

New Jersey Court of Errors and Appeals

DESIRE FORTIEN AND PIERRE

FORTIEN,

Plaintiffs-Respondents,

vs.

D., L. & W. R. R. Co.,

Defendant-Appellant.

*On Appeal
from Hudson
County Cir-
cuit Court.*

Brief for Respondent.

In several respects, which will be developed in our argument, the statement of facts contained in the brief for appellant is not accurate. Particularly are the following statements at the conclusion of the statement contrary to the evidence, "that the bulkhead was the limitation of the appellant's ferry property; that the appellant never assumed the duty of laying or repairing or maintenance of the asphalt pavement."

The case was distinctively one of fact and was submitted by the court to the jury with proper instructions. After the verdict, a rule to show cause was obtained (p. 8), and after consideration by the trial judge was discharged. The sole question now before the court is whether a verdict for the defendant should have been directed upon either or both of the grounds which are discussed in the brief for the appellant.

THE APPELLANT UNDOUBTEDLY OWED THE DUTY OF REASONABLE CARE WITH RESPECT TO THE PLACE WHERE THE ACCIDENT HAPPENED.

The evidence is not in dispute. The plaintiff had been a passenger on the ferry boat "Orange"

which landed her at the Christopher street ferry. Upon leaving the boat she continued along the passageway which had a plank floor and thereafter over an asphalt pavement, intending to go through a line of posts which marked the outward boundary of the ferry premises to the place from which the trolley cars started. There were many other passengers, some in front of her and others behind her (p. 13, l. 24). The people were close around (p. 18, l. 36) and she was on her way to take the trolley car in front of the ferry (p. 18, l. 36). Before reaching the posts she tripped upon a hole in the asphalt pavement and fell, receiving the injury which was the subject of her complaint. It was the custom for passengers to go through these posts to the trolley cars (p. 34, l. 1). The plaintiff always went that way when she travelled on that ferry (p. 34, l. 18). Over this asphalt pavement, and extending to the line of the posts is a covered shed upon the front of which is displayed the name of the company and the word "entrance." The situation is shown by the photographs which were introduced in evidence. There is no doubt whatever that the place where the accident happened was a portion of the ferry premises with respect to which it was the duty of the defendant to exercise reasonable care to make them safe for the use of the plaintiff and other passengers. Not only was it under the shed, and, as far as outward appearances were concerned, a portion of the ferry premises, but it was the way in which it was necessary for the passengers to cross upon entering the shed or alighting from trolley cars. It was furthermore a portion of the premises as to which there was a plain duty to repair under the terms of the lease by which the ferry property was obtained from the City of New York.

It was uncontradicted that the employees of the defendant were accustomed to sweep up the entire asphalt pavement out to the row of posts (p. 21, l. 1; p. 34, l. 30).

The Christopher Street ferry property belongs to the City of New York and was the subject of a lease to the Hoboken Ferry Company made on July 18, 1905 (Exhibit D. 7, p. 127). The terms of this lease leave no doubt whatever that thereunder the duty of making repairs upon the ferry premises and keeping them in a safe condition lay upon the lessee. Reference may be made to the following pertinent provisions of this lease. It included:

"The privilege or franchise to operate ferries from and to the foot of Christopher street and Barclay street * * * together with all that certain wharf property owned by the City of New York at the foot of Barclay and Christopher streets, North River, Borough of Manhattan and *used in connection with the ferries.*"

In passing, it is obvious that this section of the asphalt, which was enclosed within the shed, and the line of posts, was obviously not a part of the public highway of West street, and was, by this manner of enclosure, separated from the street and made a part of and used in connection with the ferry property.

In the lease the lessee further covenanted for itself and its assigns that it would

"at its or their own proper costs, charges and expenses, build, erect, make and furnish, and at all times during the term hereby demised, will well and sufficiently uphold, maintain and keep in good order and substantially repair the necessary bridges and floats and other fixtures at each landing place of the

said ferries and will, during the whole of said term, maintain and operate said ferries" (p. 131, l. 24).

It is further provided

"And the said party of the second part, its successors and assigns, shall and will at all times during said term, put, keep and maintain the said wharf property herein demised, and every part thereof, and the structures thereon in good and sufficient repair and condition, and all such repairs, re-building and dredging during said term shall be done at the sole cost, charge and expense of said party of the second part, or its successors or assigns." (p. 132, l. 10.)

The lease further provides that the lessee should hold the City of New York harmless

"if at any time during the aforesaid term any accident to person or property shall occur on or in proximity to the aforesaid wharf property by reason of the negligence of the parties of the second part, its agents or employees." (p. 133, l. 10.)

The lessee covenanted also that it would remodel the Christopher street ferry house to the satisfaction of the Commissioner of Docks (p. 139, l. 88).

This lease (Exhibit D 7) was assigned to the defendant by the Hoboken Ferry Company (D 6 p. 113) and the defendant became charged with all of the covenants thereof, said lease containing in addition, an independent covenant upon the part of the defendant, to make repairs, (p. 126, l. 9).

