank is running out, of course, naturally— 30

Q. I have not asked you for an explanation. You said No, sir. Is that right? A. All right.

Q. Where did you first notice that your oil was not flowing as freely as usual. A. About where

*Joseph A. McGrath—cross.*

we stopped, we could have thrown our gears out there.

Q. So that it flowed just as freely as usual up to the place where you stopped? A. About that; yes, sir.

Q. Of course, you cannot tell within a yard or so, but about that? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

10 Q. And the amount of oil that you put on the road up to that place, up to that place where you stopped, where your gauge indicated and where you saw it was not flowing freely any longer? A. Yes, sir; when we did not get our right pressure, then we stopped.

Q. I say, up to that point, there was just as much oil, it flowed freely from that car as it usually is put on roads, is that correct? A. Yes, sir.

Q. There was no difference, so far as you knew? A. No, sir.

20 Q. And did you wait there for the other car to come up to you? A. I would not say for sure. I think we did, because we were strangers in town, both of us, and we were putting up our cars at the same place, and we did not know the exact way home.

Q. Have you been up to this same place since? A. I have oiled in Paterson this summer.

Q. Have you oiled there this summer? A. Yes, sir; I have.

30 Q. At the time that you oiled there, did you know that this accident had taken place? A. Yes, sir; I did.

Q. How do you know it is Ninth avenue where you stopped? A. How do I know?

Q. Yes? A. Because I have visited the place. I have oiled that street, I have oiled around there.

*Joseph A. McGrath—cross.*

I have oiled Tenth avenue and have oiled all around there since.

Q. You have looked at it since, having this accident in mind? A. Yes, sir.

Q. How far does this oil spread from the machine upon which you were? A. Six feet.

Q. And do you know much of the road you oiled there? A. Do I know now?

Q. Yes, sir? A. It was to be nine feet.

Q. Are you sure of that? A. That is on each side of the car track.

Q. It was to be eighteen feet altogether? A. Yes, sir.

Q. Which nine feet did you oil? A. I oiled six feet of each, on each side of the car track.

Q. That afternoon, that first afternoon? A. No, sir; I laid one six foot strip that afternoon.

Q. On which side? A. On the right hand side going north on East Eighteenth street.

Q. That would be the westerly side, is that right? A. The right hand side going north toward River street.

Q. Then the next day you started up at that place again? A. Yes, sir.

Q. And did you start from Broadway that day? A. I would not say for sure about that.

Q. You remember, however, oiling? A. Finishing it up; yes, sir.

Q. Finishing up down to what point? A. The next day the street was finished, with the exception of the part that had been partly done the day before.

Q. Did you start in from Broadway and come down to Ninth street and finish that space first? A. No, sir; we never came that way.

Q. You don't remember specifically how you did, that is, the particular street? A. Not over

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*Joseph A. McGrath—cross.*

there, no I would not state for sure.

Q. Do you remember seeing that the three foot strip was done there that day, that first day? A. Yes, sir.

Q. And by the other car? A. Yes, sir.

Q. Could you see whether or not the usual amount of oil had been allowed to come out by the other car? A. Not from my car; no, sir; I could not.

10 Q. You could not observe that? A. No, sir; I had all I could do to look after my own.

Q. After you were through, didn't you go back over the road that you had travelled down from Broadway? A. I would not say for sure that we did.

Q. Where did you put up your car that night? A. At the Standard Oil Company plant at Paterson.

30 Q. You know you did go back to the plant? A. As I stated before, I was a stranger in town and I don't know which way we went.

Q. You are not a stranger now? A. No, sir.

Q. Didn't you go back on East Eighteenth street and come to the Standard plant down here on Railroad avenue? A. No, sir; I could not state I did go back on East Eighteenth street.

30 Q. The next morning, when you started out, did you observe whether or not the oil had been laid on the remaining three feet on the right side to cover up that three feet of oil there that the contract called for, or not? A. The company put it there.

Q. Yes? Did the company put it there? Whether it was put there? A. Whether it was called for or not?

*Joseph A. McGrath—cross.*

Q. You say that the contract called for this nine feet? A. Nine feet on each side of the track, yes, sir.

Q. Now, I ask you, did the company put that three feet of oil there? A. Yes, sir; we put it there, with the road oiler.

Q. You are sure of that? A. Yes, sir.

Q. You saw it there? A. Yes, sir.

Q. And you saw it there in the morning of the next day, didn't you? A. Yes, sir.

Q. The morning of the second day? A. Yes, sir. 10

Q. And, then, when you saw it there, was it the same amount of oil as usual? A. The next day?

Q. Yes? A. The roads was not in perfect condition the next day, and that was the reason—

Q. I am not asking that. I want you to answer my question. A. You ask me if the road is in as good a condition as the other roads would be.

Q. You have not listened to my question. Now just listen. You said that the six feet of oil you had done was the same amount of oil as usual? A. Yes, sir. 20

Q. You say the next morning you saw that the other three feet had been done? A. Yes, sir.

Q. And also you remember the other side was done, the whole street? A. Not the same morning I didn't remember.

Q. You say some time that day, it was done the other side was done? A. Yes, sir; it was finished the next day. 30

Q. Were both sides done evenly? For instance, was the east side done as well as the left side? A. Yes, sir; with the exception of the first spot we did the day before.

Q. The first spot? A. Yes, sir; which we had to go over.

*Joseph A. McGrath—cross.*

Q. That was on the right hand side, the westerly side? A. Yes, sir.

Q. Up towards Broadway, is that it? A. Yes, sir.

Q. With the exception of that spot the oil was just the same as usual? A. Yes, sir.

Q. As much of it as is usual on a road? A. Yes, sir.

Q. Then you say the inspector came along? A. The inspector was with us.

10 Q. The Road Supervisor? A. The inspector was with us all the time.

Q. Who was it came up in the afternoon? A. The County Engineer. I said the morning, I think.

Q. That was after you had finished this part though? A. I don't quite catch you.

20 Q. You said in your direct examination, that after you had gotten through with the part towards Broadway, between Ninth avenue and Broadway, that then, the next day you saw the County Engineer and that he directed that you do some of that work over again, is that correct or not? A. I said when we were finishing up East Eighteenth street we met the County Engineer on the top of the hill.

Q. And he told you to do some of this work over? A. He told us we would have to go over the work we done the day before.

30 Q. And then, I believe, you did go over that work you had done before? A. Yes, sir; we did.

Q. So as to make a good job of it you went over that again? A. Yes, sir.

The Court: By going over it again, do you mean re-oiling it?

The Witness: Yes, sir; with a lighter

*Joseph A. McGrath—cross.*

spray. There was a rough road there and it did not take the oil proper and it was unsatisfactory and it had to be re-oiled again to make a good job of it.

Q. So that you went over it and oiled it thoroughly the second time? A. I would not say we oiled it thoroughly, properly.

Q. What you considered properly? A. Yes, sir.

Q. But you did use an extraordinary amount of oil? A. No, sir.

Q. Why not? A. Why so?

Q. Why didn't you go over it the day before with your machine, as you testified here, when it was running just the same as properly as it ever ran? A. Yes, sir.

Q. And you went over it the next day and put more oil on it? A. No, sir; the next day we used the smaller spray.

Q. But you did put more oil on it? A. Yes, sir.

Q. So then you used an extraordinary amount on that road? A. The smaller spray, the smaller quantity to the square yard was put on.

Q. But that was more than ordinary? A. Not to the condition of the road.

Q. I am not talking about the condition of the road. A. Well, I am, that is the way we do our work.

Q. Wasn't that more than you usually put on the road? A. Not with the road in that condition; no, sir.

Q. I thought you said you got instructions as to the amount you were to use per mile? A. We did, but we had to give a satisfactory job.

Q. So that you are the judges of how much oil

*Joseph A. McGrath—cross.*

you shall put on to make a satisfactory job, is that it? A. No, sir.

Q. Did both cars go back the next day to finish up that oiling? A. Yes, sir.

Q. On the part you had done the day before? A. No, sir; one car went back the next day.

Q. Whose car? A. Mr. LeBaugh's car.

Q. Did you go back? A. No, sir.

Q. So you don't know how much oil was put on there? A. I seen the sprays changed, I helped change them, and I know from working on the cars.

Q. Do you know from your actual knowledge from what you saw, how much oil was put on there the second day? A. I see the job after it was finished.

Q. I thought you said you did not go back there? A. Not the same day; no, sir.

Q. When did you see it? A. I rode over it finishing up other streets.

Q. How long after? A. That same week.

Q. Where were you working then? A. In that part of the city.

Q. Where? A. Tenth avenue. Two days afterwards we oiled Tenth avenue.

Q. So that was the first you saw of it, two days afterwards? A. Yes, sir.

Q. From actual observation of how much oil there was on that road or seeing it on, you don't know the quantity of oil that was put on by the other man that morning of the second day? A. I could not swear to the quantity; no, sir. I know it was a good job. It was a perfect job.

Q. Is it not true that this operates on the same plan as a water wagon? A. No, sir.

Q. When I speak of a water wagon, I don't

*Joseph A. McGrath—cross.*

mean the term naturally used, I mean a sprinkler, is that correct? A. No, sir; it is not used on the same principle.

Q. Is it not turned off and on the same way?

A. It is turned off and on; yes, sir.

Q. Is there any external pressure to force that oil out? A. Yes, sir.

Q. What? A. Eighty to a hundred and twenty pounds.

Q. That is in a pump is it not? A. Yes, sir.

Q. That pressure is not increased as the quantity of oil in the tank diminishes? A. No, sir; that is just the way of regulating in applying the road oil. 10

Q. So that there is the same pressure at the start as there is at the finish? A. Yes, sir.

Q. I mean the same pounds of pressure? A. Yes, sir.

Q. But, is it not true, when you get low in your tank—? A. Your pressure goes down.

Q. And the oil is not forced out so rapidly, is it? 20

A. Well, that is regulated by the speed of your car then.

Q. I thought you said when you saw it begin diminishing you stopped your car? A. Well, when it gets out to the low pressure.

Q. Do you remember what pressure you had on on that day when you stopped? A. No, sir; I do not.

Q. What I want to know is this, is it not the fact that as your tank, the quantity of oil in your tank gradually goes down, that the amount of oil that is sprayed or sprinkled on the ground grows less? 30

A. As you go along?

Q. Yes. I mean towards the end? A. Towards the end; yes, sir; but, when you see it getting that

*Joseph A. McGrath—cross.*

way, then is when you are to stop.

Q. Did I understand you to say, there was a canvass over the back of your sprinkler? A. Yes, sir.

Q. What kind of sprinkler have you got there on those trucks? A. Iron nipples.

Q. What do they look like? A. It is just a nipple, it goes out, there is two holes in the nipple.

10 Q. Can you describe to the Court and Jury what specifications those are? A. The nipple is about that big around. (Indicating a space about an inch in diameter as agreed by counsel.)

Q. I don't understand that. A. You have seen a nipple on a gas jet, where they have taken the fixture off the gas jet and they put a nipple on to stop the flow of gas?

20 Q. Yes. A. Well, that is the exact size of the spray, and those sprays have different sizes of holes and from a thirty-second of an inch to well, say, less than a quarter.

Q. What did you have on that day? A. Our sprays go by different numbers.

Q. What did you have on that day? A. Number three spray.

Q. What size was that? A. I should think a little over a thirty-second of an inch hole.

Q. That lets out a mere spray, doesn't it? A. Yes, sir.

30 Q. That does not let out a stream, does it? A. No, sir; it does not.

The Court: Are those nipples all along the pipe?

The Witness: Yes, sir; there is one pipe, they call a manifold, and it sprays through that.

*Joseph A. McGrath—cross.*

The Court: That comes out of the back of the car does it?

The Witness: Yes, sir; that is in the back of the car, that is fastened on.

Q. And these nipples are in the bottom of the pipe? A. They are on this pipe line, on this manifold, this manifold spray pipe, and these nipples come down so, (indicating) about eight inches to a foot to the bottom, the arms about a foot apart, the nipples are the sprays.

Q. Do I understand this manifold, the pipe that you term the manifold, runs right across the rear of the car? A. Yes, sir.

Q. And then coming down from that are arms, about a foot apart? A. Yes, sir; not all a foot, some six to eight inches or nine inches.

Q. And on the end of each one of those arms is a nipple? A. Yes, sir; or a spray.

Q. How many are there across this manifold? A. How many arms?

Q. How many nipples? A. I never counted them.

Q. About? A. Well, take the six feet, I should judge about twelve to fourteen.

Q. And then, as I understand it, the oil is let down on the road from these twelve or fourteen places? A. Yes, sir.

Q. Say, twelve places? A. Yes, sir.

Q. It is sprayed out? A. Yes, sir.

Q. And it is so light you have got to have a canvass there to keep the wind from blowing it away?

A. Yes, sir.

Q. And that is the way to properly oil a road?

A. Yes, sir.

Q. And, if it is not done that way, it is improper, is that right? A. I would not say that; no, sir.

*Joseph A. McGrath—cross.*

Q. You say it comes out as a spray? A. Yes, sir.

Q. It does not run in a stream? A. No, sir, it come out in a spray.

Q. If it came out of there in a stream it would be wrong, wouldn't it? A. I don't say that.

Q. Would it? A. I don't know, I have never seen oil that way.

Q. Haven't you ridden along roads that have been oiled where you have seen a stream of oil, or at least a regular mark in the road, one part of the road, where there has been a regular stream? A. No, sir, I have not; not a stream of oil.

Q. In your experience in this business haven't you seen marks on the road that have indicated to you where there has been a regular stream of oil, that those streams have passed over? A. Well, a stream is not a mark. I have seen marks of oil; yes, sir; but not a stream of oil.

Q. Where it must have come out in more than a spray? A. Not to my knowledge, no; not in our line of business; no, sir.

Q. Not in your company? A. No, sir.

Q. On this day before, or on the day of the accident, if the oil were coming out of that sprinkler like a stream, out of any one of them, that would be wrong wouldn't it? A. Yes, sir.

Q. And improper? A. Yes, sir.

Q. And it would let out too much oil wouldn't it? A. Yes, sir.

Q. And make it dangerous? A. Yes, sir; that is what the helper is there for, to stop it and watch that.

Q. But it can happen, can't it? A. Not the stream; no, sir.

Q. The helper is there for that purpose? A.

*Joseph A. McGrath—cross.*

The helper is there to watch the sprays, the holes in those sprays are so small that the tar or any substance that might get into your tank will get down into the spray and stop up the spray, and if it does, of course, naturally, that will leave a white streak in the road and it will not be covered with oil, and the helper is watching those sprays to see that none of those sprays gets clogged up; if they do the car is stopped immediately and we get off and take that spray off and clean it up and put it back on again.

10

Q. And does not the helper also see to preventing the oil from coming down in a stream as I have described it to you? A. I did not see it coming in a stream. I can't impress upon you that he was there to watch out that those sprays worked properly. There was no way for that oil to come out of those sprays in a stream.

Q. Didn't you a moment ago when I asked you if a stream of oil came out of those sprinklers such as I described, when I asked you if they did that would not be proper and dangerous, and didn't you answer yes to all those questions, and didn't you then add this, that is what the helper is there to prevent? A. I meant to say that he was there to watch the sprays to see that they were working properly. I thought perhaps that was what you were trying to get at.

20

Q. Then do I understand you to mean he is not there to watch these streams coming out? A. There is no way for a stream to come out.

30

Q. You say the nipples are changes to different sizes? A. Yes, sir.

Q. And if they get clogged up the helper goes around and unfastens them? A. He cleans them

Q. He takes them off? A. Yes, sir.

*Edward R. Lebaugh—direct.*

Q. And cleans them? A. Yes, sir.

Q. Then it is possible for them to come off, is it not? A. They will come off; yes, sir.

Q. And if they come off a stream of oil will come out, won't it? A. Yes, sir.

*By Mr. Garven.*

Q. You did not oil between the tracks, did you?  
A. No, sir.

10

EDWARD R. LEBAUGH, sworn as a witness on behalf of the defendant, the Standard Oil Company, testifies as follows:

*Direct Examination by Mr. Garven.*

Q. Where did you work in August, 1913? A. In Middlesex County, Mercer, Hunterdon, this county, about six months.

20 Q. Did you work for the Standard Oil Company in August, 1913? A. Yes, sir.

Q. And you are still employed with the Standard Oil Company, aren't you? A. Yes, sir.

Q. Were you driving one of the tank wagons sprinkling Eighteenth street? A. Yes, sir.

Q. Can you recall the dates or the day? A. I cannot.

30 Q. It was in August, was it? Some time in the middle of August? A. Some time in the middle of August, somewhere around there.

Q. Who was with you? A. James Foley.

Q. He was your helper? A. He was my helper, I was the operator.

Q. Did you see the other gentleman, Mr. McGrath? A. Yes, sir.

*Edward R. Lebaugh—direct.*

Q. Was he working there too, on that job? A. Yes, sir.

Q. What was he doing? A. Oiling.

Q. On a tank wagon? A. Yes, sir.

Q. Do you know Mr. McDonald? A. Yes, sir.

Q. Do you know what position he held at that time? A. He was inspector, as to what streets, as to what streets we should oil and how we should put it on.

Q. Was he the inspector on that Eighteenth street job? A. Yes, sir.

10

Q. Was he with you at that time? A. Yes, sir.

Q. During the whole time you were sprinkling the street? A. Yes, sir.

Q. Whereabouts was he? A. He was sitting on my truck, between me and my helper.

Q. Did you receive instructions from him? A. Yes, sir.

Q. In reference to sprinkling? A. Yes, sir.

Q. Did you carry out those instructions? A. I did.

20

Q. At what point did you start sprinkling that street. A. We started in at Broadway and Eighteenth street the first day, the first afternoon.

Q. What did you do? A. We oiled around six-tenths of a mile down on the right hand side, about down to Tenth or Ninth avenue, somewhere along in there near the second switch.

Q. Were you the leading truck? A. No, sir; I followed up with the three-foot spray, next to the rail.

30

Q. Just tell the court and jury how you did that work and what you did? A. Well, the other truck with Mr. McGrath, that he was operating, he was on, went down near the curb, he took the six-foot spray, the six-foot strip, and I followed

*Edward R. Lebaugh—direct.*

up with the three-foot, filling that side of the street, completing that side that day, that afternoon.

Q. Completing what side? A. The right hand side going north.

Q. How far? A. About six-tenths of a mile going north. Around Ninth avenue.

Q. Was that completing that side of that street? A. That far that day; yes, sir.

10 Q. That did? A. That side; yes, sir.

Q. The next day what did you do?

The Court: Do I understand he did all that that day?

Mr. Garven: Yes, he followed the other.

Q. What did you do the next day? A. The next day I finished up on the right hand side to River street, up to the top of the hill and the left hand side, completing the whole street.

20 Q. How much did you oil between the curbing and the car track, how much space? A. Around nine to ten feet, we thought.

Q. Did you see Mr. Ferguson while you were working on that job? A. Yes, sir.

Q. Who was Mr. Ferguson? A. The County Engineer.

Q. Did you get any instructions from him in reference to that work? A. Yes, sir.

30 Q. What? A. He said I had not properly oiled it, that I had not put quite enough oil on the places there and I would have to touch it up.

Q. Where were those places? A. Well, from about Eleventh avenue to Tenth, Eleventh avenue and up to Ninth, around in that section.

Q. What points did he tell you to touch up?

*Edward R. Lebaugh—direct.*

A. From about Ninth to the railroad in there, below Eleventh avenue, somewhere in there.

Q. What do you mean by touching up? A. I had to put an extra covering of oil on, he said I did not have enough on.

Q. You got those instructions from Mr. Ferguson? A. Yes, sir.

Q. What was the condition of the road along in there, Eleventh avenue and Tenth avenue? A. It was very dusty.

Q. How did the oil take on the outside of the rails? A. Well, it penetrated and went out of sight, it did not thoroughly lay the dust, we did not have enough on it. 10

Q. And the next day did you complete that? A. I did.

Q. Did you oil between the tracks? A. No, sir.

Q. Was there any oil between the tracks? A. No, sir.

Q. What kind of a vehicle did you have, a horse driven or a motor? A. I had a motor. 20

Q. What did the other fellow have? A. A motor.

Q. On the back part of that motor of yours, just describe it, will you? A. Well, on the back part there is a revolving spray goes across the back end and it is curtained in, the reason the curtains are there is to prevent the oil from flying or splashing on people, it comes out lively and we put it on with force.

Q. How low are those sprays? A. About a foot off the ground. 30

Q. And this curtain, how wide was it, or the depth of it? A. About four feet.

Q. That extended down to how near the surface? A. About six inches.

*Edward R. Lebaugh; recalled—direct.*

Q. Six inches from the surface? A. Yes, sir; four to six inches.

Q. Did you have any trouble in spreading the oil on that street at any time with that machine of yours? A. No, sir.

Q. Did you notice any trouble with the other machine? A. No, sir; I did not.

Q. How many miles of roadway had you oiled up to that time, that you can recall? A. I should judge I oiled a couple hundred miles.

10 Q. And you thoroughly understood that kind of work? A. I did.

Q. You oiled that street in the same manner you had oiled other streets? A. Yes, sir.

The court then adjourned to tomorrow, November thirtieth, 1914, at 10:00 o'clock A. M.

Third day. Paterson, N. J., November 30, 1914.

The trial was resumed this day pursuant to adjournment.

20

EDWARD R. LEBAUGH resumes the stand.

*Direct Examination (continued) by Mr. Garven.*

Q. On East Eighteenth street at that time were there any cross walks? A. No, sir.

30 Q. I understood you to say that the engineer, Mr. Ferguson, met you the second day and said something to you about re-oiling spots, can you tell us again just what he said? A. He met me and he told me that I had to put the right amount of oil on there.

Q. What is that? A. He met me the second day, before I had finished up and he told me that I did not have enough oil on the street and that

*Edward R. Lebaugh; recalled—direct.*

I would have to go back and touch up some spots where it was dusty.

Q. And "touching up" was re-sprinkling more oil on the spots? A. Yes, sir; I would have to go back for applying a little oil on those spots, the places where they needed the oil, where it was dusty, I would have to go back there and put on a little more oil.

Q. Can you recall what particular places they were in East Eighteenth street that you had to touch up? A. Well, from about Ninth avenue up to around Eleventh. 10

Q. Here and there, or along the entire place? A. Here and there.

Q. Did you receive any instructions from Mr. McDonald or Mr. Ferguson about putting up any barriers or lights or obstructions of any kind along in there? A. No, sir.

Q. When you received instructions from Mr. Ferguson to retouch here and there, did you do that? A. I did. 20

Q. And then you left the job and went elsewhere? A. Yes, sir.

Mr. Garven: Probably it might be well to mention to the court at this point that I ordered one of the trucks that was used that day to be here and I find that the trucks have been dismantled, but we have in front of the court house here one of the same pattern, identical in every particular and I thought that I would ask the court to permit a view if I can establish the fact that that is a similar machine. 30

The Court: Is there any objection?

Mr Ward: I do not for one moment

*Edward R. Lebaugh; recalled—direct.*

doubt Mr. Garven's good faith, but it seems to me that where this very truck has been dismantled they should not be permitted to have a view of another truck. Not only that, but we cannot tell, there is no way in which we can assume that it is in the same condition it was at that time. It puts us in a position where we are more or less helpless.

10 The Court: What help do you think it would give to the jury?

Mr. Garven: It is not so much the mechanism or the levers or the sprays that I have in mind as it is the fact that the back part of it was boxed off, and we can prove that the other car was boxed in identically as this car is now. That is the main purpose of showing the rear end of that truck.

20 The Court: I think you had better describe it under the circumstances. I think your witnesses have sufficiently described it.

Mr. Garven: I think so, but I think it would be much better if the court and the jury could have an actual view of a similar truck.

The Court: No, I don't think I will permit a view; there is a certain element of uncertainty about it.

30 Mr. Garven: I am sorry about that. I wanted the same truck to be here but it is being repaired and dismantled.

Q. The rear part of the truck that you used; I wish you would describe that to the court and the jury as near as you can? A. Well, the oil is

*Edward R. Lebaugh; recalled—direct.*

pumped from the front end of the car back to the manifold, the sprays, and then go down to within about six inches of the ground, the sprays do, and then there is about eighteen inches of curtain all the way around that prevents the oil from flying or spluttering on anyone that would be passing by or we would be passing them, and the curtain covers within two or three inches of the ground and it is impossible to see the oil coming.

Q. Does what? A. It is impossible for anyone to see the oil coming out or any way. 10

Q. How about on the side? A. On the side?

Q. Yes. A. On each side of the curtain there is a curtain, on the ends and all and in back and on the front. It is built, I should judge, two feet and a half wide and about seven feet across.

Q. The sprays that you speak of, just explain that to the court and jury, how they were adjusted? A. Well, that comes down in a manner like that (indicating) down, and then there is a cover comes up here and a lever here to the helper and he control that, and that closes the valves and turns them off, and as we get ready to start along and as we complete or our tank runs out he closes it or starts it. 20

Q. I am speaking of the sprays, just describe how they are located on the car, how they are fastened on the car? A. Well, they are fastened from the rear end, they are fastened on there with an elbow and then turn through and go down and then meets into a manifold that goes across. 30

Q. This manifold, what is it, metal or wood or what? A. It is a brass manifold and has twelve sprays running down from it.

Q. When you say "manifold" do you mean a

*Edward R. Lebaugh; recalled—direct.*

pipe? A. A pipe, a regular pipe, a manifold, running across.

Q. How long is that manifold or pipe? A. The manifold is six feet wide, and there is twelve tubes on it, twelve sprays doing down.

10 Q. How far apart on the manifold do those sprays extend? A. About eight inches apart on the manifold, and the manifold is about two feet or a foot and a half from the ground and that throws the sprays about six inches from the ground.

Q. How many sprays are there along that manifold? A. There is twelve sprays along that .

Q. Can you describe the rear part of the other car used by Mr. McGrath? A. The other car is built in the same way with mine, it was exactly the same.

20 Q. And did I understand that you were driving behind that other car? A. I was following him up; yes, sir.

Q. Could you see how the oil was let out by that other truck? A. No, sir; I could see that he was putting the proper amount on and his truck was running the same as mine, the same as usual, in good working order.

Q. Could you say whether or not you were using more oil on that road than you were on other roads in Passaic County at that time?

30 Mr. Ward: Objected to.

The Court: I think you used that comparison, Mr. Ward.

Mr. Ward: I might, of course, have used it improperly.

The Court: I think in fairness if you used it improperly that it ought to be admitted.

*Edward R. Lebaugh—cross.*

Mr. Ward: I think I did use that comparison. I think myself I was in error in doing it.

A. No, sir; I did not put any more oil on there than I put any place else.

Q. Did you oil between the tracks? A. No, sir.

Q. Were there tracks running on part of East Eighteenth street where you oiled? A. Yes, sir.

Q. And you did not oil between those tracks? A. No, sir.

Q. What was the width of the street on each side of the tracks along near Eleventh avenue and Tenth avenue? A. Well, from nine to ten feet from rail to gutter. 10

Q. How wide a street would that be, or don't you know? A. I don't know the exact width.

*Cross Examination by Mr. Ward.*

Q. How much of that road was oiled altogether? A. The road was oiled, the natural street the full width was oiled, with the exception of the tracks. 20

Q. How many feet would that be in width? A. Well, we allowed from nineteen to twenty feet of the street where the tracks were.

Q. According to where the tracks were? A. Yes, sir.

Q. Do you mean to say the track was in or out? A. Out.

Q. How much of that road, in width, was actually oiled by your company or you people on that day? A. On that day? 30

Q. On that day, I withdraw, to complete the oiling of the road? A. Well, I should judge around eighteen or nineteen feet, where the

*Edward R. Lebaugh—cross.*

tracks was and from—weil, about twenty-four on the place where the tracks were not.

Q. You say you were the driver of this car?  
A. Yes, sir.

Q. And the helper was the person who manipulated the lever? A. Opposite me.

Q. Near the street? A. Yes, sir; beside me there.

Q. And your duty was to drive the car and his duty was to attend to the oiling of the road, is that correct? A. He was to open the valves so that the oil would start.

Q. And, of course, your attention was directed to the driving of the car? A. And also my gauge putting on the oil, the pump.

Q. Wasn't that your helper's duty? A. No, sir.

Q. Did you hear Mr. McGrath testify last Wednesday? A. I did.

Q. In view of his testimony do you still say that it was your duty to keep track of that gauge?

20 A. To keep track of the gauge, yes, sir; the pressure.

Q. You had gone over how much of that road the first afternoon? A. Leading from Broadway on to Ninth avenue we oiled on the right hand side.

Q. Did your oil give out too then? A. Yes, sir.

Q. So that both oil wagons gave out about the same time? A. Yes, sir.

Q. This wagon of which you speak, do you say  
30 that had a manifold and on that manifold there are twelve sprays? A. Yes, sir.

Q. You described those sprays last Wednesday as revolving sprays, now what did you mean by that? A. Revolving sprays?

Q. Yes. A. Well, there is three different sizes

*Edward R. Lebaugh—cross.*

and they revolve over, there is a quarter inch, half inch and about inch, I should judge.

Q. How do you mean they revolve over? A. You turn them over, and if you want to use a smaller spray you turn it over, and if you want to use a larger spray you can use it.

The Court: The spray itself does not revolve?

The Witness: No, sir; it is the manifold; the sprays are attached to the manifold and the manifold revolves. 10

Q. Does the manifold revolve? A. Yes, sir.

The Court: That is the method used in order to change the size of the spray?

The Witness: Yes, sir.

Q. While you are sprinkling? A. Not while we are sprinkling, no, sir; we have to stop the car and change if we want to change the size of the sprays. 20

Q. These three sprays you describe are something like a pinwheel? A. No, sir.

Q. Do you mean, for instance, there is one down here and one up here and they form a triangle? A. No, sir; there is a manifold that runs across the back end and a set of sprays hangs back this way, and on that side a pair of sprays comes back this way, and if you want to use the smaller sprays we onto a lever and turn a whole set around. 30

Q. Do you remember what size spray you were using that day? A. We had the largest spray on, I believe.

*Edward R. Lebaugh—cross.*

Q. Those sprays sometimes become clogged, don't they? A. Yes, sir.

Q. And it is possible to take them off, to unscrew them and put on new nipples? A. Yes, sir; or clean them.

Q. They just screw off, don't they? A. Yes, sir; they just screw off.

Q. And there is simply a thread there and a screw, and that can be screwed on and off? A. Yes, sir.

10 Q. How much oil do those large sprays put on a square yard of road? A. I could not say.

Q. How fast were you going that day with your car? A. Three to four miles an hour.

Q. And with a rough road, you go, of course, and necessarily, more slowly than you do over a smooth road? A. No, sir; we run all the same.

Q. From three to four miles an hour? A. From three to four miles an hour while we are applying the oil.

20 Q. And the oil comes out at the same ratio or at least passes through the spray the same no matter whether you are going fast or slow? A. No, sir.

Q. What? A. No, sir. If you stop, the oil stops; if you speed up the oil comes a little faster, and if you slow down the oil comes slower.

Q. Does not your lever control the supply of oil that is used? A. No, sir; none whatever.

30 Q. Was not your car like MrCarthy's car? A. Yes, sir; the lever opens up the valves for the oil to pass through the sprays and the speed of the car takes the oil out of the tank and pushes it back through the sprays.

Q. Pushes it back through the sprays? A. Yes, sir; a centrifugal pump, and the gauge is there

*Edward R. Lebaugh—cross.*

to show the pressure the oil is going out and we have to drive according to orders, we have to drive. There it was from three to four miles an hour, applying the oil in a proper way.

Q. If those nozzles were off, there would be nothing to prevent the oil from flowing out, would there? A. The pressure would go right down off your pump; yes, sir, and stop.

Q. I beg your pardon? A. The pressure would go right down off the pump and show if there was something wrong and we would get right off and change them.

Q. Now, suppose you answer my question. If the nozzle were off, it would flow right through this pump, wouldn't it? A. No, sir. 10

Q. Why not? A. It would stop.

Q. Do you mean your automobile would stop? A. No, sir; the pressure, the oil would stop.

The Court: It would flow until the pressure was exhausted, wouldn't it?

The Witness: Yes, sir.

Q. Will you answer my question? A. I did. 20

Q. You said yes, sir? A. Yes, sir.

Q. You heard McGrath testify here last Wednesday, didn't you? A. I did.

Q. With whom have you talked since then about this case? A. I have not talked with anyone.

Q. You have not talked with anyone at all? A. No, sir.

Q. About the pressure of the oil or anything of that kind? A. I have not.

Q. How long have you been a driver? A. I 30  
drove for the Standard about six months.

*Edward R. Lebaugh—cross.*

Q. Do you mean at that time or at this time?  
A. At that time.

Q. And have you been driving since? A. Not for the Standard; no, sir.

Q. Have you been driving for anyone since then? A. I have been driving for the general manager of the Standard Oil.

Q. Not an oil wagon? A. No, sir.

Q. So that you had six months' experience on an oil wagon, did you? A. Yes, sir.

10 Q. And you have not talked with anyone, you say, about the oil pressure and character of this car, etc., since last Wednesday? A. No, sir.

Q. None at all? A. No, sir.

Q. You say that this road was oiled just about the same as the ordinary road? A. Yes, sir; I do.

Q. And these sprays spread the oil or spray the oil finely over the surface of the road? A. No, sir.

20 Q. They do not leave any pools, do they? A. They do not; no, sir.

Q. They would have to be out of order to do that, wouldn't they? A. They would; yes, sir.

Q. And if you saw a road that was oiled with one of these machines such as this company has, where there were pools of oil, you would know that the machine must have been out of order, would you not? A. It is impossible for it to lay it in pools.

30 Q. You would know that there must have been something wrong with the machine, wouldn't you? A. Certainly.

Q. And you would know that the road had not been properly oiled, wouldn't you? A. Yes, sir.

Q. So that if you went over a road where there were pools of oil in hollows and where the oil was

*Edward R. Lebaugh—cross.*

so thick as to track over a floor and all that, you would know that that road was improperly oiled, wouldn't you? A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. Now, let us see; you say that on the first day you just went down on the right hand side, and had a three-foot space? A. I did.

Q. And the part of the road that you had oiled up to that time was properly oiled, wasn't it? A. It was.

Q. Then the next day, whereabouts did you oil? A. From Ninth avenue on towards River street and came back and started in on Broadway and oiled the left hand side and finished it up. 10

Q. Then you oiled on the left hand side as well? A. Yes, sir.

Q. And when you got down on the left hand side, as I understand you, down by the hill, you met the engineer? A. I met Mr. Ferguson.

Q. How far ahead of you was the other car on which Mr. McGrath was? A. A few blocks. 20

Q. A few blocks ahead? A. Yes, sir.

Q. And did that car go right on down to River street? A. No, sir; he stopped to wait for me. We met.

Q. Met where? A. We met them at the top of the hill after they had spoken to Mr. Ferguson.

Q. What do you mean? Mr. Ferguson stopped you and then you went on to Mr. McGrath? A. Yes, sir.

Q. Where did Ferguson stop you? A. On the top of the hill. 30

Q. And the other car was two or three blocks ahead of you at that time? A. It was a little ways ahead.

*Edward R. Lebaugh—cross.*

Q. Was Mr. McGrath sitting there when Ferguson spoke to you? A. No, sir.

Q. You are sure of that, are you? A. Yes, sir; I am.

Q. Mr. McGrath was not where he could hear what Mr. Ferguson said to you? A. No, sir.

Q. Then you went back, did you? A. I did.

Q. Did McGrath go back too? A. No, sir. He went to the car after oil.

10 Q. And you went over this space, you say? A. I did.

Q. There was nothing to prevent the oil from flowing freely the day before, or in the ordinary way, was there? A. No, sir.

Q. So that in places on this road, that road got a double dose of oil didn't it? Yes or no? A. No, sir.

Q. It did not? A. No, sir.

20 Q. Yet some places had been gone over before by you or by Mr. McGrath were gone over for the second time by you, is that right or not? A. Yes, sir.

Q. The same spray? A. Yes, sir.

Q. Are you sure of that? A. I am.

Q. The same size of spray? A. Yes, sir.

Q. Did you hear Mr. McGrath testify Wednesday that it was a smaller spray? A. No, sir; I did not.

Q. You did not hear that? A. No, sir.

30 Q. This curtain about which you are talking is nothing but a canvass curtain, is it? A. That is all.

Q. And if you want to fix those sprays you have to lift the curtain up? A. We open the doors.

Q. How do you mean open the doors? A.

*Edward Lebaugh—re-direct.*

There is galvanized iron all around and the curtain is fastened on the bottom of that and when we want to work on our sprays we open the doors, they open back.

The Court: The curtain is divided?

The Witness: Yes, sir.