From the proof in the case, therefore, viewed in the light of the provisions of the lease, there can be no question whatever that the accident in

question happened upon the ferry premises. The control of the carrier over the place of the accident is clearer here than it was in many of the leading cases, both in this State and the State of New York, where it has been held that the common carrier or ferry company was charged with the duty of keeping means of access to its stations in a reasonably safe condition, whether or not those means of access were constructed by the carrier or are its property.

The leading authority, of course, is the decision of this court in *D. L. & W. R. R. Co. v. Trautwein*, 23 Vr. 169. There the plaintiff was injured upon a stairway leading to the defendant's station, the stairway having been built and kept in repair by private persons residing in the neighborhood for their own convenience as a means of access to and from the station. The stairway had been in use by passengers generally and was in appearance a means of access to and from the depot grounds. The court held that the railroad company was charged with the duty of keeping this stairway in a safe condition. At the trial the court charged the jury as follows:

"If the company permitted it to be done openly, so that persons of reasonable judgment and discernment would conclude it to be a means of entrance and exit, then any passenger was authorized to take it and use it. It is submitted to you as a question of fact, whether, to an ordinary observer, this was held out as one of the passageways from the depot to the public street. If so, any passenger, unwarned, might use it as such. If you should so find, it is entirely immaterial who built the stairway or who kept it in repair."

This instruction this court held to be a proper statement of the law and said, p. 177:

“A passageway having the characteristics mentioned by the judge became, by the company’s act, a passageway which passengers were invited to use, with respect to which the company was under a duty to have it kept reasonably safe to use. A passenger using the way under such an invitation was not bound to inquire by whose contributions the stairway was erected or maintained. Nor was the company absolved from its duty in the premises by the fact that it erected and maintained at its own expense another way of exit.”

In *Devoe v. N. Y., O. & W. Ry. Co.*, 34 Vr. 276, this court, referring to the Trautwein case said:

“The decision was placed upon the duty of a railroad company, as a carrier of passengers, to provide safe means of access to and from its station for the use of passengers, and it was held that a passageway having the characteristics mentioned, became, by the company’s act, a passageway which passengers were invited to use.”

In *Yetter v. Gloucester Ferry Company*, 47 Vr. 249, this court applied the rule announced in the Trautwein case to a ferry company, in a case where a passenger was injured upon a pier at which the ferry company landed its passengers. This court held that the court below had properly refused to direct a verdict for the defendant. It was said that the duty of the ferry company as to the safety of landing passengers applies “not only to the immediate means of getting on and off the boat, but requires a ferryman to use care to furnish safe passageway between the ferry-house and the street.”

With respect to the contention that there was no liability because of the fact that the pier where the accident happened was not the property of the ferry company, the court said:

“The ownership of the pier, however, is immaterial so far as the defendant’s liability is concerned. It was the landing place supplied by it to the plaintiff and it owed to her the duty of using care to see that this landing place was safe for her use.”

See also

Phillips v. Library Co., 26 Vr. 307.

The decisions are to the same effect in New York.

Thus in *Schlesinger v. Manhattan Ry. Co.*, 98 N. Y. Supp. 840, the court said:

“Plaintiff tripped upon a stairway leading from one of the defendant’s platforms to the street. Assuming that the stairway was constructed by the city and remained its property, and should have been and perhaps to some extent is, cared for by the city, I am of the opinion that this does not excuse the defendant from liability. The duty of a railway company towards its passengers extends to the exercise of reasonable care in affording them safe approaches to the stations and platforms and this duty, in my opinion, applies not only to such approaches as may have been constructed and owned by the company, but to those constructed and owned by other persons, if constructed and notoriously used by passengers as a means of approach. Such a one as indicates the expressed or implied invitation by the carrier and more especially when the carrier indicates the approach by signs as one to be used. The adoption and indication of such

an approach as one to be used casts upon the carrier the duty of exercising a reasonable amount of *care and inspection* to see that the approach is kept in a safe condition, even if it has no right to make repairs without permission, and is not called upon to seek permission, it can at least provide against injury to its passengers by erecting such barricades or giving such warning as will guard against accidents."

The court cited with approval *D., L. & W. R. R. Co. v. Trautwein*, 52 N. J. Laws 169; *G. C. Santa Fe R. R. Co. v. Glenk*, 9 Tex. Civ. app. 599; *E. Tenn. R. R. v. Watson*, 94 Ala. 634.

See also *Wolf v. Brooklyn Ferry Co.*, 66 N. Y. Supp. 298; *Magoris v. Little, Recr. &c.*, 25 Fed. Rep. (N. Y.) 627; *McKimble v. Boston & Maine Ry. Co.*, 2 N. E. (Mass.) 976.

In every one of the cases cited under this head in the brief for the appellant, except *Quimby v. Boston & Maine R. R. Co.* 69 Me. 340, there was a recovery allowed to the plaintiff upon grounds which are equally applicable to the case at bar. In the *Quimby* case the court laid stress upon the fact that the place where the accident happened

"was a part of the public street under the control of the city. The defendants had no right to enter upon it to make any changes or repairs."

In the case at bar the place where the accident happened was not a part of the public street, but was separated therefrom by the row of posts and was furthermore enclosed by the entrance shed of the ferry premises which bore the name of the company, the words "Hoboken Ferry" and "entrance."

It therefore appeared by the uncontradicted evidence that the place where the accident happened was a portion of the ferry premises, or at least was an approach thereto, as to which the defendant owed the duty to the plaintiff of reasonable care as to the condition thereof. Certainly the contrary was not so plain as to have justified the court in granting the defendant's motion for the direction of a verdict upon this point.

THE ISSUE OF NEGLIGENCE OF THE DEFENDANT WAS PROPERLY LEFT TO THE JURY.

Under point 2 of his brief, counsel for the appellant argues that a verdict should have been directed by the court below, because the accident, having happened in New York State, the law of that state governed, and under the law of New York a rule should have been applied like that enforced in the case of municipal corporations. Against such corporations it is alleged recovery can not be had in the case of a hole or break in a pavement similar to that existing in the case at bar. The unsoundness of this argument consists in assuming first that the law of New York controls in this state on the issue of the quantum of evidence necessary to take a case to the jury on the question of negligence; and, in the second place, in assuming that the law of the State of New York is as alleged by the appellant.

It is not necessary to cite authorities for the proposition that the issue with respect to negligence is one of fact; and that if there be evidence from which the jury may arrive at the conclusion of negligence, the case is one for their consideration. It is also elementary that if the state of the evidence be such that reasonable minds may

arrive at different conclusions, then the case is one for the jury. Such has always been the law of this state, and it has been the law in New York also. However that may be, it is the law of this state which must control in this connection.

This is clearly pointed out by this court in the case of *Ferguson v. C. R. R. Co.*, 42 Vr. p. 647. The court said, p. 650:

"In taking this case from the jury the court erred. Upon the correct ascertainment and determination of the cause of the derailment depended the further questions at issue, bearing upon the performance by the defendants of their legal duties of proper inspection and care to discover and remove from their tracks obstructions likely to derail a locomotive moving thereon, as well as upon their liability, if any existed, for the non-performance of duties relating to the drainage of surface water at the place of the accident.

If different minds might honestly draw from the testimony (from which the negligence of the defendant could reasonably be inferred) different conclusions as to the cause of the accident, the settled legal rule is that such material question, remaining in substantial dispute, belongs to the province of the jury. *Newark Passenger Railway v. Block*, 26 Vroom 605; *Traction Company v. Scott*, 29 *Id.* 682; *Smith v. Erie Railroad Co.*, 38 *Id.* 636; *Adams v. Camden and Suburban Railroad Co.*, 40 *Id.* 424.

Upon the matter just considered, relating to the quantum of evidence required to place the case within the province of the jury, the law of the forum is controlling. It is a part of the order of judicial proceedings where

the action is pending. The law of the place where the right was acquired, or the liability was incurred, will not govern the decision of such question."

The cases cited from New York are clearly not applicable. Our courts will not, nor is it submitted have the New York courts ever countenanced the view that the liability of a carrier, or of any other private individual or corporation with respect to the safe condition of its premises is no more than that of a municipality with respect to the maintenance of the streets and highways in a great community. But even were the defendant to be considered as a municipality corporation under a duty to inspect and repair, the facts in the case at bar would have necessitated its submission to the jury. The New York cases so hold.

Beltz v. City of Yonkers, 148 N. Y. 67, cited by the appellant has been criticized by the Court of Appeals of New York, and there are other cases of interest involving similar circumstances.

In *Mullins v. Siegel Cooper Co.*, 75 N. E. (N. Y.) 1112—*Beltz v. City of New York* was declared to be a border case and not followed by the Court of Appeals of New York in a case where a person had been injured by tripping over a flag-stone upon a pavement before premises of the defendant where the flag-stone was from 2½ to 3 inches out of place. The court cited with approval the earlier case of *Fordham v. Gouverneur Village*, 55 N. E. (N. Y.) 490, as follows:

"On the trial of an action against the village for damages for the death of the plaintiff's intestate, it appeared that at the time of the accident the village was laying a

water pipe under the sidewalk of a bridge, and for that purpose cut holes in the flagging; that the walk had not been finished on the days the holes were cut; they were each covered at night fall with a plank one to two inches thick; that before this the walk had a smooth surface; that no light or signal was placed on the bridge * * * held that the evidence sufficed to take the case to the jury upon the question whether the injury (the plaintiff had fallen at this point in the darkness) was caused by stumbling over the planking and upon the questions of the defendant's negligence and of the plaintiff's intestate's freedom from contributory negligence."