Q. You pull them aside like a curtain? A. No, sir; they open the same as a door, two doors and the curtain is on the bottom of them. 10

Q. When was that spray attached after you got to East Eighteenth street that second day? A. At the switch on the other side of Broadway when I loaded up.

Q. That is the helper's duty, is it not? A. Mine also.

Q. Yours also? A. Yes, sir.

Q. You have about as many duties, or about the some duties as the helper, haven't you? A. Practically; yes, sir. 20

Q. So that you do not divide your work; the only thing that you do that he does not do is to run the car, is that right? A. That is right.

Q. But everything that he does you do? A. I do, with the exception of turning on the oil and turning it off, with the lever.

*ReDirect Examination by Mr. Garven.*

Q. You had charge of that car, didn't you? A. I did. 30

Q. Foley was your helper? A. Yes, sir.

Q. Do you know where Foley is? A. No, sir; I do not.

Q. I understood you to say that in order to

*Edward Lebaugh—re-direct.*

track oil it has got to be put on improperly, is that so? A. No, sir; not to track oil.

Q. It does not make any difference whether it is put on thinly over the road or whether it is very thick on the road, it will track, won't it, if it is fresh? A. Yes, sir; it will track up just the same.

Q. What did you mean when you said that the oil would not track unless it was improperly laid on the road? A. I did not answer that question. He said pools .

Q. You understood him to say pools? A. Yes, sir.

The Court: That is what he did say, I think.

Q. I understood you to say to counsel that where you saw pools in the road here and there it indicated that it had been put on improperly, did you understand his question at that time? A. No, sir; not that, he said that the sprays **must** have been working or something wrong with that that it would pool.

Q. Is that the fact, or is it due to the fact that the car was not operating at the same rate of speed a which you were running at the time you oiled this—?

Mr. Ward: I object to counsel leading. Objection sustained.

Q. What I want to find out is this, I understood you to say that this road was improperly oiled because there were pools on the road. Has the speed got anything to do with the laving of the

*Edward Lebaugh—re-direct.*

oil on the roads? Yes or no, do you know? A. Yes, sir; it has.

Q. If your car had been going two miles an hour instead of four, would it have laid a greater quantity of oil or less? A. It would have laid less oil.

Q. It would have laid less going two miles an hour? A. Yes, sir.

Q. If it had been going eight miles an hour would it have laid more or less oil than it did going at four miles an hour? A. I beg your pardon, it would lay more more oil if it was going slower than faster. 10

Q. And if it had been going two miles an hour? A. It would have been laying less oil.

Q. Just half as much, is it not? A. Yes, sir.

Mr. Ward: I object.

Q. Well, how much, have you any idea? A. If you were driving slow you would be putting on more oil than if you were driving at the proper speed. 20

Q. So that if there were pools of oil along the road, would that indicate to you that the car which had been spreading it had been going four miles an hour or less than four miles an hour? A. It is impossible to lay pools of oil. It oils the same at one place as it does in another, it oils the same amount from one spray as the other, it runs all the way across. 30

Q. When counsel spoke to you about pools of oil on the road, did you understand his question when he asked you if the machine laying that oil was in proper condition or not? A. No, sir; I did not.

*Garwood Ferguson—direct.*

Q. Might it not, instead of being improperly oiled, by the machine being out of order, might it not have been that the machine was going at a very low rate of speed?

Mr. Ward: Objected to as leading.  
Objection sustained.

10 Q. Can you tell us from your experience whether it is necessary that the machine be out of order in order that pools of oil shall gather, or that it might also be a question of speed? Can you tell us? A. Well, I never had any trouble with my car. I never had any experience in that way. I never had it to lay pools of oil.

Q. You answered a question of counsel on the other side, when you said, in answer to his question, that the machine must have been out of order if there was pools? A. There would have to be a break in the pipe or something if there was a pool; yes, sir.

20 Q. Might it not have been also because the machine was going at a very low rate of speed for those pools to gather? A. No, sir; I do not see that that would have anything to do with it.

Q. You don't know whether it would have anything to do with it or not? A. No, sir; it would not have anything to do with it.

30 GARWOOD FERGUSON, sworn as a witness on behalf of the Defendant, the Standard Oil Company, testifies as follows:

*Direct Examination by Mr. Garven.*

Q. You hold a County position? A. Yes, sir.

*Garwood Ferguson—direct.*

Q. What position? A. I am County Engineer.

Q. And you have held that position for many years? A. About six years.

Q. In August, 1913 you were County Engineer?

A. I was, sir.

Q. As County Engineer was it part of your duty to take charge of the spreading of oil along the different roads in the County? A. Yes, sir.

Q. Do you recall the oiling of East Eighteenth street in the City of Paterson? A. I do.

Q. Can you tell us about when that was oiled? 10

A. Some time near the middle of August, a little later.

Q. Of 1913? A. Something like that, yes; I could not give you the exact date.

Q. At that time you were sprinkling other roads of the County? A. Yes, sir.

Q. Have you had any experience in the laying of oil along roads? A. Yes, sir; we have been oiling for about four years in the County.

Q. Have you any idea about how many miles of roads had been sprinkled during your time? A. Well, for those three years we had been laying about fifty to sixty miles of road a year.

Q. You have had direct supervision and charge of the work of that character? A. Yes, sir.

Q. Do you remember the spreading of oil over East Eighteenth street? A. I do.

Q. I wish you would tell the jury just what you observed in the spreading of oil along that street?

A. Well, I came along that road in the machine 50  
about somewhere between nine and ten o'clock in the morning and from Governor street up to Ninth avenue, that is where the car tracks comes in on the street, the street was in rather poor condition and there was a lot of loose material on it, and I

*Garwood Ferguson—direct.*

noticed several places where the oil was not put on sufficient and also the street was not swept, so I went immediately up there and told the inspector and one of the oil men who was there, I don't know who it was now, I told him to up and touch those spots up, and fix the road in good shape.

Q. This inspector, was he there representing the County? A. Yes, sir.

Q. Who was the inspector? A. Mr. McDonald.

10 Q. Mr. Edward McDonald? A. Mr. Edward McDonald.

Q. And at that time had the entire street been completed? A. It had not been, not when I was up there in the morning about nine o'clock; no, sir.

Q. What part of it had been completed if you can recall that? A. The right hand side.

Q. The right hand side going north? A. Yes, sir; towards Riverside.

Q. Had the left hand side been touched at all? A. They were working on it then.

20 Q. What was your complaint about? A. There were spots there that looked like as if they had not had sufficient oil on, and the street was dirty and had not been swept sufficiently and these loose spots, I suppose when it went over that the machine let the oil out but they absorbed the oil and it made a sort of a mottled appearance.

Q. After the work was finished, did you observe the street? A. I was there about three or four days after it was finished; yes, sir.

30 Q. Can you tell us the condition of the street after the work was finished? A. Well, it was satisfactory to myself and if it was not satisfactory I would have so reported.

Mr. Ward: I object to the last part of the

*Garwood Ferguson—direct.*

answer and move that it be stricken out.

Motion granted.

Q. You did not have any complaints about the condition of the spreading of the oil on the road, from the inspector? A. Not after I told him to fix it up.

Q. Do you of your own knowledge know that it was fixed up or not? A. Yes, sir; my men measured the street after the oiling and they reported in—

10

Mr. Ward: I object.

Q. This inspector, Mr. McDonald, was representing you and the Board of Freeholders, was he? A. He was; yes, sir.

Q. And you did not receive any complaints from him about the spreading of the oil? A. I did not; no, sir; only what I told him about this.

Q. The road along up there, Tenth and Eleventh avenues, was pretty well dug up wasn't it? A. The surface was rather loose, there was a lot of dirt and outs there where they had put sewers in in previous years and it had been patched up, but the road was in rather uneven condition and dirty condition.

20

Q. There were a number of ruts up in there through that section? A. Well, I would not say ruts, but a lot of loose spots, loose material.

Q. I notice in the specifications it calls for this oil to be flowed on by means of power oil sprinklers satisfactory to the county engineer or supervisor; did you have occasion to inspect those oil sprinklers? A. Yes, sir; I have seen them work several times.

30

*Garwood Ferguson—direct.*

Q. You have seen them several times? A. Yes, sir.

Q. And were both of those oil sprinklers suitable and satisfactory to you? A. Yes, sir.

Q. And were they in good working order?

Mr. Ward: Objected to.

A. I could not say at the time. I was not there at the time when this was applied.

10 Q. You had seen these machines before that, that was used to sprinkle East Eighteenth street had you not? A. Yes, sir.

Q. And you saw them after they had sprinkled East Eighteenth street didn't you? A. Yes, sir.

Q. While they were working on any of your roads under this contract, was there any complaint made about the manner or method of laying the oil?

20 Mr. Ward: Objected to.  
Objection sustained.

The Court: He may tell us what his own observation was, but not what somebody told him.

Q. Did you observe anything out of the way?  
A. I never saw the sprinklers out of order.

30 The Court: Did you see them working at all?

The Witness: I have, several times.

Q. From your experience, can you tell us whether or not the quantity of foil that was being spread on per yard was according to your contract and specifications?

*Garwood Ferguson—direct.*

Mr. Ward: Objected to, unless he had knowledge of the amount being spread on.

The Court: Yes. Do you know of your own knowledge?

The Witness: Well, the specifications provide for a quantity sufficient, satisfactory to myself, and in some cases the maximum amount not more than a quarter gallon to the yard. Now, as much less as that as could do the work satisfactory is acceptable, and on Eighteenth street after it was finished I believe it was accepted satisfactory. 10

Q. It was satisfactory? A. Yes, sir; after they completed the job.

Q. Can you say it was less than a quarter gallon per square yard? A. I could not say positively, because I have no knowledge of it; no, sir.

Q. You had charge of the work, didn't you? A. Yes, sir. 20

The Court: I suppose you looked at it generally and found it satisfactory?

The Witness: Yes, sir; that is the maximum amount fixed as a rule they were bound to put that much on it.

Q. Can you say as to whether on Eighteenth street they ever exceeded the maximum or not? A. I cannot say positive on that. 30

Q. I mean, do you know, do you know that to be so or not that they did? A. Well, generally, whether the job was satisfactory or not, we often made tests of the force of a tank of oil working in the road at a certain speed and we find that a

*Garwood Ferguson—direct.*

tank of oil will go a six foot coat a little over a mile and sometimes 1.1 mile, and that was a satisfactory job and it was less than a quarter gallon a square yard. I think ordinarily the Standard was lower than that calculation, and I have positive proof of that because I have often watched them putting on one-sixth of a gallon per yard.

10 Q. Did you see any difference in the spreading of the oil on Eighteenth street from what it was on any other place that you observed and had charge of? A. Except in these conditions I observed.

Q. Where there was not enough oil? A. Yes, the upper part of the road was all in pretty good shape, the road was in better shape there than down below, but the road was in better shape there to take it.

20 Q. These tests that you observed that showed you this quantity, they showed you clearly did they than there was less than a quarter gallon per square yard?

Mr. Ward: Objected to. He did not make any tests.

Mr. Garven: He said he did make tests and knew exactly what the spread would be from those tanks.

Mr. Ward: You are referring to this very job?

30 Mr. Garven: No, I am referring to the tests that were made by him with those tanks and for means to determine the amount spread per square yard.

The Court: Taking your experience all together, can you tell, do you know, wheth-

*Garwood Ferguson—direct.*

er there was more than the maximum amount used on this job or not?

The Witness: I know there was always less than the maximum amount specified.

Q. And in this instance there was less?

Mr. Ward: Objected to.

Q. Was there in this instance less? A. Apparently; yes, sir.

10

Q. So much so that you ordered a re-spread, is that so?

Mr. Ward: Objected to.

Q. Did you order a re-spreading? A. I did.

Q. Why? A. Because there was not sufficient oil in those spots.

Q. Did you give any instructions to either of the drivers of the machines to put up barriers or lights or any instructions of any character? A. I did not.

20

The Court: Did you give them any instructions not to put any up?

The Witness: No. The specifications provide, that specification provides that one side of the road shall be laid at a time, that is to allow the other side to be open for traffic. It was not necessary but it was generally understood as that.

30

The Court: Was that done, one side left open for traffic?

The Witness: Yes, sir; so that one side might be laid in the morning and they might work on the other side in the after-

*Garwood Ferguson—direct.*

noon, and one side be left open for traffic. I presume that was always the case. I was not there in the previous afternoon and in the morning they were laying the other side when I was there.

Q. In the morning when you went there they had just finished the right hand side going north?

10 A. I only went up to the top of the hill, I did not go all the way.

Q. What did you see? A. One side of the road was laid and they were working on the other side.

The Court: Which side was laid?

The Witness: The right hand side going north.

The Court: And they were laying the other side?

20 The Witness: They were laying the other side; yes, sir; at the lower end of the road.

Q. Can you tell from observation and could you tell from observation there, whether that oil had been freshly laid that day or been laid at a previous time? A. Yes. You could tell that it had not been laid that day.

30 Q. Did you find it necessary, in your judgment to put up barriers or lights of any character to protect the road from traffic? Did you find it necessary on East Eighteenth street? A. No, I did not.

Q. And you gave no directions of that character? A. No, sir.

Q. Do you know whether the supervisor went up there or not? A. The supervisor of roads?

*Garwood Ferguson—direct.*

Q. Yes. Did he go up to look over the roads or did you? A. I went up. I was up there, I did not think he was up there, I don't think he was up there for several days afterwards anyway.

Q. Were there any cross-walks along that street, around Tenth, Eleventh or Twelfth avenues? A. There are some cross-walks at Eleventh avenue, I could not say as to the others.

Q. There were none at that time? A. No, sir.

Q. The spreading of the oil on the road on the right hand side going north can you say whether or not in your judgment there had been sufficient penetration to have allowed traffic over it, the right hand side I am speaking of, going north?

A. To have allowed traffic over it?

Q. Yes? A. Yes, sir.

Q. Along in there, Eleventh avenue, did I understand you to say that there was considerable dust and dirt, as you observed it? A. Yes, sir.

Q. From your experience does oil lay on the surface of a dusty road in about the same manner as it would on a hard road, a hard macadam road?

A. No, sir; it will sop it up.

Q. What is that? A. The dust will absorb it and then traffic turns it over.

Q. Equally—

Mr. Ward: I object counsel leading witness.

Objection sustained.

Q. From your experience, can you give us the length of time usual in the absorption of oil in a dusty road, such as you found on Eleventh avenue? A. It absorbs very quickly, the dust sops it right up, especially with the spray machines, the

*Garwood Ferguson—cross.*

oil is simply sprayed on the road and a half an hour afterwards you would hardly know it was there, outside of the color.

Q. These spraying machines were being used were they? A. Yes, sir.

10 Q. Can you say from your observation and your supervision of oil spraying machines, whether there was anything apparent indicating that one of the spray machines was out of order, one or more of the sprays were out of order? A. I could not say, no. I don't just get that question.

Q. From your observation and knowledge of the spreading of oil, can you tell whether or not there was anything the matter with the machines so far as the sprays were concerned? A. Well, from the appearance of the road it looked like the sprays were all right. There was no streaks or anything like that.

20 Q. You did not find any streaks along in there? A. No, sir.

*Cross Examination by Mr. Ward.*

Q. You were not there the day before when they began on the road? A. No, I was not.

Q. And you were not there, as a matter of fact, on the morning of the second day when they started? A. No, sir.

Q. You got there about nine or ten o'clock? A. Yes, sir.

30 Q. Whereabouts did you observe the road? A. I got on the road at Twelfth avenue and went up to the hill and then went off.

Q. You came on the road at Twelfth avenue and turned to your right north? A. Yes, sir; that is correct.

*Garwood Ferguson—cross.*

Q. What street is it or was it where you overtook these people? A. Well, I don't think it was at a street; it was on the hill somewheres above, I should say, around Eighth avenue, or Seventh avenue, something like that.

Q. That is down towards Riverside? A. That is down towards Riverside.

Q. You did not go back on that particular job for a number of days? A. No, not personally. I was not back there for three or four days.

Q. And three or four days after when you went back, so far as you could observe the road was all right, it looked all right? A. Yes sir, the road looked good. 10

Q. Do you remember whether it was four or five days after? A. No, I do not.

Q. Do you remember how long it was? A. No, I do not.

Q. It might have been six or seven days after? A. I hardly think so; no, sir.

Q. I know your duties are a little various? A. Yes sir, of course, my men though follow that part of the work right up. 20

Q. So far as you personally are concerned, it might have been a week, might it not, before you got on that particular street again? A. It might have been, yes sir.

Q. You did not get down to Eleventh avenue then at all, did you? A. Oh, yes, I passed Eleventh avenue. 30

Q. You passed Eleventh avenue, is that it, came in at Twelfth? A. I came in at Twelfth and went up to the hill and passed to about Seventh or Eighth I should think.

Q. Do I understand you to say that at that time the right hand side of the road was not done?

*Garwood Ferguson—cross.*

A, No. The left hand side of the road. They were working on it then.

Q. That would be the westerly side of the road was not finished, had not been touched? A. No. They were working on it that morning.

Q. They were working on the westerly side of the road? A. They had been working on it, yes sir; I was up on the hill and met them up on the hill somewhere.

10 Q. So that, so far as the road was concerned, up to the hill, where you met them from Broadway northerly to the hill, it would be about what street, did you say? A. I should think at least Seventh avenue.

Q. That road had been completed? A. I should not say positively about that, no sir.

Q. Well, the part that you went over had been completed, had it not? A. I went over on the right hand side.

20 Q. The left hand side had not been completed had it? A. I could not say.

Q. Up to the hill? A. I could not say that.

Q. You could not say that? A. No. Because I only came in at Twelfth avenue and did not come in lower down.

Q. If you came in at Twelfth avenue and drove down to Seventh avenue you drove along five blocks, driving or walking were you? A. Driving.

Q. An automobile? A. Yes, sir.

30 Q. You drove along five blocks? A. Yes, sir.

Q. Now, was the westerly side of that road along that five blocks completed at that time? A. I could not tell you positively, because I was looking at the other side, where they were working and I don't know whether that part of it was completed or not.

*Garwood Ferguson—cross.*

Q. You don't know whether there was any oil on the westerly side of that road from Twelfth avenue down to Seventh avenue or not? A. I know there was some oil on that road, I know that because they were working there.