See also

Cummings v. New Rochelle, 56 N. Y. Supp. 701;

O'Brien v. Syracuse, 52 N. Y. Supp. 224;

Corr v. New York, 106 N. Y. Supp. 280.

Where a defect in a street is of such a character that reasonable and prudent men may differ as to whether an accident could or should reasonably have been anticipated from its existence, the case is one for the jury. (28 Cyc. 1504.)

The court cannot in any case where the right of trial by jury exists, and the evidence presents an actual issue of fact, properly direct a verdict; if in such a case it is dissatisfied with the verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted before another jury, and the directing of a verdict under such circumstances is reversible error. (See the important case

of *McDonald v. Metropolitan Street Ry. Co.*,
167 N. Y. 66.)

The hole upon which the plaintiff tripped was large enough to admit the entrance of her foot (p. 29, l. 29) and to trip her. The evidence is that she tripped on this hole. It was in the direct path which passengers were accustomed to take. It was usual for the passengers to come out in a crowd close together, so that their view of the path before them was naturally obscured. Therefore they had the right to assume that the ground under their feet was in good condition and did not present obstacles or obstructions which might lead to their tripping and falling. The hole was considerable enough to be plainly noticeable upon photographs offered in evidence. (See Exhibits P 1 and P 3.) It cannot be denied, in view of the evidence, that the plaintiff actually did trip on this hole. Upon the entire case, it is obvious that the court could not say as a matter of law that the defendant was free from negligence in permitting this hole to remain in the condition in which it was. The court was clearly justified in refusing to direct a verdict upon this ground. The judge's charge was very full upon this branch of the case, and the principles laid down were clearly correct. The court did not hold the defendant to the duty of an insurer, but only to that of reasonable care.

Therefore *Palmer v. P. R. R. Co.*, 111 N. Y., 488, and other cases of that character are not applicable.

Thus the Court in his charge said, among other things:

“Now while I have said to you that the first point or fact to be decided by you is whether or not this alleged hole actually

existed, or whether or not the plaintiff has satisfied you thereof, and, secondly, if it did, and she has satisfied you thereof, then whether or not it was the proximate cause of what happened to her * * * there yet cannot be a recovery unless it be shown that the hole existed and was the proximate cause of the injury and that hole was chargeable to the defendant company as negligence upon its part, as it must appear, and you must be satisfied by a fair preponderance of the evidence on the part of the plaintiff that it was the negligence of the defendant company which brought about or permitted the existence of the hole in question; because if that is not shown, then even if all the others are shown, there cannot be a recovery" (p. 100, l. 20).

And again (p. 100):

"Passengers have a right to assume that the means of access provided were *reasonably safe*."

Again (p. 101):

"That such a company as this defendant would use reasonable care to keep its passageways and the means of ingress and egress to and from its ferry houses in reasonably safe condition."

And on page 105, line 15, the Court pointed out that the defendant was not an insurer, but owed the duty of reasonable care only. At the request of the defendant, the Court also charged the jury as follows (p. 108):

"You cannot find the defendant company liable if you find that the injury to the plaintiff was caused solely by her slipping on the axle grease which she says was

present at the place where the accident happened, because there is absolutely no evidence in this case as to how long the same had been there or that the defendant company had notice that it was there or that it had been there such a length of time as to charge the defendant with notice.

“You cannot find the defendant company liable if you find that the injury to the plaintiff was caused solely by the rain which had occurred or was occurring at the time she met with her injury.”

With this very clear instruction upon the rule of negligence, it cannot be contended that injustice was done to the defendant. In any event, it is very clear that the evidence required the submission of that issue to the jury, and if this be so, there is no merit in the contention of the appellant.

On the entire case, therefore, it is respectfully submitted that there is no merit in either of the grounds urged for reversal, and that the judgment should be affirmed.

Respectfully submitted,

ROBERT H. McCARTER,

WILLIAM F. BURKE,

Of Counsel with Respondent.

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOHN HUTCHINGS
OF THE BOSTON BAR
IN TWO VOLUMES
VOL. II.
BOSTON: PUBLISHED BY
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EXHIBITS.

- P-1, P-2, P-3, P-4—Photographs. Admitted in evidence at page 35; not printed.
- D-1—Paper showing size of hole in which plaintiff slipped; offered for identification at page 60; not printed.
- D-2—Weather report for the day of the accident. Admitted in evidence at page 66; not printed.
- D-3, D-4, D-5—Photographs. Admitted in evidence at page 74; not printed.
- D-6—Indenture of December 31, 1909, between The Hoboken Ferry Company and The Delaware, Lackawanna and Western Railroad Company. Admitted in evidence at page 91; printed at 113
- D-7—Indenture of July 18, 1905, between The City of New York and The Hoboken Ferry Company. Admitted in evidence at page 91; printed at 127

EXHIBITS

- 1-1. Ex. 1-1-1-Photograph. Admitted in evidence at page 211 and printed at page 212.
- 1-2. Paper found on the floor in the room where the murder was committed. Admitted in evidence at page 211 and printed at page 212.
- 1-3. Photograph of the floor of the room where the murder was committed. Admitted in evidence at page 211 and printed at page 212.
- 1-4. Photograph of the floor of the room where the murder was committed. Admitted in evidence at page 211 and printed at page 212.
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- 1-10. Photograph of the floor of the room where the murder was committed. Admitted in evidence at page 211 and printed at page 212.