Q. Where were they working? I think you said up on the hill? A. I met one of the wagons up on the hill.

Q. Where did you see the other? A. I did not see the other wagon at all.

Q. One wagon was working on the hill and you did not see the other wagon, now, tell me, how do you know whether any part of that road on the westerly side had been done? A. Because I saw it. 10

Q. What did you see? A. I saw the oil.

Q. Now we have got down to your seeing the oil? A. Not all of it, though.

Q. Do you mean all of the road or all of the oil? A. I mean from Twelfth avenue to Seventh avenue, I don't know just particularly whether the road was completed or not. In just a casual manner as I went along I saw some oil there, saw some fresh oil there. 20

Q. On which side? A. On the left hand side.

Q. On the left hand side, eh? A. No, the right hand side, that was oiled the day before and I went up on that side.

Q. So that the right hand side upon which you went from the place where you came in at Twelfth avenue down to the place where you found the wagons on the hill, about Seventh avenue, was all the same, was it? A. Yes, sir; about the same. 30

Q. But on the other side you assumed that the oil had been put on later, or been put on that day because it looked fresh? A. That is just my recollection of it; yes, sir.

*Garwood Ferguson—cross.*

Q. Your recollection is not very distinct, is it?

A. Not particularly on that side, because I was not looking there.

Q. Don't you know it was put on on the right hand side from Tenth to Ninth avenue and down to Seventh avenue that morning? A. I don't know.

Q. Would it surprise you to know that it was so?

A. No, because oil is absorbed from the spraying machines inside of a half an hour.

10 Q. Didn't it look fresh on the right hand side as well? A. Not particularly, no. I did not get there until nine or ten o'clock, if they went to work at seven oiling it had been there three hours.

Q. If they oiled the westerly side at seven o'clock and oiled the other afterwards, the right hand side would be fresher wouldn't it? A. Yes, sir.

20 Q. And the oil was so fresh there, you say on the westerly side that you noticed it, it was something that attracted your attention wasn't it? A. No, all I noticed was the trucks working there.

Q. Haven't you told this jury that it was the oil that you noticed on the westerly side of the road? A. I don't know whether I did.

Q. Didn't you just tell the jury that you noticed the oil on the westerly side of that road? A. I don't know whether I did.

30 Q. Didn't you just tell the jury that you noticed the oil was fresh on the westerly side of that road? A. I don't know whether I said that or not, I did not mean to say it if I did.

Q. Didn't you say you did not see one wagon and the other wagon you saw at the top of the hill? A. I only saw one wagon.

Q. And that was at the top of the hill? A. Somewheres on the hill.

*Garwood Ferguson—cross.*

Q. And then you had asked what called your attention to the fact that the road had been oiled on the westerly side and you said the oil in the road? A. Well, they were working there, of course that part of the road I did not notice.

Q. Did you or not notice oil on the westerly side of the road? A. I did.

Q. And from the condition in which it was on the westerly side of that road you judged it to be fresh didn't you? A. The condition of the oil?

Q. Yes. A. I won't say that. 10

Q. Didn't you just say a moment ago to the jury that the reason you thought it had been put on that morning on the westerly side and later than it had been put on on the easterly side was because it was fresh? Didn't you just explain that beautiful theory that you had, to the jury? A. I don't recall saying that, no.

Q. As a matter of fact didn't it look fresher on the westerly side than it did on the easterly side? A. I did not take any particular notice about it, because my attention was called to look on the road on the right hand side going towards Riverside. 20

Q. You were there to inspect the entire road, weren't you? A. No, I came there more by accident than anything else.

Q. Even though it was accidental, when you saw it had not been done, put on properly on one part didn't you observe where the road had not been oiled properly and you directed them to put on more oil? A. No, I simply went up and told the inspector about this road, the road as I remember it looked very good. I was driving the car myself, I could not see the whole road, and I simply told the inspector and told the driver to fix the road up and went on. 30

*Garwood Ferguson—cross.*

Q. The westerly side was bad, wasn't it? A. No, I did not notice anything about the westerly side, except that they were working on that side.

Q. Didn't you notice the oil? A. I noticed some oil, but I could not say it was all like that that I noticed.

Q. You did not notice whether it was thick or thin on the westerly side? A. I know it was not thick, because if it was thick my attention would have been called to it.

10 Q. Do you know whether it was thin? A. I know it was satisfactory.

Q. So then, so far as you observed then, that road was satisfactory on the westerly side? A. Yes, as far as I observed, I saw nothing on the left hand side to indicate that the road had been either completed or the oil had been put on in an improper manner.

20 Q. And yet you told us you observed the road **refully enough to believe** that the oil had been put on the easterly side before it had been put on the westerly side along that very place? A. No, just simply they were working on that side. That is my observation. That is all. They were simply working on that side and I presume working there that the oil had been **put on later**.

Q. You went all the way down to Riverside? A. No. I did not go to Riverside.

30 Q. What did you do? A. I went down to one of the side streets toward River street, I was going to the country.

Q. Whereabouts? A. I was going to Green Pond, I had my family with me.

Q. From the experience you have had in oil laying in roads, if oil lay in pools or puddles on the road it would be improperly put on wouldn't

*Garwood Ferguson—cross.*

it? A. Not necessarily. It might be with some sort of wagons, that they would allow the oil to run down, and there might be a hollow and the oil might slide down into the depression, run down into such a depression.

Q. What should be done then? A. They should not put it on that way; the inspector is there for that purpose.

Q. Will you kindly watch your answers and see if you do not contradict yourself? Didn't I just ask you if there were pools and puddles in the road if the road would not be in an improper condition due to the way the oil had been put on it? A. I would say not. 10

Q. And didn't you just here in the next question answer that it would not be put on that way because the inspector would prevent it? A. I say it should not be put on that way.

Q. Why shouldn't it be put on that way? A. Why shouldn't it be put on that way? 20

Q. Yes? A. Because, that is not the proper way to put oil on. 20

Q. Then if the oil runs in pools or puddles on the road it is improper, is it not? A. Yes, sir.

Q. Why didn't you say that a moment ago when I asked you the question? A. I did not understand your question.

Q. If you do not understand any of my questions tell me and I will explain them. Now, you understand that I am asking you now, you understand that I am asking, where there are pools or puddles of oil on the road it is improper is it not? A. It is improper; yes, sir. 30

Q. And there would be too much oil put on under those circumstances, wouldn't there? A.

*Garwood Ferguson—cross.*

Not necessarily, no; it might be due to other conditions.

Q. All right. The oil would have been put on improperly then, would it not? A. No, it would not.

Q. What would there be improper about pools or puddles of oil on the road? A. The simple fact that they are there and should not be allowed.

Q. How would they get there? A. The oil might slide down and run down into them.

10 Q. The oil has to be put on the road, that is correct, is it not? A. Yes, but not in a pool all the oil.

Q. Do you know what your specification says with reference to that? A. I think I do.

Q. What does it say? A. It specifies the amount must be satisfactory.

Q. With reference to the accumulation of oil in one place? A. It must be broomed, swept, swept up.

20 Q. And where there are conditions of that sort they should be protected at least six hours, shouldn't they, from traffic? A. Yes, the traffic hurts the road.

Q. Do you mean in any event they should be protected six hours, the road? A. No, not in any event. It depends upon the inspector, the matter of traffic regulations, it depends on the inspector and the instructions he has.

30 Q. Suppose there are streaks of oil, you say they should be broomed out? A. No; I say the oil in the pools, if there is any pools.

Q. Suppose there are streaks of oil, what then? A. Well, if there are streaks of oil that are very heavy it might be well to broom them out.

Q. Suppose they are not very heavy? A. Well, I don't imagine there would be any—

*Garwood Ferguson—cross.*

Q. What kind of streaks do you refer to in your specifications? A. Streaks sufficient to be a nuisance on the road.

Q. It simply mentions any streaks here in your specifications which should be broomed out? A. Yes, I know it.

Q. You expected this company to live up to these specifications, didn't you? A. I did.

Q. You were there to see that they did it? A. Yes, sir.

Q. Then if there were any streaks in the road, would you compel them to broom them out or not? A. If they were bad enough I would, yes.

Q. Any streaks? A. No, not necessarily.

Q. Would you not? A. Not necessarily; no, sir.

Q. What made you put it so in your specifications? A. I always do that. That makes the county left entirely to the judgment of the engineer or the inspector.

Q. So that if they were bad enough you would have them broomed out, would you? A. Yes, sir.

Q. And then you would have placed barriers for six hours, wouldn't you, or have the road protected? A. Depending upon the conditions.

Q. If they were broomed out? A. Have them protected if they were broomed out?

Q. Yes? A. No, sir.

Q. Why did you put that in your specifications? A. Because if there was a very heavy accumulation of oil the traffic hurts the road.

Q. Do you know how the specifications read in that respect? A. I do.

Q. Tell me? A. That the road should be protected from traffic with barriers six hours. You will find I think in the judgment of the engineer or something like that.

*Garwood Ferguson—cross.*

Q. No, it does not say anything about the judgment of the engineer. This road you say was oiled the second time? A. Yes, they went over it afterwards.

Q. That same day? A. I don't know when they went over it.

Q. Was it ever touched after that day to your knowledge? A. No, not to my personal knowledge, the inspector told me he had fixed it up.

10 Q. I mean after that day, to your knowledge was that road ever gone over? A. According to the inspector it was gone over.

Q. After that date to your knowledge was that road ever gone over? A. I don't know when he went back.

Q. Did you direct them to go back that day? A. I told him to fix the road up before he left.

Q. That day? A. No, I did not say that day.

20 Q. Do you know whether the contract or specifications direct that the road shall not be gone over again for six weeks, do you know that? A. No. That is a second coating if it was deemed necessary. Some roads we give two coats of oil a year.

Q. You did deem this necessary? A. That is a different thing. That is for coating the road twice with oil during the season. Some roads you do twice where there is heavy traffic.

30 Q. Did I understand you to say that where the oil is put on a road that is dusty it immediately penetrates through the dust? A. The dust absorbs it; yes, sir.

Q. And there is no indication on the road that it has been oiled? A. Oh, yes.

Q. And it does not lay the dust? A. Not satisfactorily, the traffic shakes the dust out.

*Garwood Ferguson—cross.*

Q. And you say that condition would come about in six hours? A. Six hours?

Q. Yes.

Mr. Garven: I understood him to say in a half an hour.

Mr. Ward: Did he say a half an hour?

Mr. Garven: Yes.

Mr. Ward: That is better still for me.

Q. In a half an hour? A. Yes, sir. 10

Q. What do you mean by that? A. I mean to say that this oil applied to the road, the dust would absorb the oil and the traffic would be working it up.

Q. It depends upon the traffic, doesn't it? A. To a certain extent; yes, sir.

Q. So that, if there is no traffic it would not be absorbed? A. Yes, it would absorb the oil, the traffic churns up the dust, and turns it over.

Q. Where there is oil put on the dust it lays the dust, doesn't it? A. Yes, sir. 20

Q. It does not run through it, does it? A. Not entirely through it; no, sir.

Q. It makes it like a paste, doesn't it? A. No, not like a paste, it absorbs the oil.

Q. Doesn't it take the oil up, as it were? A. Yes, it sops it up.

Q. You don't mean to say that there is only the oil on the outside surface over the road? A. No, not entirely. 30

Q. It becomes like a paste, it is the dust and the oil mixed, isn't it? A. Yes, they mix together.

Q. So then it is like a paste? A. I would not say it is like a paste.

*Garwood Ferguson—re-direct.*

Q. Is that right? A. No, I don't think it is right.

Q. Is it some other consistency, the dust and oil mixed together? A. The dust absorbs the oil.

Q. Is it some other consistency the dust and oil mixed together?

The Court: It must have the same consistency if they mix together.

10 Q. And you say you found that condition on the road? A. I say when I came over the road I found several spots which evidently had not enough oil.

Q. And didn't you say you found spots where there had not been switched or swept? A. I did, yes, swept sufficiently.

Q. And you gave them instructions to go back with the broom and sweep it? A. Yes, I told them to put more oil on the spots, there was a lot of  
20 dust all over the road.

Q. To sweep it? A. To broom it off.

Q. You don't know whether that was done or not? A. I don't know positively, no; I told the inspector to do it.

Q. So that it was improper in that respect? A. As far as sweeping it was concerned, the job on the right.

Q. You are interested in this case, of course?  
30 A. Yes, for the county.

Q. And your testimony is more or less prejudiced, is it not? A. I don't think so.

*Re-Direct Examination by Mr. Garven.*

Q. You have not any prejudice in this matter, have you? A. No, sir.

*Garwood Ferguson—re-cross.*

*Edward McDonald—direct.*

Q. You are an official of the county trying to protect its interests, aren't you? A. That is my duty; yes, sir.

Q. This oil, was it heavy oil or light oil? A. Just light oil, forty per cent. asphalt.

Q. Can you tell us whether between the tracks there was any oil? A. There was not any oil between the tracks.

Q. Going north, on the morning that you went up there, did you go on the right side of the track, with your machine on the right side? A. Yes, sir; on the right side and partly in the car tracks. 10

Q. You had no difficulty, did you, in driving the machine up there? A. No, sir.

Q. The gentleman on the other side has said that if the oil flows into a hole, that indicates improper applying of the oil, is that true? A. No, that is not true, because the oil might just flow into a hole from gravity. 20

Q. And from tracks made by vehicles? A. It might be, yes, just as soon.

*Re-Cross Examination by Mr. Ward.*

Q. If there are pools in the road and puddles of oil you consider the oil improperly applied? A. The road is improper, yes.

EDWARD McDONALD, sworn as a witness on behalf of the defendant, the Standard Oil Company, testifies as follows: 20

*Direct Examination by Mr. Garven.*

Q. Where do you live? A. No. 538 East Twenty-fifth street.

*Edward McDonald—direct.*

Q. You are an old resident of this town? A. Yes, sir.

Q. Did you hold any position in the county in August, 1913? A. Yes, sir.

Q. What was that position? A. Inspector over the oiling.

Q. Do you recall the oiling of East Eighteenth street in Paterson? A. Yes, sir.

Q. Was it oiled during that month? A. Yes, sir; about the middle of August.

10 Q. Prior to that time had you had any experience as inspector of oiled roads? A. Yes, sir.

Q. What experience? A. That season; that is the first time they put an inspector on.

Q. That year was the first? A. Yes, sir.

Q. How many miles of oiled road had you inspected previous to the oiling of East Eighteenth street, approximately, do you know? A. I cannot tell just the amount of miles.

20 Q. Were there many streets? A. Yes, sir; many of them.

Q. How many machines were used on East Eighteenth street job? A. Two machines.

Q. Where were you during the time the oil was being sprinkled? A. Sometimes I would be on the sprinkler, other times I would be on the sidewalk, it would just depend upon how things were going.

Q. Most of the time where? A. Most of the time on the machines.

30 Q. Were you on the job during the entire time the oil was sprayed on both sides of that street? A. Yes, sir.

Q. And you did not go off the job at all? A. No, sir.

Q. Can you recall about the time when the work

*Edward McDonald—direct.*

was started? I mean, can you recall the day of the week? A. No, I cannot recall the day of the week.

Q. How much work was done the first day, how many days were they on that job? A. Two days, that is, a day and an afternoon.

Q. How much of the work was finished the first day? A. Up to about just above Ninth avenue, what we call the first switch, the Zabriskie switch there.

Q. Which side of the street? A. The right hand side going north. 10

Q. What was done the next day? A. We completed the road the next day.

Q. Were you under the direct supervision of the county engineer? A. Yes, sir.

Q. Did you see him during either of the two days this work was going on? A. Yes, sir; the second morning I met him.

Q. Where were you then? A. Up at the corner of Seventh avenue and East Eighteenth street. 20

Q. Did you have any conversation with him about this road, or did he have any with you? A. He told me it was light in places down below and to go back and fix it up.

Q. Did you give the instructions to anybody? A. I told the drivers, I was on the machine with him, and I took him back.

Q. And he went back? A. Yes, sir.

Q. Did you see him make the applications to your satisfaction? 30

Mr. Ward: Objected to as leading.

Q. Did he make the applications of oil to the street, put more oil on? A. Not that day.

*Edward McDonald—direct.*

Q. Did you see him put the additional oil on?

A. Yes, sir; I was there.

Q. Did you have direct charge of the method of laying that oil on that street?

Mr. Ward: Objected to.

Objection overruled; plaintiff excepts.

A. I went under the engineer's instructions. Yes, I was there as boss for the work outside of the  
10 engineer's instructions.

Q. That is, you gave instructions to the men?

Mr. Ward: Objected to as leading.

A. Yes, sir.

Q. Did you give instructions to the men? A. Yes, sir; I did.

Mr. Ward: That is just as leading, and I think that is important.

20 The Court: Yes, let us try and get along without leading.

Q. Do you know whether or not the work was performed according to the contract and specifications? A. Yes, sir; as near as I could tell.

Q. Your duties were what, in respect to the laying of that oil? A. To see that it was applied as uniform as possible.

30 Q. To see it applied that way? And was it applied so? A. Yes, sir.

Q. Did you have any complaint to make to the engineer or to the board in reference to the laying of that oil? A. No, sir; none whatever.

Q. Can you say whether or not that was laid in the same manner as other roads which were

*Edward McDonald—cross.*

covered by this contract? A. About the same thing; yes, sir.

Q. That was a pretty rough road to work on?  
A. Well, in places the macadam had worked through, yes, sir, and that made a rough surface.

Q. Did you notice whether there were any pools along there or not? A. Pools of oil?

Q. Yes. Pools of oil? A. No, sir; there were not.

Q. Did you give any instructions about putting up barriers or lights to protect the road from traffic? A. No, sir. 10

Q. Did you find it necessary? A. No, sir.

Q. Can you say whether or not there was oil between the rails, the tracks? A. Between the car tracks?

Q. Yes? A. No, sir; there was not.

Q. Were there any crosswalks along there at Eleventh avenue? A. No, there were no crosswalks after you leave Twelfth avenue to River-  
side. 20

*Cross Examination by Mr. Ward.*

Q. Are you sure about that? A. About what?

Q. Crosswalks? A. Yes, sir.

Q. Don't you know there are crosswalks at Tenth avenue? A. There is not, no flagged crosswalks.

Q. Are you positive about that? A. Yes, sir.

Q. Mr. McDonald, you say everything was going very smoothly there that day and to your entire satisfaction? A. Yes, sir. 30

Q. You had no complaints to make? A. I did not make any; no, sir.

Q. You did not make any complaints? A. No, sir.

*Edward McDonald—cross.*

Q. There was not anything done improperly?

A. Not to my jurisdiction; no, sir.

Q. The oil was laid on properly? A. The oil was laid on properly.

Q. You were right on the automobile truck there? Part of the time.

Q. And everything went splendidly and according to contract, didn't it? A. Yes, sir.

Q. So far as you knew? A. Yes, sir.

10 Q. It must have been quite a shock to you when Ferguson came up and claimed the work had not been done right, wasn't it? A. Well, he told me to go back in places and put a little more oil on.

Q. After you went back did you think Ferguson was right? A. Yes, sir.

Q. So that you found out that you had made a mistake before that? A. Not necessarily; no sir.

Q. Well, were you right, or was Ferguson right? A. Well, that is up to you, I don't know.

20 Q. No, it is not up to me. I am asking you about it now, now tell me? A. Tell you what?

Q. Didn't you think Ferguson was right when he said there should be more oil put on at points there? A. Well, I did not say whether he was right or not, he was my boss and I would have went back and done it anyway.

Q. Did you think he was right? A. Of course he was or he would not have told me to go back.

30 Q. You had not been very careful how that work had been done before, had you? A. Certainly.

Q. You did not even see anything the matter with the road before that, did you? A. No, not particularly, till he told me, no.

Q. Now you say you think he was right in send-

*Edward McDonald—cross.*

ing you back to have it done over again? A. Yes, sir.

Q. Now, I understood you to say the driver did not put the oil on all that day? A. No, not any further than the switch; no, sir.

Q. You were asked about when Mr. Ferguson came up and told you to put the oil on, and Mr. Garven then asked you if you did not put it on and you said not on that day? A. No, I did not understand the question; it was finished that day when Mr. Ferguson was there. 10

Q. It was finished that day? A. Yes, sir.

Q. When was this extra oil put on? A. In the afternoon of the second day.

Q. That was the day when Mr. Ferguson came there? A. I should judge between nine and ten o'clock.

Q. And then it was the afternoon when this oil was put on? A. The afternoon, when the touching up was done; yes, sir. 20

Q. Whereabouts were you when Ferguson came up there? A. About around Seventh avenue and East Eighteenth street.

Q. Were you on Lebaugh's wagon? A. With McGrath, I was with him then.

Q. You were with Mr. McGrath? A. On the machine; yes, sir.

Q. Didn't Ferguson come up to Lebaugh, wasn't it Lebaugh that Ferguson came up to? A. No, sir; not to my knowledge. I don't know whether he came up to Lebaugh, he came up to me. 30

Q. Was it McGrath's machine that put this oil on back there, the second coat? A. Yes, sir; McGrath's wagon put it on the second coat.

Q. So that, as I understand you, after Mr. Fer-

*Edward McDonald—cross.*

guson came up to you and to Mr. McGrath and told you about those places back there that needed the fresh oil, or more oil, at least that needed sprinkling again, that you and Mr. McGrath went back in the afternoon or later on and put the oil on? A. I was with them; yes, sir.

Q. I say, it was you and McGrath that went back? A. Yes, sir.

Q. Don't you know that is not so? A. No, I do not.

19 Q. Don't you know it was Lebaugh's car that went back there and put that oil on? A. No, sir.

Q. You are sure you went back with McGrath? A. I am positive.

Q. And you are sure it was McGrath's car? A. Yes, sir.

Q. Did you hear Mr. McGrath testify here yesterday? A. No, sir.

Q. Did you hear Mr. Lebaugh testify here this morning? A. Yes, sir.

20 Q. Did you hear Mr. Lebaugh testify that it was his car? A. I did not notice whether he said it was his car or not, you are asking me who I am with, I am telling you.

Q. Do you remember anything about it at all?

The Court: It does not seem proper to examine him about what somebody else testified to.

30 Q. You say this work was performed according to contract, are you sure of that? A. Yes, sir.

Q. Well, there is a crosswalk at Twelfth avenue, isn't there? A. Yes, sir.

Q. Was there any sand put on there? A. It was not necessary.

*Edward McDonald—cross.*

Q. Was there any sand put on there? A. No, sir.

Q. Why do you say it was not necessary? A. Because they cut off before they came up to it, they cut off before they came up to it and left the crosswalk open.

Q. Don't you know your contract provided that sand should be put on? A. Not unless they are told to put it down.

Q. Have you read the contract and specifications? A. Yes, sir.

Q. All crosswalks should be immediately, before oiling, covered with clean, sharp sand, did you know that was in your contract and specifications? A. I did not notice it.

Q. No oiling is to be commenced until the sand is on the walk ready for distribution. There was no sand there that day? A. Not to my knowledge.

Q. Why did you let them begin then? A. I did not think it was necessary, if the walk was left open, without the sand.

Q. Didn't you know that the contract said that no oiling should be commenced until the sand was on the job? A. No, sir.

Q. And you were there as inspector? A. Yes, sir.

Q. All that you were there for was to see if the work was done it was done to your satisfaction, isn't that right? A. Yes, sir.

Q. So that if it was done, you were there to see if it was satisfactory? And to see if it was all completed right.

Q. That it was turned over, in other words? A. Turned over? What do you mean?

Q. You could not tell them, of course, which side of the road to go up or which side of the road

*Edward McDonald—re-direct—re-cross.*

to come down on, but if they oiled the road you were there to see that it was all right? A. Yes, sir.

Q. And that it was turned over to the county in good condition, is that right? A. Yes, sir.

Q. And that was all your duty, wasn't it? A. Yes, sir.

10 Q. From your experience in the oiling of roads and if there were pools of oil or puddles of oil in the roadway, that would not be proper oiling, would it? A. Not if they were there.

*Re-Direct Examination by Mr. Garven.*

Q. You did not find any crosswalks there at all, did you? A. No, sir.

*Re-Cross Examination by Mr. Ward.*

20 Q. Didn't you say there was one at Twelfth avenue? A. Yes, there was one at Twelfth avenue.

Q. There were two at Twelfth avenue, weren't there? A. No, only the one.

Q. What about Governor street? A. Was there a crosswalk there?

Q. Yes. A. No, sir; not on Eighteenth street.

Q. Right near the cafe or saloon there? A. Crossing the other way, not on Eighteenth street.

30 Q. Not on East Eighteenth street? A. Well, it runs on the side going on, not crossing Eighteenth street.

*By Mr. Garven.*

Q. You did not spread any oil on the Twelfth avenue crossing, did you? A. No, sir.

Defendant Rests.

Testimony Closed.

*Motion to Direct Verdict.*

Mr. Garven: I make a motion for the direction of a verdict in favor of the defendant, the Standard Oil Company, on the grounds stated in the motion for a nonsuit, and in addition to those points I desire to make the following points:

That the freeholders of this county retained control of the manner of doing the work, and the quantity of oil used, therefore, the relation between the Standard Oil Company and the board was that of Master and Servant, and the maxim respondeat superior applies, and if liability exists, the master alone is liable. 10

Now, there are a great many cases cited in 28 Cyc. cover this very point, that if a municipality retains control over the manner of doing the work or the man employed, that the relation exists of master and servant and that that maxim applies. 20

So that on that point it seems to me there should be the direction of a verdict.

And again, that the defendant, the Standard Oil Company, having completed the work under the direction and to the satisfaction of the board and its engineers, the same having been accepted, cannot be held liable to the plaintiff by reason of the condition of the work.

All that the Standard Oil Company had to do under this contract was to spread that oil, and, of course, there is no contradiction that it was done under the direction of the engineer and the inspector who was his representative and after the oil was spread if there was no objection to that 30

*Motion to Direct Verdict.*

why then our work was completed absolutely. And I have a great many cases bearing upon that particular point and it seems to me that the work in this instance was completed as soon as the inspector passed upon the work and it was approved by the County Engineer.

10 In other words, the plaintiff, not being party to the contract between the Standard Oil Company and the board cannot maintain an action for damages in respect to the breach of a duty that arises wholly from its provisions.

20 Our duty arises, of course, only from this contract. If it does not then we were trespassers, and there is no allegation of that. But whatever duty we owed must arise under that contract. We were responsible to the Board of Freeholders and to none others. We were required to give a bond, and you will notice in that bond and also in the specifications that it provides that if the county is compelled to pay damages growing out of the negligence of the agent that we then must compensate them. It was not a reverse feature as we find it here.

30 And the additional point, the Standard Oil Company was undertaking merely to protect the Board of Freeholders and said board could not be and has not been held liable in damages for negligence in oiling the road, neither can the Standard Oil Company be held liable.

And this other point which is along the same line, the Standard Oil Company was

*Motion to Direct Verdict.*

in any event simply to protect the board and cannot be held liable for damages for negligence in oiling the road.

In addition to that I call attention to the Stiles case which I could not find the other day, and it seems to me that that case is on all fours with this case.

(Counsel argue the motion.)

Motion granted; plaintiff excepts.

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London, 17th Dec 1841

My dear Sir,  
I have the honor to acknowledge the receipt of your letter of the 11th inst. in relation to the proposed alterations in the regulations for the management of the Poor Law, and I beg to assure you that I have given the subject my most careful attention.

I have also the honor to acknowledge the receipt of your letter of the 14th inst. in relation to the proposed alterations in the regulations for the management of the Poor Law, and I beg to assure you that I have given the subject my most careful attention.

I have also the honor to acknowledge the receipt of your letter of the 14th inst. in relation to the proposed alterations in the regulations for the management of the Poor Law, and I beg to assure you that I have given the subject my most careful attention.

Yours faithfully,  
G. D. S.

I.

ARTICLES OF AGREEMENT, made the twenty-eighth day of August, one thousand nine hundred and thirteen, between The Board of Chosen Freeholders of the County of Passaic, of the first part and the Standard Oil Company, a body corporate, of the second part,

The party of the second part in consideration of the covenants and agreements hereinafter contained to be kept and performed by the party of the first part, and of One Dollar, the receipt whereof the party of the second part hereby acknowledges, does covenant, promise and agree, to and with the party of the first part and their successors, that the party of the second part will clean all those roads in the county of Passaic as shall be directed to be cleaned by the Board of Chosen Freeholders, the County Engineer or County Road Supervisor, and will spread its Standard Road Oil on the same as directed in strict and entire conformity with specifications hereto annexed and made a part of this contract as fully and with the same effect as if the same had been set forth at length therein, and will provide at its own expense all the materials, tools and labor necessary for the completion of said work; will begin work within five days after notice by the Board of Chosen Freeholders, the County Engineer or the County Road Supervisor on any street as directed, and will deliver said work to the party of the first part completely finished, to the satisfaction of the County Engineer within so many days thereafter as shall be based on the completing of 20,000 sq. yds. per day, proper allowance to be made for weather conditions.

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The party of the first part in consideration of the covenants and agreements aforesaid to be kept and performed by the party of the second part, doth covenant, promise and agree, to and with the party of the second part, the said party

## II.

of the second part performing the covenants and agreements on its part, that the party of the first part will pay or cause to be paid unto the party of the second part, for completing said work in manner aforesaid and providing the tools, labor and materials therefor, the sum of one and one-half cents per square yard for said oiling as aforesaid, upon completion of the work to the satisfaction of the committee known as the Road Committee and upon approval of the bill by the Committee on Finance and auditing of the party of the first part.

10 PROVIDED, that in each of the said cases a certificate shall be obtained signed by the Committee of said party of the first part in charge of the work.

AND IT IS HEREBY MUTUALLY COVENANTED AND AGREED, between the said parties that the party of the first part may make or required to be made alterations in the plan of construction from that herein and in said specifications and plan expressed, without annulling or invalidating this agreement; and that in case  
20 of any such alterations, the increase or diminution of expense occasioned thereby shall be estimated according to the price fixed by these presents for the whole work and materials, and allowance shall be made on one side or the other as the case may be. AND that if there shall be any delay on the part of the said party of the second part in completing said work that in the opinion of the said Committee of said party of the first part will prevent the same being completed on the  
30 day herein specified, then the party of the first part may, after three days' notice in writing be given at their option, either employ persons other than the party of the second part to do the whole or any part of said work, or furnish the whole or any part of said materials, and deduct the cost of the same from the sum hereinbefore agreed to be

III.

paid by the party of the first part, or leave the completion of said work unto the party of the second part, and enforce their claim for damages should said work be not completed on the day herein specified. AND it is further agreed that if the said work shall not be finished and completed in the manner aforesaid by the party of the second part within the time hereinbefore mentioned, the party of the second part shall forfeit the sum of five dollars for each and every day from and after that time during which the said work shall remain unfinished and not completed as aforesaid, to be deducted from the sum hereinbefore agreed to be paid by the party of the first part. AND THAT in case of any disagreement between said parties relating to the performances of any covenant or agreement herein contained the same shall be referred to the Committee of said party of the first part in charge of the work, whose decision shall be final. AND, it is further agreed, that the said party of the first part shall not be liable for any loss or damage that may happen to said work or materials, nor for any damage or injury that may happen to personal property through the want or care of negligence of said party of the second part in doing said work. IN WITNESS WHEREOF the said party of the first part has caused these presents to be signed, by its President, its corporate seal to be hereto affixed, and attested by its Secretary on the day and year first above written.

10

20

The Standard Oil Company,  
Sealed and delivered as By A. C. Bedford,  
to the Party of the Sec- President.  
ond part in the pres- Attest:  
ence of C. F. White,  
Secretary.

30

IV.

As to the Director in presence of

The Board of Chosen Freeholders of the County of Passaic,  
By

Director.

Attest:

Clerk.

.....

10 KNOW ALL MEN BY THESE PRESENTS,  
That We, the Standard Oil Company and  
of the of  
in the County of and State of  
are held and firmly bound unto "The Board of  
Chosen Freeholders of the County of Passaic" in  
the sum of Two thousand dollars, lawful money  
of the United States of America, to be paid to the  
said "The Board of Chosen Freeholders of the  
County of Passaic," or to its certain attorney,  
successors or assigns: to which payment well and  
truly to be made, we bind ourselves, our and each  
20 of our heirs, executors and administrators, firmly  
by these presents. Sealed with our seals and  
dated the twenty-eighth day of August, in the year  
of our Lord one thousand nine hundred and thir-  
teen.

30 WHEREAS, The said The Standard Oil Com-  
pany has this day entered into an agreement with  
the said "The Board of Chosen Freeholders of  
the County of Passaic", to oil such streets in the  
County of Passaic as may be directed by the Board  
of Chosen Freeholders, the County Engineer or  
the County Road Supervisor.

Now the condition of this obligation is that if  
the said The Standard Oil Company shall in all  
things faithfully and fairly undertake, complete  
and carry out said agreement in all its terms and  
conditions according to the true intent and mean-  
ing, and shall indemnify and save harmless the  
said "The Board of Chosen Freeholders of the

V.

County of Passaic" from any and all suits, or actions of any name or description brought against it on account of the fault or neglect of the said Company, then this obligation to be void, otherwise to remain full force and virtue.

The Standard Oil Company,

BY \_\_\_\_\_  
President.

Attest:

\_\_\_\_\_  
Secretary.

FOR OILING OF ROADS IN PASSAIC COUNTY, NEW JERSEY. 10

All work done under this contract shall be done under the direction of the Board of Chosen Freeholders, County of Passaic, County Engineer and Supervisor, and to their satisfaction.

INSTRUCTION TO BIDDERS.

Bidders will be required to bid on blank form of proposal and are to submit a price per square yard for applying oil as per specifications, in two ways: 20

1—For each road separate, per square yard.

2—For the entire mileage of roads per square yard.

Bidders may submit bids for Standard Asphalt Road Oil, Texas Road Oil, Asphaltine, or any of the other Asphaltic Oils equally as good, the determination being left entirely to the Board of Chosen Freeholders.

The Board of Chosen Freeholders reserves the right to increase or decrease the yardage of any of the roads mentioned in the specifications and proposals fifty per cent (50%). 30

The roads will be oiled for the most part nine (9) or twelve (12) feet in width, the determination being left to the Board of Chosen Freeholders.

## VI.

### CLEANING.

The surface of the road for a distance of two feet more on each side than the width of oil to be applied, shall be thoroughly swept and cleaned by scraping and brooming: all dirt and dead material as soon as collected shall be removed away from the road in carts before any oiling is commenced.

### APPLICATION OF OIL.

10 Road shall be absolutely dry and the sprinkling should be done only in warm weather. The oil should be applied by means of a suitable Oil Sprinkler satisfactory to County Engineer or Supervisor, capable of distributing the oil uniformly at different widths and so arranged as to allow the operator to control the flow.

20 The oil must be applied on the road in two applications at the rate of not more than one quarter gallon per square yard per application and must lay the dust to the satisfaction of the Board of Chosen Freeholders and the County Engineer: the second application to be made six weeks after the first application, unless the County Engineer or Supervisor rules otherwise.

After the application has been made any streaks or spots left uncovered by an unequal distribution should be broomed evenly over the surface and should be protected from traffic at least six hours or for such a time as is necessary to allow the oil to penetrate into the surface of the macadam.

30 Only one side of the road to be oiled shall be treated at a time and the other side left open for traffic until in the judgment of the County Engineer or Supervisor sufficient penetration has been obtained so as to allow traffic on the same.

## VII.

### SANDING OF CROSS WALKS.

All cross walks should be immediately before oiling covered with clean sharp sand. No oiling is to be commenced until the sand is on the work ready for distribution.

### PROTECTION OF THE WORK.

All work should be protected if found necessary, by sufficient barriers and lights or other means as directed by County Engineer or Supervisor.

Contractors will be liable for any damages from his neglect to do so.

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### INTERFERENCE WITH TRAFFIC.

The contractor will execute his work so as to interfere with traffic as little as possible.

### DELAYS IN THE WORK.

If at any time the Engineer shall be of the opinion that the said work is unnecessarily delayed and will not be finished in the prescribed time, he shall notify the Contractor in writing to that effect.

20

If the contractor shall not within two days thereafter take such measures as will in the judgment of the Engineer incur satisfactory completion of the work, the Engineer may then, by and with the consent of the Board of Chosen Freeholders, notify the said Contractors to discontinue all work under the contract and by written notice to be served upon the said Contractor either personally or by leaving notice at his residence or with his agent in charge of the work. The Contractor shall immediately respect such notice and stop the work and cease to have any rights to the possession of the road. The Board

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## VIII.

of Chosen Freeholders shall thereupon place such and so many persons as they may deem advisable by contract or otherwise, to work at and complete the work herein described, and to use such materials as they may find on the line of work or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the aforesaid contractor and the expense of said charge shall be deducted and paid by the said Board of Chosen Freeholders out of such moneys as may then be due, or may at any time thereafter become due to said Contractor under and by virtue of this contract or any part thereof: and in case such expense is less than the sum which would have been payable under the contract if the same had been completed by the contractor, he shall be entitled to receive the difference and in case such expense is greater, the Contractor shall pay the amount of excess on notice from the said Board of Chosen Freeholders of the excess so due, and his bond shall be liable thereafter without notice to the sureties of default on part of the Contractor.