Notice of Appeal.

(Filed June 15, 1915.)

HUDSON COUNTY CIRCUIT COURT.

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DESIRE FORTEIN and PIERRE FOR-
TEIN,

Plaintiffs,

vs.

Action
at Law.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,

Defendant.

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WILLIAM F. BURKE, ESQ.,
Attorney of Plaintiffs.

SIR:

YOU WILL PLEASE TO TAKE NOTICE that the
above defendant, the Delaware, Lackawanna &
Western Railroad Company, hereby gives notice to
you that it appeals from the judgment rendered in
the Hudson County Circuit Court in the above case
to the Court of Errors and Appeals for the State
of New Jersey. 30

AND YOU WILL FURTHER TAKE NOTICE that pur-
suant to the statute and practice in such case made
and provided, the above defendant will serve upon
you and file its grounds of appeal within the time
required by law.

Yours truly,

Attorney of Defendant.

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Grounds of Appeal.

(Filed July 15, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

DESIRE FORTEIN and PIERRE FORTEIN,

Plaintiffs-Respondents,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Defendant-Appellant.

Action
at Law.

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The above appellant, The Delaware, Lackawanna & Western Railroad Company, within the time prescribed by law and the practice in such cases made and provided, hereby writes and sets down its grounds of appeal in the above entitled cause:

I. Because the Trial Court refused to direct a verdict in favor of the Defendant-Appellant for the following reasons:

1. That the plaintiff-respondent, Desire Fortein, was guilty of contributory negligence.

2. That the proximate cause of the accident to the plaintiff-respondent, Desire Fortein, was her tripping or slipping, either on some axle-grease, or water produced by rain which had recently fallen—there being no evidence whatever as to the length of time that the axle-grease was present at the place where the plaintiff-respondent, Desire Fortein, slipped.

3. That the defendant-appellant, having provided a good and sufficient ferry exit, and had

Grounds of Appeal.

complied with its full duty and obligation in the premises, no negligence was shown or charged that made it liable.

4. That the defendant-appellant fully complied with its duty to furnish a proper and sufficient exit and the accident happened on adjacent property over which the defendant-appellant had no authority or control.

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5. That even if the defendant was bound to maintain the place where the accident happened in a reasonably safe and suitable condition, the accident happened in the State of New York, and therefore is governed by the law of the State of New York, and for a hole of the nature and character and size of the one into which the plaintiff fell, the law of the State of New York is uniform that a hole of that size is not such negligence as could predicate liability upon the part of the defendant-appellant and that there was no question of fact for presentation to the jury.

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All of which grounds and reasons are more fully and particularly set forth in the record of the above cause.

II. Because the Trial Court refused to charge the jury the following requests of the Defendant-Appellant presented to the Court before the close of the trial of the above cause:

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1. By virtue of the lease between the Hoboken Ferry Company and The Delaware, Lackawanna & Western Railroad Company, the defendant herein dated December 31, 1909, and the lease between the City of New York and the Hoboken Ferry Company, dated July 18, 1906, the premises of the defendant company for which it was chargeable extended merely to the bulkhead at which said ferries were located, and if you find as a fact that the accident happened east of said bulkhead,

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Grounds of Appeal

that is, in the opposite direction from the river, then your verdict must be for the defendant company.

2. The mere fact that the lease of the City of New York, dated the 18th day of July, 1906, allowed the plaintiff to build certain superstructures upon the property of the City of New York is immaterial in considering the liability of the defendant company unless you should find that the building of said superstructures, or their construction and maintenance, was the proximate cause of the accident to the complainant.

3. I charge you as a matter of law that the property east of the bulkhead of the ferries operated by the defendant company, upon which it has been shown there had been laid an asphalt pavement, was not owned by or in the possession of or a part of the ferry grounds and premises of the defendant company or its lessor.

4. Under the facts in this case, I charge you that the defendant company or its lessor was under no obligation to keep the asphalt pavement east of the bulkhead in repair and that the same was a part of the public street under the control of the City of New York.

FREDERIC B. SCOTT,

Attorney of Defendant-Appellant.

Amended Complaint.

(Filed Jan. 19, 1915.)

HUDSON COUNTY CIRCUIT COURT.

DESIRE FORTIEN & PIERRE FORTIEN,
her husband,

*Plaintiffs,**vs.*

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD COMPANY,
(a corporation of New Jersey),

Defendants.

Action 10
At Law.

The Defendant Corporation was summoned to answer unto the plaintiff's amended complaint.