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### PAYMENTS.

Payment on account of work performed will be made monthly by the Board of installments of 80 per cent on the amount of work executed during the preceding month, under and in accordance with the provisions and stipulations of the contract, which will be certified by the County Engineer. Final and full payment of the balance due the Contractor after all legal and equitable deductions will be made upon the final certificate of said Engineer, provided the whole work and each of its parts be in perfect order.

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## IX.

### RIGHT TO DISCONTINUE THE WORK.

The Board of Chosen Freeholders reserves the right to discontinue the work at any time upon notice to the Contractors, and in case of such discontinuance the Contractor shall be entitled to be paid only for the work done at the time notice to discontinue the work is given.

### BOND OF CONTRACTOR.

The Contractor will be required to execute within five days of giving of contract a bond in such sum and with such securities as shall be approved by the Board of Chosen Freeholders, conditioned for the faithful performance of this contract, to indemnify and save harmless the Board of Chosen Freeholders from all suits or actions of any name or description brought against it on account of the default or neglect of the Contractor, said Bond shall be in the sum of not less than one-half the estimated cost of the road completed. Any change made in plans, specifications, agreements or quantities without the consent of the Bondmen shall in no way vitiate said bond. The Contractor hereby further agrees that so much of the money due him under or by virtue of this agreement, as be retained by it, until all suits of damage aforesaid, shall have been settled, and evidence to that effect furnished to the satisfaction of the Board of Chosen Freeholders.

Contractor to insure payment for labor, material, etc. on final estimate.

The Contractor must also furnish the Engineer with satisfactory evidence that all persons who did the work furnished material for this contract, or who have sustained damage or injury by reason of any act, omission or carelessness on his part or his agents in the prosecution of the work, have been duly paid or secured. He shall also give no

X.

tice to the Engineer within ten days after the completion of the work, and before final estimate is made, that any balance for such work or materials or compensation for such damages due, has been fully paid or released.

The right is reserved to reject any or all his bids, if deemed to the interest of the County or State.

10 The Contractor must start work within five days after the contract has been awarded and shall so prosecute the work as to complete the same within the time specified in his contract, which will be based on an average of at least 20,000 sq. yds. per day. Proper allowance being made however for weather and other conditions over which the Contractor has no control.

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## New Jersey Court of Errors and Appeals.

JOHN J. LYDECKER, by PETER J.  
LYDECKER, his next friend,

*Plaintiff-Appellant,*

*vs.*

THE BOARD OF CHOSEN FREEHOLD-  
ERS OF THE COUNTY OF PASSAIC  
and the STANDARD OIL COMPANY  
OF NEW JERSEY,

*Defendants-Respondents.*

10

Action at  
Law.

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### **BRIEF FOR RESPONDENT STAND- ARD OIL COMPANY OF N. J.**

The plaintiff sought to recover damages for injuries received in falling from a bicycle while riding along a public road in the City of Paterson. At the close of the plaintiff's case, the Judge granted a non-suit as to the defendant, the Board of Freeholders. At the end of the entire case, the Judge directed a verdict for the defendant, the Standard Oil Company. The judgment rendered is brought before this court for review.

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At the time the motion to direct a verdict was made, the following facts were before the court:

On July 30, 1913, the Board of Freeholders of Passaic County awarded a contract for the oiling of various roads in the County to the Standard Oil Company (p. 63). This contract provided (Exhibit P-1) that all the work should be done

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under the direction of the Board of Freeholders, the County Engineer and Supervisor and to their satisfaction; that the oil should be applied by means of an oil sprinkler satisfactory to the County Engineer or Supervisor, capable of distributing oil uniformly at different widths and so arranged as to allow the operator to control the flow; that the oil must be applied on the road in two applications at the rate of not more than one-quarter gallon per sq. yd. per application and must lay the dust to the satisfaction of the Board of Chosen Freeholders and the County Engineer; the second application to be laid after the first application unless the County Engineer or Supervisor ruled otherwise. The specifications further provided that the work should be protected if found necessary by sufficient barriers or other means as directed by the County Engineer or Supervisor.

**20** The plaintiff admits in his complaint that the Board of Freeholders "In the course of exercising its control and management of said road or highway for the purpose of laying or settling dust upon said highway, entered into a contract or agreement with the defendant, the Standard Oil Co. of New Jersey". The plaintiff testified that he left his house about 4 o'clock in the afternoon of August 20, 1913, and rode on his bicycle along East 18th Street until he reached 10th Avenue

**30** (p. 17). He says, "I did not notice oil until I had rode in it, and after I rode into it, the farther I rode into it, the thicker it got, the thicker the oil got, it got like paste, and as I rode to 11th Avenue corner, I did not notice a puddle of oil because it had yellow dirt over it and I ran right into it and my bicycle slipped from under me" (p. 17). He was asked (p. 31):

**40** "Where did you get on to this oil, how far from your house? A. I should suggest about 10th Avenue.

"Q. Then when you had crossed 10th Avenue, you knew there was oil? A. Yes, sir.

"Q. You had ridden over oil a great many times, had you not? A. Yes, sir.

"Q. And you continued riding in that oil? A. Yes, sir.

"Q. On that block? A. I continued riding, it was light and the further I went along it began to get heavier.

"Q. And did you try to get on to the tracks? A. I did not. 10

"Q. Did you continue riding right into that oil? A. I kept riding in the oil."

He further testified that the macadam on the street was in bad condition; that it had worn and there were small holes here and there along the road (p. 32); that he knew the condition of the street and knew there were holes in it (p. 32).

The father testified that the roadbed was rough (p. 46); that the street was in need of repair (p. 62). Several witnesses testified that the oil seemed to be very heavy, some saying that the oil seemed to be running from the sprinkler quite heavy in some places and in other parts of the sprinkler not so heavy (pp. 89-58-85 and 102). 20

Defendants' witnesses testified that they used motor vehicles for sprinkling the road (page 115); both oil sprinklers were suitable and satisfactory to the County Engineer (p. 160); that the County Engineer had supervision and charge of the work (p. 157); that he had an inspector on the job representing the County (p. 158); in the afternoon, work was started on East 18th St. on the right hand side going north (p. 116); only part of that half of the road was completed that day for the reason that they ran short of oil (p. 116); the next morning they finished up on the right hand side and later in the day finished the left hand side of the road (p. 117). There had been no trouble with the machines (p. 140). The 30 40

inspector for the County was on one of the sprinklers during the entire time they were sprinkling the street, giving instructions in reference thereto (p. 137). On the morning of the second day, Mr. Ferguson, the County Engineer, gave instructions to the drivers to go back and touch up a part of the road that had been done the day before as the work was not satisfactory and there was not enough oil laid (p. 118). These

**10** instructions were carried out by laying additional oil with a light spray (p. 119). No instructions were given by either the inspector or the County Engineer in reference to putting up barriers or obstructions of any kind at the place where the sprinkling was done (p. 141). The work, when finished, was satisfactory to the Engineer (p. 158 and 161), and the quantity of oil used was less than the maximum quantity prescribed in the specifications (pp. 161-162-163).

**20** The Engineer further testified (p. 166) that there were no streaks or anything of that character along the road, which indicated that the sprays of the machines were alright. The oil was a light oil, 40% asphalt (p. 179).

The Inspector testified (p. 182) that the work was performed according to the contract and specifications so far as he could tell; that the oil was laid on properly (p. 184).

**30** With this evidence before him, the Judge was justified in directing a verdict for the Standard Oil Company for the following reasons:

1. Plaintiff was guilty of contributory negligence.
2. There was no evidence of negligence on the part of the defendant, the Standard Oil Co.

3. The defendant, the Standard Oil Co., without negligence on its part, performed its contract according to the terms thereof, under the specifications and requirements of the Board of Freeholders of the County, and under the direction of the County Engineer and Supervisor.

4. Negligence of the Standard Oil Co. in the discharge of its duties under the contract with the Board of Freeholders cannot constitute the basis of an action in behalf of the plaintiff. 10

5. The Standard Oil Co. as agent of the Board of Freeholders and having no discretion in the matter, is not responsible in damages for any negligence arising from the improper laying of oil on the surface of the road.

#### POINT I.

**Injury not the result of negligence on the part of the defendant, the Standard Oil Company.** 20

The contract provided for two applications of oil at the rate of not more than  $\frac{1}{4}$  gallon per sq. yd. per application and the quantity used should lay the dust to the satisfaction of the Board of Freeholders and the County Engineer (P. Ex. 1). Specifications also provided for a second application to be laid six weeks after the first, but that was not done in this instance. The oil was to be applied by means of an oil sprinkler satisfactory to the County Engineer. The work was to be done under the direction of the Board of Freeholders and the County Engineer, and to their satisfaction. 30

The plaintiff seeks to recover damages because the defendants carelessly, negligently and improperly placed large and excessive quantities of oil on the road thereby rendering the surface slippery and dangerous to persons using the same 40

and the defendants also failed to close the road to traffic or to warn persons using the road of its dangerous condition. Upon this theory the case was tried.

Several witnesses testified as to the quantity and character of the oil spread upon the road, but there is nothing in the plaintiff's case to indicate that the quality or the quantity used was in violation of the terms of the contract. On  
10 the other hand, it was clearly shown that the quantity of oil laid was less than the maximum required by the specifications (pp. 161-162-163). In fact, after the first application was made on a part of the road, it was necessary to go over the work again and make a second application of oil. This was done under the direction of the County Engineer (p. 118). Plaintiff's whole case was built around the fact that there was a  
20 shallow depression in the roadway caused by a wearing away of the material and that oil was spread in that spot. No effort was made to show that the terms of the contract were not strictly obeyed. There is testimony that the oil was "thick," that it was "pasty," but that evidence is not sufficient to place responsibility on the Standard Company. If the quantity used was less than the maximum required and yet was an excessive quantity, nevertheless, the Standard Com-  
30 pany should not be responsible for the injury. It was for the Board to determine under its supervisory control over roads what quantity of oil was necessary to lay the dust and if the provisions of the contract were complied with the Standard cannot be held responsible for the injuries sustained. The duty of keeping the road-  
way safe for travel is fixed upon the Board of Freeholders and if, in the performance of that  
40 duty, they failed to provide safe roads, the responsibility is upon the Board.

There is some testimony as to the flow of oil from the machines, but granting that it did not flow evenly out of the sprinkler, nevertheless, that of itself does not indicate negligence. If the Company spread the oil in the manner prescribed by the contract, and laid on the road less than the maximum amount required, there is no liability. The evidence is uncontradicted that the spread of oil complied with the contract. It might have been "thick" when laid, or it may have been "pasty" and yet laid according to the terms of the contract. If the quantity required under the contract was excessive, which put the road in a dangerous condition for travel, that possibly would be a neglect of duty for which the Board of Freeholders alone is responsible and in such case an indictment only would be the remedy. *Bisbing vs. Asbury Park*, 51 Vr. 416. 10

This work was done under the supervision of the Board of Freeholders and the County Engineer; they were in direct charge of the work. The Standard Company had no right to close the road to the public. This was a duty which the County alone could exercise. The only authority granted the Standard Company to obstruct or interfere with the use of the road was contained in that part of the specifications which reads "all work should be protected, if found necessary, by sufficient barriers and lights or other means as directed by the County Engineer or Supervisor" (Exhibit P-1). The County Engineer gave no direction to put up barriers and in his judgment he did not find it necessary to do so (p. 164). Unless directed by the County Engineer, the Company had no authority to place any obstructions in the road. 20 30

## POINT II.

### **The civil liability of the Standard Oil Company should not extend further than the liability of the County.**

It is well settled in this State, that where a municipality owes a specific duty to an individual, an action will lie for the breach or neglect of that duty whenever such breach or neglect has occasioned an injury to the individual. But if such municipality owes a duty to the public and neglects to perform it, although every individual comprising that public is thereby injured, some more and some less, they can have no private remedy against the municipality. *Freeholders of Sussex vs. Strader*, 3 Harrison, 108-121. Such neglect is a public offense and must be remedied by indictment. *Pray vs. Mayor of Jersey City*, 3 Vr. 394-398. *Bisbing vs. Asbury Park*, 51 Vr. 416.

The duty to improve and keep county roads in repair is imposed upon the Board of Freeholders. This duty is a public duty and any neglect or carelessness in performing that duty by the Board affects the entire community and it is not such a specific duty to an individual as will sustain an action where an injury has resulted therefrom. *Bisbing vs. Asbury Park*, supra.

Therefore, it cannot be seriously contended that the Board is responsible in damages for the injury in question.

The question then arises whether the Standard Oil Co. can be charged with liability for performing the work of the Board of Freeholders in improving and making repairs to the road. It is admitted that the Board of Freeholders had the right to enter into this contract (p. 4). As was stated in the case of *Marvin Safe Co. vs. Ward*, 46 N. J. L., 19-27, referring to bridges,

“Such a contract creates the ordinary relation of employer and employee; it does not put off from the Board of Chosen Freeholders the duty and responsibility which the statute fixes upon them; nor does it create any duty or liability on the part of the other contracting party except such as arises inter sese from the terms of the contract.”

Now what is the situation? A Contract was made to oil the road. There is no proof that the Standard Company violated any part of that contract. Even though the maximum required was an excessive quantity nevertheless, there was no duty imposed upon the Standard Company to direct the Board what should be done in this respect. It was for the Board to determine that question. 10

It may be conceded for the purpose of argument that there was an excessive quantity of oil used on the road. That of itself would not make the Standard Company liable if the terms of the contract called for the quantity used. If there was too much oil, it was not due to any neglect or fault on its part. It was not for the Company to say that the quantity prescribed by the contract was excessive. If the Standard Company can be held responsible for doing the work in the manner prescribed in the specifications, then a contractor building a court house can be held responsible for injuries to a third party where the defects are due to the fault of the architect's plans, or where a contractor builds a public road in strict compliance with his contract and injury results to a third party by reason of defects in the plans of the Board of Freeholders. The Standard Company was under no obligation to do anything other than carry out the contract, and if the injury resulted to the plaintiff by reason of any imperfection or defect 20 30 40

in that contract, the Company is in no way responsible therefor.

10 I do not find any cases in New Jersey which bear directly upon the point in question. The case of *Styles vs. The F. R. Long Co.*, 70 N. J. L., 310, seems to be somewhat analagous. In that case the Board of Freeholders contracted to build a bridge. In the course of its construction, the contractor failed to properly light the bridge and as a result, the plaintiff was injured. It was contended that the contractor had sole control of the bridge and that its failure to properly light the same was a negligent act for which it should respond in damages. This court held that the duty to provide and care for bridges rests primarily upon the county authorities. The court affirmed the action of the court below in directing a verdict for the defendant.

20 In this case, the duty to maintain and keep in repair county roads rests exclusively upon the Board of Freeholders and the responsibility for its neglect rests upon that Board.

30 The Court of Appeals in Kentucky held that where a county is not liable for injuries caused by defects in its highways, one who contracts with it to construct a highway is not liable for injuries to a traveler caused by defects. In *Schneider vs. Cahill*, (Ky.) 127 S. W., 143, 27 L. R. A. (N. S.) 1009, a case where the plaintiff sought to recover of the contractor damages for an injury alleged to have resulted from the negligence of the contractor in permitting a ditch to remain open and unguarded upon the public road, the contractor having charge of the construction of the road, the court said:

40 "It is the duty of the county to care for and maintain its public roads, and whether this work is done by hands employed by the

day under the general supervision of a county official or under the direction of the supervisor or contractor is immaterial, the result is the same. The expense in either event being borne by the county and where because of some defect in the work or in the manner in which it is done, an injury is sustained by one using the road, if a liability existed, it would be the liability of the county and not that of the supervisor, the contractor or other employee, and, no recovery being allowed against the county, the trial judge correctly held that the petition did not state a cause of action." 10

### POINT III.

#### **The plaintiff contributed to his own injury.**

It clearly appears that the plaintiff knew the danger of riding a bicycle through freshly laid oil. He states that as he rode into the oil, he noticed it getting heavier, and, as he says, "It got like paste" (p. 17). Nevertheless, he continued running his machine through the oil on a road which he knew had holes in it (p. 33). 20

The judgment under review should be affirmed.

PIERRE P. GARVEN,  
Attorney of Defendant-Respondent,  
Standard Oil Co. of N. J.

30

day under the general supervision of a court  
 official of under the direction of the  
 work or contractor in handling the result  
 of the same. The expense in either event  
 being borne by the county and when placed  
 at some distance in the work or in the manner  
 of doing the same, it is sustained by  
 the county. If a liability existed, it  
 would be the liability of the county and not  
 that of the supervisor, the contractor or other  
 person, and no recovery being allowed  
 against the county, the court judgment  
 holds that the petition did not state a  
 cause of action.

POINT III.

The plaintiff contributed to his own  
 injury.

It clearly appears that the plaintiff knew the  
 danger of riding a bicycle through a hole  
 in the sidewalk, that he rode into the hole  
 and fell, it being however, and as he says, not  
 like the hole in the sidewalk, but a hole  
 caused by the machine through the sidewalk  
 and which he knew had holes in it.

FRANK P. GARDNER,

Attorney of Defendant Respondent,  
 Standard Oil Co. of N. E.

## New Jersey Court of Errors and Appeals

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John J. Lydecker, by Peter  
J. Lydecker, his next friend,  
*Plaintiff.*

vs.

The Board of Chosen Free-  
holders of the County of  
Passaic, and the Standard  
Oil Company of New Jersey  
(a corporation),

*Defendants.*

---

*On Appeal.*

### **BRIEF ON BEHALF OF PLAINTIFF.**

#### **Statement of Facts.**

The plaintiff, eighteen years of age, on the 20th of August, 1913, while riding his bicycle along East 18th Street, Paterson, was injured by reason of the bicycle suddenly slipping from under him, throwing him to the ground and causing him to sustain a compound fracture of the arm and other injuries. The cause of the slipping was due to the fact that the street had been oiled, and such an extraordinary quantity of oil had been used as to form pools in depressions in the street, and over these pools a film of dust or dirt had formed, so that their existence was not apparent to an ordinary observer.