The plaintiffs residing at 710 Monastery Street, Town of West Hoboken, Hudson County, New Jersey, say that: 20

First Count:

1. On July 25, 1914, the defendant was and still is a common carrier of passengers by ferry boats or other vessels from Hoboken to the City of New York, in the State of New York and was in possession and control of a certain ferry-house at the foot of Christopher Street in the said City of New York, and its entrances and exits. 30

2. On said day the plaintiff Desire Fortien became and was lawful a passenger on a certain boat operated and managed by the said defendant, its agents and servants called and known as the Ferry Boat "Orange" to be carried and conveyed by said defendant by the means of said ferry boat from its dock or slip at Hoboken to its dock or slip at said Christopher Street in said City of New York. 40

Amended Complaint.

3. It became and was the duty of said defendant to provide and maintain the said ferry house, its approaches, entrances and exists in a safe and proper condition.

4. The defendant, in violation of its said duty did not provide or maintain the said ferry house its approaches, entrances and exits in a safe and
 10 proper condition and on said day and for a long time previous thereto the said defendant negligently permitted the said entrance to said ferry house and the approach thereto and exit therefrom to be and remain in a broken, defective and dangerous condition and permitted a hole or opening to remain in the concrete of said entrance, approach and exit and the said plaintiff, Desire Fortien, while leaving said ferry house or slip or
 20 dock and while on the premises under the management and control of the defendant, without any negligence on her part, but wholly by reason of the said broken, defective and dangerous condition of said entrances, approach and exit and of the said hole or opening in the concrete thereof, tripped or slipped and fell to the ground, whereby her right leg was broken at the ankle, the ligaments of the leg were torn and she was otherwise bruised and severely injured.

5. At the time of said injury the said plaintiff
 30 Desire Fortien was employed in the said City of New York as a milliner and was receiving a salary of \$25 per week for her services. By reason of her said injury the said plaintiff Desire Fortien was unable to perform her duties as such milliner for a period of two months, and during that time wholly lost the said salary.

Second Count:

1. By reason of the said injury, the plaintiff
 40 Pierre Fortien was deprived of and lost the ser-

vices and companionship of his said wife, Desire Fortien, for a long space of time, to wit; for two weeks and was compelled to and did hire and engage servants and others to help and assist her in the performance of her household duties.

2. That the plaintiff Pierre Fortien has expended the sum of seventy-five dollars in the hiring of servants and other help in the household, and the sum of \$200 for medical and surgical aid and nursing and for medicine.

10

Plaintiff Desire Fortien demands damages \$5000 on the first count and the plaintiff Pierre Fortien demands \$2,000 on the second count.

WM. F. BURKE,
Attorney of Plaintiff.

Answer.

(Filed Feb. 2, 1915.)

The Defendant Corporation answers as follows: 20

The Delaware, Lackawanna & Western Railroad Company the above named defendant, answering the allegations contained in the complaint of the plaintiffs herein filed in the above cause, says as to the First Count:

I. That it admits the allegations contained in the first paragraph of the First Count of the Plaintiff's complaint.

II. That it has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the second paragraph of the First Count of the plaintiff's complaint. 30

III. It admits that the statement contained in the third paragraph of the First Count of the plaintiff's complaint is a proper statement of the duties of this defendant in the premises.

IV. It denies the allegations contained in the Fourth paragraph of the First Count of the plaintiff's complaint. 40

V. It has no knowledge or information sufficient to form a belief as to the allegation contained in the fifth paragraph of the First Count of the plaintiff's complaint.

This defendant, answering the allegations contained in the Second Count of the plaintiff's complaint, says:

10 VI. It has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the first and second paragraphs of the Second Count of the plaintiff's complaint.

And this defendant therefore prays that the above suit may be dismissed against it, with its costs in the premises.

FREDERIC B. SCOTT,
Attorney of Defendant.

Rule to Show Cause.

20 (Filed March 20, 1916.)

The above defendant, the Delaware, Lackawanna & Western Railroad Company, within six (6) days after the rendering of the verdict in the above case, having applied to this Court for a Rule to Show Cause in the above matter, with request that certain of the exceptions taken on the trial of said case be reserved to it,

30 It is this 20th day of March, 1916, ORDERED, that the above plaintiff do show cause before this Court on the Fourteenth day of April, 1916, at the Court House in Jersey City at 10 o'clock in the forenoon or as soon thereafter as the Court can hear and attend to the same, why the said verdict should not be set aside and for nothing holden, because the damages awarded to the plaintiff in the above action by the jury were contrary to the evidence and contrary to the weight of the evidence, and also excessive.

IT IS FURTHER ORDERED, that the said defendant do have reserved to it the following exceptions, the said defendant took at and upon the trial of said cause, to wit:

1. The exceptions taken by said defendant to the Court's refusal to direct a verdict in favor of the defendant and against the plaintiff.

2. The exceptions and objections taken to the Court's refusal to charge the jury with the defendant's requests to charge which requests were handed to the Court before the close of said cause. 10

IT IS FURTHER ORDERED, that all other exceptions taken by the defendant at the trial of said cause not hereinbefore specifically set forth are not reserved to the said defendant, but are expressly waived by said defendant.

LUTHER A. CAMPBELL,
Judge. 20

Order Discharging Rule.

A rule to show cause why the verdict of the jury in the above entitled action should not be set aside, and a new trial granted, and the Court having heard the argument of counsel of the respective parties and having considered the matter.

IT IS ORDERED that the said rule to show cause be dismissed with costs. 30

On motion of

WM. F. BURKE,

Attorneys of Plaintiffs.

Let the foregoing rule be entered on the minutes.

LUTHER A. CAMPBELL,
Judge.

Rule actually entered this May 26, 1916.

Filed Clerk's Office May 26, 1916.

JOHN J. MCGOVERN, Clerk,

Hudson County, N. J. 40

Judgment.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit Mar. 15, 1916.

The cause having been heard and submitted to the jury they returned their verdict as follows:

10 They say they find for the plaintiffs, and against the defendant and they assess the damages or the plaintiffs Desire Fortien at the sum of Three Thousand (\$3,000.00) Dollars and in favor of Pierre Fortien at the sum of Five hundred (\$500.00) Dollars on occasion of the premises at the sum of Three thousand Five hundred Dollars (\$3,500.00).

20 Whereupon it is adjudged that the plaintiffs recover of the defendant the sum of Three thousand and Five hundred Dollars damages and his costs which are taxed at Sixty-three Dollars and Fifty-five cents (\$63.55) making in the whole the sum of Three thousand Five hundred Sixty-three Dollars and Fifty-five cents (\$3,563.55).

Judgment entered this 17th day of March, 1916.

LUTHER A. CAMPBELL,

Judge.

Attest:

JOHN J. MCGOVERN,

30

Clerk.

Testimony.**HUDSON COUNTY CIRCUIT COURT.**

DESIRE FORTIEN

vs.

DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY.

10

Transcript of so much of the shorthand notes of testimony taken on the 15th day of March, 1916, before Judge Campbell and a Jury as is necessary to present the questions raised on this appeal.

APPEARANCES:

WILLIAM F. BURKE, ESQ., for Plaintiff.

20

FREDERIC B. SCOTT, ESQ., for Defendant.

MR. SCOTT: We have agreed, may it please the court, on the map which we have placed on the easel.

THE COURT: Without proof?

MR. BURKE: I suppose we ought to read into the record that the map shows the New York site of the Christopher Street Ferry of the Delaware, Lackawanna & Western Railroad, and shows the baggage room, the walk from the ferry to the street, the street car tracks, and it shows the shed of the ferry, the shed which is owned by the Delaware, Lackawanna & Western Railroad, and indicates the edge of the shed; it shows these boundary posts—

30

MR. SCOTT: I object to the expression "boundary posts". It shows posts.

40

Mrs. Desire Fortien—Direct.

MR. BURKE: Beg pardon. It shows posts which are owned by the Delaware, Lackawanna & Western Railroad.

MR. SCOTT: Yes.

MR. BURKE: I think that is all, unless Mr. Scott wants to call your attention to something.

10 MR. SCOTT: The blue on the map represents the asphalt pavement, where it is shown in blue.

MR. BURKE: You mean all this represents the asphalt?

MR. SCOTT: Asphalt pavement.

MRS. DESIRE FORTIEN, SWORN.

DIRECT EXAMINATION BY MR. BURKE:

20 Q. Mrs. Fortien, where do you live? A. 710 Monastery Street, West Hoboken.

Q. How long have you lived in West Hoboken? A. Ten years.

Q. Are you married? A. I am married.

Q. What is your husband's name? A. Pierre Fortien.

Q. You live there with your husband? A. I live there with my husband.

30 Q. What is your business now, Mrs. Fortien? A. Forelady and designer.

Q. You are forelady over what and what do you design? A. I am forelady over the department of children's coats.

Q. What do you design? A. I design all the trimmings for the children's coats—the trimming.

Q. How old are you, Mrs. Fortien? A. Forty-two.

Q. Where were you employed on July 25, 1914? A. Louis Metzger & Company.

Mrs. Desire Fortien—Direct.