The plaintiff's story on this point is as follows: "When I left the house I walked out to the gutter and got on my bicycle, crossed the street, and when I reached Tenth Avenue, I did not notice the oil until I had rode on it, and after I rode in-

to it, the farther I rode into it, the thicker it got, the thicker the oil got, it got like paste, and as I rode to Eleventh Avenue corner I did not notice a puddle of oil, because it had yellow dirt over it and I ran right into it and my bicycle slipped from under me." When asked where he first came in contact with the oil he said it was after he crossed Tenth Avenue, and the accident happened when he reached Eleventh Avenue, one block south. (P. 17 L. 20-40). At the time of the accident he was riding at about five miles an hour (P. 18-L. 5-10). He could not see the oil at the point where he fell because it was covered with a scum of dirt (P. 18-L. 20-30).

The condition of the road, the manner in which the accident happened was shown not only by the plaintiff, but by a number of witnesses produced by him. In fact, the proof as to the manner of the action was overwhelmingly in favor of the plaintiff, the defendant not producing any one in contradiction as to the manner in which the accident happened.

It appeared that East 18th Street, although a city street, was under the control of the Passaic County Board of Freeholders, and that it had been oiled by the defendant, the Standard Oil Company of New Jersey, in accordance with a contract between it and the Board of Chosen Freeholders, which contract although bearing date August 28th, 1913 (eight days after the accident) was by stipulation between counsel conceded to have been entered into on the 30th of July previous, and that the Standard Oil Co. had actually undertaken the performance of the contract before the same was actually signed (P. 63). The contract marked Exhibit E. P.-1 is annexed to the state of case.

It further appeared that this accident had happened about 4:00 o'clock in the afternoon (P. 17. L. 22), and that the oil had been put on the road that afternoon somewhere between 2:30 and 3:00 o'clock. (See testimony of Alexander Smith, p. 80, L. 10-15; Elizabeth Williams, p. 88, l. 20-30; Georgiana Conklin, p. 96, l. 10-15; Mary E. Cubbe, p. 105, l. 10-14). It appeared generally throughout the case that there had been no barriers put up, or no warning of any kind given as to the condition of the road. (See testimony of Georgiana Conklin, p. 95, l. 1-5; Mary E. Cubbe, p. 106, l. 5-10, and the testimony of other witnesses).

At the close of the plaintiff's case the Court granted a non-suit as to the Board of Chosen Freeholders, and at the close of the whole case, directed a verdict in favor of the Standard Oil Company. From these rulings this appeal is taken.

### POINT I.

**The street was negligently and improperly oiled; the plaintiff was free from contributory negligence.**

At the close of plaintiff's case the counsel for the Standard Oil Co., moved for a non-suit on the ground of contributory negligence on the part of the plaintiff and lack of evidence on the part of the defendant. This motion was denied, but was renewed at the close of the whole case in connection with other motions. Although the court directed a verdict for the defendant, the precise grounds do not appear at the close of the whole case, although it is a fact that it was on questions of law arising out of contractual relations be-

tween the Standard Oil Company and the Board of Chosen Freeholders, which caused the direction of a verdict. Nevertheless as counsel for the defendant may insist that this court should consider the question of contributory negligence or negligence of the plaintiff, we accordingly are giving this part of the case consideration.

As we have stated above all the evidence in the case with reference to the accident appears on the part of the plaintiff. It appears in the case from the testimony of the plaintiff that on the afternoon of the day of the accident he rode south on East 18th Street. He proceeded to cross Tenth Avenue, and then came in contact with the oil on the road. As he rode on, the oil got thicker and pastier, but the immediate cause of the accident was that when he reached 11th Avenue, a pool of oil which had formed in a hole in the street was unnoticed by him, and in consequence he rode through same and his bicycle slipped and he fell. He did not notice the pool because of the presence of dirt or dust over it (p. 17-p. 18, l. 1-10-l. 25-30). The oil covered the entire street from curb to curb (p. 18, l. 24-28). He testified that he had ridden over other oiled streets at other times, but had never had any trouble (p. 19).

PETER J. LYDECKER testified that the road at East 18th Street was rough with spots or holes (p. 46, l. 20-30). That he learned of the accident at 5:00 o'clock in the afternoon of the day in question (p. 46, l. 35); that on his way to work at 2:00 o'clock that day he had noticed the oil all over the street, at a point from 11th Avenue to Broadway (this would be south of the scene of the accident, as Broadway lies to the south of 11th Avenue and 10th Avenue lies to the north of 11th Avenue). He noticed that around 11th Ave-

nue the oil was very heavy and pasty (p. 47, l. 30-40). This oil he described as being as thick as molasses (p. 48). Upon learning of the accident he examined the place where it happened, and saw the pool which his son has testified to (p. 53, l. 10 to bottom; page 54, l. 16-22). The hole was oval shape about 18 in. long.

ALEXANDER SMITH, testified that he saw plaintiff coming along on his bicycle at a slow rate of speed, that suddenly the wheel slipped from under him and he fell down (p. 77, l. 30 to bottom); that this happened on the corner of East 18th Street and 11th Avenue (p. 77); that at that point the road was rough from usage with a number of holes there, and the oil seemed to be laid right in them; the oil seemed to be heavier than he had ever seen before (p. 79, l. 15-30).

ELIZABETH WILLIAMS, testified that the whole street from curb to curb was oiled (p. 89, l. 30); that it was heavily oiled (p. 90, l. 10-15).

GEORGIANA CONKLIN, described the oil as being thick like molasses and in a puddle (p. 96, l. 30-40); this puddle was at the place where the boy fell (p. 97, l. 1-5). The road at that point was in bad condition filled with holes (p. 97, l. 1-5).

MARY BRIGGS, was sitting on her porch when she saw the accident. She saw the boy go down to 11th Avenue and the wheel go from under him; that the road at that point was all oiled and was like a thick paste (p. 100, l. 8-25). She noticed these different puddles in the road filled with oil (p. 100 and 101).

MARY E. CUBBE, testified generally as to the condition of the road and the fact that the oil

filled the holes, so that they were not easily visible after they were filled. She saw the accident (p. 104) (as did the other witnesses). That she saw the oil wagon and to her it seemed as if the oil came thicker from some parts of the sprinkler than the other, and as a result the oil was falling thicker on some parts than the other (p. 105, l. 25; p. 106, l. 1-7). That there were no barriers erected on the street.

All of the witnesses agreed to the extraordinary condition of the road caused by the excessive use of oil. In using the street the plaintiff was not guilty of negligence. In the first place, he had traveled but a city block and conditions had only grown worse as he had traveled along, so that it cannot be said as a matter of law that he was made cognizant of the dangerous condition of the street until the accident had happened. The pool in which he slipped had been covered with a scum of dirt or settling of dust, so as to hide its presence, and these facts coupled with the law on the subject as to what a person using a public highway may presume, left the question of contributory negligence a question for the jury. The law is well settled in this State as it is elsewhere that a person has a right to presume the street to be safe.

See *Palmer vs. Durant*, 29 N. J. L. p. 594.

The following is also particularly in point:

“When one drives from the country into the city, it is not contributory negligence for him to drive through a public street, and through what appears to be a mere pool of water standing there; there being in fact a concealed hole 2 1-2 feet deep under the pool.”

*Hedges vs. Kansas City*. 18 Mo. App. 62.

In the case of *Bailey vs. Osborne*, 80 N. J. Law, p. 334, the following is said:

“That a municipal corporation is liable for such active misconduct is settled in this state. *Hart vs. Freeholders of Union*, 28 Vr. 90; *Kehoe vs. Rutherford*, 45 Id. 659.”

#### THE QUESTION OF NEGLIGENCE OF THE DEFENDANT, THE STANDARD OIL CO.

The duty incumbent upon the Standard Oil Co., in oiling the streets, has been well settled in the case of *Slater vs. North Jersey Street Railway Co.*, 75 N. J. Law, p. 890:

“Where a trolley company applies a lubricant to its tracks along a public street in order that its cars may pass around a curve more easily, it is its duty to make the application in such manner as not to endanger the safety of persons entitled to use the street.”

“In crossing a public street at a corner where a pavement crossing has been laid, the plaintiff had a right to assume that it was a safe place to walk over, and that there was no danger in doing so, unless warned to the contrary, and when passing along the crossing, was not guilty of contributory negligence because in observing an approaching street car to avoid danger from it, she inadvertently stepped upon a portion of the crossing covered with oil, put there by defendant as a track lubricant, and was thrown down and injured.”

In the opinion to said case, Justice Bergen said:

“Under the well established rule in this state a person using the side-walks and cross-walks of a public street has a right to presume that they are safe for ordinary use, and that ‘there is no dangerous impediment or pitfalls in any part of it’ (Durant vs. Palmer, 5 Dutcher 544), and when this defendant placed upon its tracks, and the pavement of the cross-walk, sufficient black oil or other lubricant to throw one who might step upon it, a case is presented, which *if not justifying a direction for the plaintiff*, at least required the submission to the jury of the question whether the conduct of this defendant in making the cross-walk dangerous was not, under the circumstances, a negligent act.”

If, as the witness, Mary E. Cubbe, testified, that the oil seemed to come out of one part of the sprinkler more than the other, there would be an inference that the defendant operated with a defective sprinkler. The character of the roadbed was well known to the defendant and the slightest conception of care on its part would have caused it to have had one of its employes go over the road behind the wagon, and broom from these holes the oil which had formed there, which by reason of the coating of dust which had formed thereon would prevent a pedestrian or driver from observing them.

We are about to direct the court's attention to certain provisions in the contract between the defendants, providing for precautions to be taken to protect traffic.

In referring to these provisions we do not wish to create the impression that we depend on these provisions and their non-performance by the defendant as forming the basis of our case. It is our insistence that irrespective of these provisions in the contract, the plaintiff's case should prevail on the theory that the defendant, the Standard Oil Co., created a dangerous nuisance, and was therefore liable. It is upon this theory, and not upon the theory of the non-performance of these provisions by the defendant that we base our case. Thus, we distinguish between the case of *Stiles vs. Long Co.* (41 Vr. 302), herein-after discussed and the case at bar.

We merely refer to these provisions in the contract for the purpose of indicating that the defendant, the Standard Oil Co., had it called to its attention and knew, that unless these certain things were done as contemplated by the provisions of the contract, a dangerous situation would rise, and the defendant, the Standard Oil Co., would be guilty of creating a dangerous nuisance.

The contract between the Board of Chosen Freeholders and the Standard Oil Company, distinctly provided against excess quantities of oil being placed upon the road; that the oil should be distributed uniformly, and in two applications at the rate of not more than one-quarter gallon per square yard, and six weeks to intervene between each application.

“After the application has been made, any streaks or spots left uncovered by an unequal distribution should be broomed evenly over the surface and should be pro-

tected from traffic at least six hours or for such a time as is necessary to allow the oil to penetrate into the surface of the macadam."

"Only one side of the road to be oiled shall be treated at a time and the other side left open for traffic until in the judgment of the County Engineer or Supervisor sufficient penetration has been obtained so as to allow traffic on the same."

It further provided that the cross-walks should be sanded, and that all work should be protected by sufficient barriers and lights or other means as directed by the County Engineer or Supervisor.

"The contractor will execute his work so as to interfere with the traffic as little as possible."

"Contractors will be liable for any damages from his neglect to do so."

(VII. of the contract).

The reading of these specifications which accompany the contract to the bidders, shows clearly that the road was not applied evenly as required by said contract, and that the rough spots were not "broomed;" that the oil must have been applied in a much heavier quantity than a quarter of a gallon to the square yard. The evidence distinctly shows that barriers were not erected; that the entire street, instead of half the street, was oiled at the same time, and that the road was not closed from traffic for at least six hours, or until the oil had sufficiently penetrated. It was the failure to do these things that caused the accident, and therefore, it was an act of negligence.

**POINT II.**

**A verdict should not have been directed in favor of the defendant the Standard Oil Company.**

We have pointed out that the evidence in the case showed the exercise of reasonable care on the part of the plaintiff, and of the fact that a negligent act was committed by the defendant in distributing upon the street an excessive quantity of oil, and the filling of hollows with oil. Counsel for the Standard Oil Company, however, in his argument before the trial judge placed his main contention upon the fact that "the Freeholders of this County retain control of the manner of doing the work, and the quantity of oil used, and therefore, the relation between the Standard Oil Company, and the Board of Freeholders was that of master and servant, and the maxim respondent superior applies, and if liability exists, the master alone is liable." (State of case P. 189, L. 5-15). The point of defendant's counsel is not well taken.

The contract in this case did disclose the fact that the County Engineer or Road Supervisor were to be satisfied with the manner in which the work was done; that only one side of the road was to be oiled and the other side not to be oiled until the County Engineer was satisfied that the oil on the first half had thoroughly penetrated, and that sufficient barriers or lights should be erected as required by the contract. But the contract further provided that the Standard Oil Company *should provide itself with all materials, tools and labor for the completion of said work*; that the payment to be made should be for the work, labor and material, and any loss or damage occasioned to the

work, material or to personal property should be borne by the Oil Company. It will thus be noted that the Oil Company had exclusive control over the labor and instrumentalities to be used. The Board of Freeholders by its County Engineer or Supervisor were limited strictly to seeing that the work was done to their satisfaction, agreeably to the specifications.

The cases in this State and elsewhere are clear to the effect that the relation of master and servant only arises where the right to hire and discharge and control the labor remained with the municipality. That where these were absent, the mere fact that a municipality reserved the right to supervise the work, so as to enforce compliance with the contract, did not create relationship of master and servant between said municipality and the contractor.

In illustration we cite the following:

“The corporation will not be liable for the negligent performance of a contract by an independent contractor or for the acts of his servants, even if the work is done under the direction of an official authorized to inspect it and vested with all powers necessary to secure compliance with the contract, but with no authority to control the men or the manner of their work, such power of direction referring merely to the result of the work” (28 Cyc. 1281).

In connection with the above quotation, the following citations appear:

“Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392 (unauthorized act by servant of contractor); Foster v. Chicago, 96 Ill. App.

4 (holding that, although the contractor agreed to perform all the work "under the immediate direction and superintendence of the commissioner of public works, and to his entire satisfaction, approval and acceptance," the work he agreed so to perform was that prescribed in the contract, and this direction and superintendence relate to results, to the character of the workmanship and not to methods, unless by use of improper methods the character of the workmanship was rendered unsatisfactory); *Cary v. Chicago*, 60 Ill. App. 341."

"*Erie v. Caulkins*, 85 Pa. St. 247, 27 Am. Rep. 642 (where a stipulation that an engineer should have power to direct changes in the time and manner of conducting the work was held not such a reservation of power as would render the corporation liable); *Ginther v. Yorkville*, 3 Pa. Super. Ct. 403." (28 Cyc. 1282).

In *Upington v. New York*, 165 N. Y. 222, 59 N. E. 91, the Court said:

"While certain municipal officers could require the contractors to discharge incompetent workmen, that did not make the workmen not discharged the servants of the city, nor empower it to fill the places of those discharged with men of its own selection. Stipulations to secure faithful compliance with the specifications on the part of the contractors do not make them servants of the city, as was held in *Kelly v. New York*, 11 N. Y. 432, where the contract contained the following clause: "The

whole work to be done under the direction and to the entire satisfaction of the commissioner of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work." The contractor in that case also "agreed to do the work, to take all necessary precautions for the prevention of accidents or injuries to persons or property, and to indemnify the corporation against all loss or damage by reason of any neglect or unskilfulness in its performance." The court said: "The clause in question clearly gave to the corporation no power to control the contractor in the choice of his servants. That he might make his own selection of workmen will not be denied. This right of selection lies at the foundation of the responsibility of a master or principal for the acts of his servant or agent. \* \* \* \* \* As a general rule, certainly no one can be held responsible as principal who has not the right to choose the agent from whose act the injury flows. \* \* \* \* \* The object of the clause relied upon was not to give to the commissioner of repairs and the other officer named the right to interfere with the workmen and direct them in detail how they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe what was to be done, but not how it was to be done, nor who should do it." So, in *Pack v. New York*, 8 N. Y. 222, the contract provided that the work was to be done according to certain specifications, and the contractor also agreed to "conform the

work to such further directions as should be given by the street commissioner and one of the city surveyors;" yet it was held that this was "nothing more than a stipulation for a change of the specification of the work, as stated in the contract, at fixed prices, provided, therein." "It does not, as the court held below, make Riley the immediate servant of the defendants, or give to them any control over him as to the manner or otherwise in which he should conduct the blasting." See also *Charlock v. Freel*, 125 N. Y. 357, 25 N. E. 262, where the city reserved the right to "vary, extend or diminish the quality of work during the progress, and authorized the engineer to fix the price of all work not included in the contracts." As was said by the learned appellate division, the "supervisory powers related to the character of the work performed for the then City of Brooklyn, and not to the relations of the contractors with third persons" (41 App. Div. 376, 58 N. Y. Supp. 535.)

*The case of Stiles vs. Long Co.* (41 Vroom, page 302).

Counsel for Standard Oil Company placed great reliance upon this case. His point being that this action arose because of a breach by the Standard Oil Company, of its contract with the Board of Freeholders, and that the plaintiff being a third person could not take advantage of this breach of contract. He cited the Stiles case, which does hold substantially the contention of the defendant's counsel. The Stiles case, however, and the case at bar are entirely dissimilar. The Stiles case by

the opinion of the Court of Errors and Appeals, 41 Vroom, page 301, 57 Atl. Rep., p. 448, showed that the injury arose out of the failure on the part of the Long Company, to properly light a temporary bridge which it had erected as part of a contract with the Freeholders of Passaic County to build a new bridge. The court held in the second syllabus that:

“Where an injury to the plaintiff arises out of the failure of the defendant to perform a contract with a third person, the defendant in the absence of positive duty, apart from the duty to perform the contract, is not liable to the plaintiff, where the duty of a third person intervenes between the neglect of the defendant and the injury to the plaintiff.”

This case, however, did not arise out of the failure on the part of the Standard Oil Company to perform its contract. The cause of the action in the case at bar was the *creation and maintenance of a nuisance* by the Standard Oil Company. The cause of the injury in the Styles case was not the creation of a nuisance. It was the failure of the Long Company to do something which it had contracted to do, but the failure to perform such contractual act did not constitute a nuisance. The Court of Errors in the Long case made that distinction clear when it said:

“It is not contended that the bridge was a nuisance.”

The distinction between the cases are made more clear in the Supreme Court opinion in the Stiles case (51 Atl. Rep., p. 710), where the court said:

“The general rule that one who is not a party to a contract cannot maintain an action of tort in respect of the breach of a duty arising solely out of the contract applies to stipulations imposing a continuing obligation.”

In *Appleby v. State*, 45 N. J. Law, p. 161, the Court held:

“A duty the breach of which is an actionable wrong may arise from a contract or be imposed by positive law. In the first case, the party to the contract only can sue; in the other case any person injured may sue, if he be one of the class of persons for whose benefit the duty is imposed.”

Justice Depue in that case said:

“The duty of the clerk with respect to such entries in the records of his office being a public duty, if there has been a breach of it he will be liable to any one who may have suffered damages from his neglect or default—the action being founded, not on contract, but on breach of duty. Add. on Torts 14, 15; Whart. on Neg., Sec. 285, 443.”

The rule is thus stated in 38 Cyc., page 433, subject “torts”:

“When the duty violated by defendant was created solely by contract, a cause of action arising out of such violation is limited strictly to the parties to such contract and those in privity with them. No priv-

ity of contract is necessary, however, to sustain an action in tort by an individual specially injured by an act or omission constituting a breach of contract, where it also constitutes *an invasion of a legal right of or violation of a legal duty owed to the plaintiff independently of or concurrently with the contract.*"

In connection with the above quotation, amongst the cases cited is that of Pennsylvania Steel Co. v. Elmore & Hamilton Contracting Co., 175 Fed. Rep., p. 176. In that case the defendant company entered into a contract with a third company to erect concrete piers. They negligently and fraudulently failed to mix the concrete properly, so that the piers became unsafe and insufficient, and when plaintiff attempted to use one of the piers, it collapsed and injured plaintiff's property. The court in that case said there was no contractual relationship between plaintiff and defendant. The court in its opinion said:

"Allowing the use of the word 'negligently,' as descriptive of the nature and character of defendant's acts of omission and commission, to determine the nature of the action, as one of wilful tort and wrong, or as one of negligence pure and simple, and we have a complaint in an action of negligence, and then we are to consider whether, in such a case, it is necessary for the complaint to allege or show contractual relations or privity of contract between the plaintiff and defendant. \* \* \* \* \* 'We have a case where a contractor \* \* \* \* \* makes a dangerous structure to persons and proper-

ty thereon, which is designed for people to go upon and place heavy loads and valuable property upon, and then turns it over for such use with assurance that it is all right and safe and according to contract. It falls when put to its intended use and damage to the property of third persons, rightfully there follows. Can there be any doubt of the existence of a right to recover damages? Not if *Kuelling v. Lean Manufacturing Co.*, 183 N. Y. 78, 83, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, or *Devlin v. Smith* 89 N. Y. 470, 477, 42 Am. Rep. 311, or *Torgesen v. Schultz*, 192 N. Y. 156, 159, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 12 Am. St. Rep. 894, or *Heaven v. Pender* L. R. (11 Q. B. D.) 503, or *Riggs v. Standard Oil Co.* (C. C.) 130 Fed. 199, or *Thomas v. Winchester*, 6 N. Y., 397, 57 Am. Dec. 455, is good law.' \* \* \* \* \* 'The liability arises, not out of a breach of contractual relations, and the duty is not one imposed by contract, but is a duty imposed by law, irrespective of contractual relations between the parties.'

We commend the foregoing case, with its exhaustive collation of authorities to the attention of the Court.

In *Lechman v. Hooper*, 52 N. J. Law, p. 253, the principal cited upon was recognized in the opinion of Chief Justice Beasley. In part he said:

"The legal situation was this: 'The defendant had erected this wall, and, therefore, the law imposed on him the duty to put it in a safe condition, or to give warning of its unsafe condition, and this was a

duty he owed to each individual person who should lawfully come upon the premises.”

See also cases cited in 38 Cyc., p. 434, note 60.

In *Conklin v. Staats*, 70 N. J. L., p. 77, Chief Justice Pitney pointed out that the injuries complained of arose solely because of a breach of contract, and the plaintiff not being a party to the contract could not recover. He said:

“There was nothing in the situation that arose out of the contract to impose upon the defendant, independent of its provisions, any general duty to the public, or any special duty to the plaintiffs of such a character as to charge the defendant with responsibility for the existence of a submerged pile.”

We believe the foregoing citations make clear the distinction between cases where the injury arises solely because of a breach of contract, and cases where an injury arises because of some breach of duty to the public. The stipulations annexed to the contract required the defendant to use care in the manner in which it oiled the road, and the means by which it guarded the public from injury while the oil should penetrate in the soil; it was a duty that the defendant owed to the public irrespective of the clauses in the contract. It was one of those cases where “an invasion of a legal right, or violation of a legal duty owed to the plaintiff” was independent of the contract or concurrent with it. The act of the Standard Oil Company, in oiling the public highway as it did was a nuisance pure and simple, and that Company could not contract away the duty it owed the public or escape responsibility by any such subterfuge.

### POINT III.

#### No non-suit should have been granted to the Board of Chosen Freeholders.

We contend that the Board of Chosen Freeholders should have been held under the case of *Hart vs. Board of Chosen Freeholders of Union County*, 57 New Jersey Law, p. 90 (Atl. Rep. 29, p. 490). The Syl. to the court in that case is as follows:

“The exemption of a municipal corporation from actions by individuals suffering special damage from its neglect to perform, or its negligence in performing, public duties, whereby a public wrong is done for which an indictment will lie, does not extend to actions where the injury is the result of active wrongdoing chargeable to the corporation.”

The wrongdoing in the *Hart* case consisted of a deep excavation in the public highway, under the control of the Board of Chosen Freeholders, which was left unguarded and which the plaintiff fell into and was injured. Said the Court:

“This discloses a special injury inflicted on plaintiff by a common and public nuisance created not by this defendant’s neglect or negligence in performing a public duty, but by its active wrongdoing.”

“There is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their wrongful acts, as distinguished from mere negligence.”



## New Jersey Court of Errors and Appeals

JOHN J. LYDECKER, by PETER  
J. LYDECKER, his next friend,  
*Plaintiff,*

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
PASSAIC, AND THE STANDARD  
OIL COMPANY OF NEW JERSEY  
(a corporation),

*Defendants.*

*On Appeal.*

### BRIEF OF DEFENDANT, THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF PASSAIC.

This appeal brings up for review a non-suit granted at the Passaic Circuit Court in favor of the defendant, the Board of Chosen Freeholders of the County of Passaic, and a direction of a verdict in favor of the defendant, the Standard Oil Company of New Jersey.

The complaint alleges (p. 4) that the defendant, the Board of Chosen Freeholders of the County of Passaic "in the course of exercising its control and management of said road or highway (East 18th St.) and for the purpose of laying or settling the dust upon said highway," entered into a contract with the defendant, the Standard Oil Company of New Jersey, to oil said road with a preparation known as Standard Asphalt Road Oil or a crude oil preparation. That said Standard Asphalt Road Oil or crude oil preparation is an extremely slippery substance when laid on the road in large quantities; that the defendant, the Standard Oil Company laid the oil in large and excessive quantities, rendering the surface

of the road extremely slippery and dangerous to persons using bicycles, etc., and charges the defendant the Board of Chosen Freeholders with negligence in not removing said oil from the road, in failing to close said road to traffic, in failing to warn persons using bicycles, etc., of the dangerous condition of said road, and in failing to make said road safe, and alleges that the plaintiff on the 20th day of August, 1913, while riding a bicycle on said street by reason of the dangerous condition of said road slipped, swerved and overturned, throwing the plaintiff with great force and violence, whereby he sustained injury for which he seeks to recover damages.

The testimony shows that the defendant, the Board of Chosen Freeholders, had entered into a contract with the defendant, the Standard Oil Company for the oiling of said street, which company was engaged in the work when the accident happened.

The testimony shows that this was a usual method of repairing the surface of a street and preventing dust.

The plaintiff's father states (p. 61) that he had been a rural delivery carrier for eight years and had ridden over roads that had been oiled five years before.

The testimony of Joseph A. McGrath, Edward R. LeBaugh, Garwood Ferguson, County Engineer, and Edward McDonald, the inspector, shows that this was a usual method of repairing streets.

There is no disputing the fact that the Board of Chosen Freeholders in causing said street to be oiled was exercising its lawful control and management of the road for the purpose of laying or settling the dust and preserving and repairing said road, and was in the lawful exercise of a public duty required of

the defendant. This is admitted by the fifth paragraph of the complaint (p. 4) filed in this cause.

I.

**IN THE ABSENCE OF STATUTE AN ACTION WILL NOT LIE AGAINST A MUNICIPAL CORPORATION AT THE INSTANCE OF AN INDIVIDUAL WHO HAS SUSTAINED SPECIAL DAMAGE IN CONSEQUENCE OF THE NEGLIGENCE OF SUCH CORPORATION IN THE PERFORMANCE OF OR NEGLECT TO PERFORM A PUBLIC DUTY.**

This principle is clearly laid down in the decisions of this state.

In *Bisbing v. Asbury Park*, 80 N. J. L. 418, our Court of Errors and Appeals held,

That where a dangerous condition exists in a public park, the negligence of the public authorities in permitting such condition to exist would not render such municipality liable to respond to a suit of one of the general public injured in consequence thereof.

In this case the plaintiff brought suit against the City of Asbury Park for damages she sustained by stumbling over a water pipe in the ground over which the plaintiff was walking, and where it was admitted in the case that the plaintiff had a right to walk. The place where she was walking was on a grass plot about 2½ feet southerly from the walk and where there was maintained by the City an upright water pipe three or four inches in height and lateral pipe which near the upright pipe was exposed, there being a hole or depression in the ground about six inches deep and some two feet in diameter.

Justice Voorhis in rendering the opinion of the court, p. 418, says,

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“It is not controverted and could not well be under the law as expounded in this state since the year 1840, that in absence of statute action will not lie against a municipal corporation at the instance of an individual who has sustained damage in consequence of the neglect of such corporation in the performance of such public duty.”

Under the principle laid down in this case, the following cases are cited:

(a) Freeholders of Sussex v. Strader, 18 N. J. L. 108, (September Term, 1840).

In this case the suit was brought for not keeping a bridge in repair. The Court held, no action lies by an individual against the Board of Chosen Freeholders for injuries sustained in consequence of their not completing or keeping in repair a county bridge or its abutments. The only remedy is by indictment.

(b) Livermore v. Freeholders of Camden, 29 N. J. L. 245 (1861).

In this case suit was brought for injuries sustained by the plaintiff's mill dam by reason of the fall of a county bridge.

On demurrer the Court held that the County was not liable. On page 246 the court says, the duty is a public duty. The plaintiff alleges that private injury was sustained by reason of the neglect of a public duty. (Affirmed 31 N. J. L. 507).

(c) Pray v. Jersey City, 32 N. J. L. 394, (1868).

In this case the city was building a sewer and in the performance of the work holes were left to permit men to go, as necessarily required, into the sew-

er, such holes being about three feet square and coped with stone. One of these holes at the place of the accident was raised above the surface of the street. The Plaintiff was driving a pair of horses near the hole, and one of the horses became excited, pushed the other horse against the stone coping, thus impeding the way which resulted in injury.

Chief Justice Beesley says (p. 397)

“The common law casts upon the township the burden of making and repairing its public highways, as it does upon the county that of making and repairing bridges, but the township is not liable civilly for the neglect of duty to anybody sustaining special injury thereby, nor is a county, in a like case, for injury arising for the non-repair of bridges. The duties are owing to the public — not individuals, — and their performance is enforced by indictment, not suits by individuals.”

(d) Wild v. Paterson, 47 N. J. L. 406 (1885).

In this suit the plaintiff was injured, being run over by a fire engine. On demurrer to declaration, Justice Magie says (p. 411), It has been stated beyond the possibility of further contention, in this state, that municipal corporations are not liable to actions *for neglect to perform or negligence in the performing of duties imposed on them by law* and due to the public, in behalf of any individual suffering damage by reason of such negligence unless an action is given by statute.

(e) Carter v. Rahwah, 55 N. J. L. 177, (1893),  
Affirmed 57 N. J. L. 196,

The Court held on demurrer to declaration, That an action would not lie because of damages sustained in consequence of a municipal street being out of repair.

(f) Paterson v. Erie Railroad, 78 N. J. L. 592, (1910),

In this case a fire engine was injured, being run into by a train of the Erie Railroad. The Court held, Neglect in the performance of public duty *by municipal agents or instrumentalities entrusted therewith is not imputed to the municipality.*

The Board of Chosen Freeholders under its contract with the Standard Oil Company was engaged in a public duty imposed upon it by law in repairing East Eighteenth Street in the City of Paterson at the time of the accident, and if the injury of the plaintiff occurred, as he alleges, from the negligence in the manner in which the work was done or negligence in the protection of said road from public travel, his action will not lie.

The plaintiff cites, in support of his contention, the case of

Hart vs. the Board of Chosen Freeholders of the County of Union, 57 N. J. L. 90.

This case clearly does not uphold his contention.

This was a decision of the Supreme Court (1894) on a demurrer to declaration.

The first count charged that it was the duty of the Board of Chosen Freeholders to maintain said highway in good and safe condition for public use. It then averred that the plaintiff while passing along the highway which was out of repair and in an unsafe condition for public use fell into a deep

excavation made by the plaintiff and left unguarded, and so was seriously injured.

Justice Magie in his opinion says as to this count,

“That without criticising the peculiar form of the averment, it is obvious that the pleader designed to charge liability on the defendant on the grounds that it failed to perform a duty imposed by law in respect to the highway in question.

“It is equally obvious that the result of the neglect of duty was the creation of a common and public nuisance for which an indictment would lie. Plaintiff however suffered special damage from the nuisance so created.

“The general rule is that one who suffers special damage from a common nuisance may have his action therefor against the creator of the nuisance, although the latter may be liable to indictment, but *an exception to this rule has long been established in this state. It has been uniformly held by our Courts that in the absence of statutory provisions a municipal corporation charged with the performance of a public duty is not liable to an individual for neglect to perform or negligence in the performance of such duty*, whereby a public wrong has been done for which an indictment will lie, although such individual has suffered special damage thereby.

“The legislation giving to Boards of Chosen Freeholders rights to acquire and maintain public highways out of which the public duty charged in this count must arise, if at all, does not impose on such

Board any liability to such action.

*"The result is that this court does not disclose a right of action against the demurrant."*

The Justice then takes up the second count, and says that this count "stripped of unnecessary and irrelevant statements, the following charge can be discovered therein, viz: That said board wrongfully and illegally made a deep excavation in a public highway under the control of said Board into which the plaintiff while lawfully passing along the highway fell and was injured."

"This discloses a special injury inflicted on the plaintiff by a common and public nuisance created, *not by this defendant's neglect of or negligence in performing a public duty, but by its active wrong doing,*" and over rules the demurrer as to this count.

In the case at bar the plaintiff says in his complaint that the defendant the Board of Chosen Freeholders "in the course of exercising its control or management of said road or highway and for the purpose of laying and settling the dust upon said highway" caused this street to be oiled, and he charges that the plaintiff suffered by negligence in the performance of this duty.

So that, by this complaint and testimony, he brings his case within the first count of *Hart v. the Freeholders of Union*, and which the court held did not disclose a right of action against the demurrant.

Active wrong doing for which a public corporation is liable is the doing of a wrongful act, not in the performance of a public duty, as stated by the Court in *Hart v. Freeholders of Union*.

If the case of Hart v. the Freeholders of Union had gone to trial on this second count, and the evidence had disclosed as in the case at bar, that the defendant was engaged in repairing the road and the injury had happened to the plaintiff through the negligence of the defendant in the performance of or neglect to perform such duty, then he would have come within the rule which was laid down as to the first count and could not have recovered.

## II.

### THE DEFENDANT WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

The thing complained of is that there was oil on the road, and by reason of this the road was slippery and caused the bicycle of the plaintiff to skid and causing him to fall.

The oil was apparent to anyone using the road, and everyone knows that oil is slippery and an auto or a bicycle is liable to skid. Section 6 of the Motor Vehicle Act, (P. L. 1912, p. 25) says, "Motor vehicle tires may be fitted with chains when roads, streets and highways are slippery because of rain, snow, ice or *oil* or manner of construction.

This section recognizes the use of oil on the roads, also recognizes the fact that roads are apt to become slippery when oil is used for repair.

The plaintiff says (p. 17) "I did not notice the oil until I had rode in it, and after I rode into it, the farther I rode into it, the thicker it got, the thicker the oil got, it got like paste as I rode to 11th Avenue corner, I did not notice a puddle of oil because it had yellow dirt on it, and I ran right into it and my bicycle slipped from under me." I first met the

oil just after I crossed 10th Avenue. (p. 29) He had been riding a bicycle for five years, and had ridden over oiled roads a great many times. (p. 32) He says that the macadam was worn and some small holes here and there, and wherever you rode along these gullies or holes were filled with liquid or oil, but there had been some traffic there since the oil wagon went through and dropped dirt off the wheels, and it laid on top of this oil. (p. 38) He knew the condition of the street and about the holes. (p. 34) He says, "If you take a slippery pavement and ride along on it it don't matter if you only run an inch deep you are down if you get slipping, and you are bound to slip in a hole like that there. There were holes like that all along there. I had noticed the holes and went around them." (p. 33) This hole was about one inch deep. (p. 54) Hole was oval shape, one inch or less deep, 18 inches long.

The plaintiff knew the condition and could easily have gotten off of his wheel and walked a block or turned back and gone down one of the cross streets, but instead of this he preferred to take his chances, and in doing so met with the accident.

In *Wheat v. St. Louis*, 179 Mo. 572, the court held, That where the plaintiff knew of an obstruction in a street, and attempts to turn his horse and wagon around in its vicinity without paying any attention to his course, he is guilty of contributory negligence.

## III.

**THE WORK IN THIS CASE WAS DONE BY AN INDEPENDENT CONTRACTOR, AND THE BOARD OF CHOSEN FREEHOLDERS WOULD NOT BE LIABLE IF THE INJURY WAS DUE TO THE CONTRACTOR'S NEGLIGENCE.**

In the case of *Jansen v. Jersey City*, 61 N. J. L. 243, (1897),

The Court held,

Where a contractor exercises an independent employment, under his contract with the municipal corporation, such corporation is not responsible for negligence of the contractor in the performance of the contract work.

See also

*Cuff v. Newark & N. Y. R. R. Co.* 35 N. J. L. 17 and 574, *Redstrake v. Swayze*, 52 N. J. L. 129 and 414.

The defendant, the Board of Chosen Freeholders, insists that the nonsuit in this case was properly granted and should be affirmed.

Respectfully submitted,

FRED W. VAN BLARCOM,

J. W. DEYOE,

*Of Counsel with the Defendant,  
The Board of Chosen Freeholders  
of the County of Passaic.*