Q. Where is their place of business? A. Their place is at 637 Broadway, New York City.

Q. At that time were you living in West Hoboken? A. I was living in West Hoboken.

Q. On July 25, 1914, did you leave your house in the morning? A. I left my house about seven o'clock in the morning.

Q. To go where? A. Go to New York; I went and took the Delaware, Lackawanna Ferry, boat named "Orange", landed on New York side at twenty to eight, and while I was trying to go to the boat my foot tripped and I fall down and I couldn't pick myself up, so two men helped me up. 10

Q. Just wait before you go that far. Do you think you can show the jury on the map here where—which slip did you come in on, do you know? A. I came through that slip (indicating). 20

Q. So that you went through the place on the map marked "Walk," did you? A. Yes.

Q. And were you coming through there alone or with other passengers? A. Oh, there was a lot of passengers ahead of me.

Q. How far did you get? A. I got about that far—here is the baggage room, and it was about three feet from where the board stops; on that asphalt, but right in front of that court there and right in front of that first post, and there was a hole there into which I tripped. 30

Q. Now on this map will you just indicate where the hole was where you say you tripped? A. Yes; about here (indicating).

THE COURT: Indicate, Mr. Burke, where that is; indicate with an X.

Q. Is that about where it was? A. That is about where it was, in front of the first post which holds the shed. 40

Mrs. Desire Fortien—Direct.

MR. BURKE: The witness indicates in front of the baggage room and to the south on a line with the post marked "H", which post upholds part of the shed.

10 Q. Just take the stand again. What were the conditions around this hole that morning? A. There was a hole full of—a great big puddle of water, which was right in the front of that hole, and I was following the people, you see, which was avoiding that great big puddle of water—

MR. SCOTT: May I hear that?
(Answer repeated by stenographer.)

20 Q. Will you describe to the jury what kind of a hole it was? A. It was a hole about the length of my foot, about an inch and a half deep, and all smooth inside, but must have been some axle grease in it, because my shoe—my rubbers was full of it, and that is where I slipped.

Q. Do you know what caught in the hole? A. My heel twisted inside of that hole.

Q. Could you tell whether it was a fresh hole or not? A. Well, it looked like an old hole, because it was all smooth.

30 Q. When your heel caught what happened? A. Then I slipped and fell down as a mass, and I tried to raise myself, but I couldn't, so one man was on one side and another young man on the other side and they both of them picked me up, and I begged them to take me on the car so I could go to business, and I tried to put my foot down, but it hurted so badly that I could not walk with it, and another gentleman was standing alongside there, and he say, "Well, you better go in the waiting room of the Lackawanna". I said, "I can't walk," and the young fellow there said, "The lady is too heavy for me, I can't carry her," so the other man said, "Let me carry her;

40

Mrs. Desire Fortien—Direct.

I think I can," so he take me inside of the Lackawanna waiting room, and left me there, and during that, while I was there he went out and telephoned either to the police or I don't know where, and I waited there in the waiting room some little while; after an officer coming in and he took my name and address and where I did fall, and then a little while again after a Doctor Morchung, who was from the ambulance, came, and he looked at my foot and I asked him what was the matter, and he said, "I guess it is broken," and I said, "Doctor, won't I be able to go to work Monday?" He said, "We will tell you that in the hospital later." Then they carried me into the ambulance. 10

Q. Let us see; you were taken then from the waiting room? A. In the ambulance.

Q. To where? A. St. Vincent's Hospital. 20

Q. What happened there? A. In St. Vincent's Hospital, after I was received in the ward a doctor came and he looked at my foot, and I said, "Doctor, what is the matter with that leg?" and he said, "Well," he said, "it is broken." I said, "What, Doctor, won't I be able to go to work Monday?" He said, "Well, to-morrow is Sunday, isn't it?" I said, "Yes." He said, "To-morrow is a holiday." I said, "Yes, Doctor," and he said, "Well, it will be a holiday for the rest of your life." (Witness weeping.) 30

MR. SCOTT: May it please the court, I do not see that—

THE COURT: I do not see.

MR. SCOTT: —that that is relevant or necessary.

MR. BURKE: No.

THE COURT: I do not think it was intended to be asked, however, and I think it ought to be stricken out. 40

MR. BURKE: I consent to it.

Mrs. Desire Fortien—Direct.

Q Were you treated at St. Vincent's Hospital?

A. No; I asked the Sister Superior—well, at first the Doctor put my foot in splints, in temporary splints, he said, and when another doctor told me I got kind of scared, and I asked to be transported home, so he called up my husband and then my husband came with a carriage to take
10 me home.

Q. All right. How long were you in St. Vincent's Hospital? A. I was from nine o'clock until twelve.

Q. That day? A. That day.

Q. You were taken in a carriage from there to your home in West Hoboken? A. In West Hoboken.

Q. How long were you confined to your bed in West Hoboken? A. I was confined to my bed for
20 six weeks in bed.

Q. How long was it before you got out of the house? A. Three months.

Q. What was the condition of your ankle and your limb? A. My foot and my whole leg was all black and blue and the ankle was terribly badly swollen.

Q. Which leg was it? A. The right leg.

Q. The right leg? A. Yes.

Q. Was it black and blue above the ankle? A.
30 Black and blue as far as the knee from the toes.

Q. Did you suffer any pain or not? A. I suffered terrible bad pains.

Q. Just where was the break, do you know? A. The break was above the ankle.

Q. And do you know whether one or both bones were broken? A. Well, I don't know. The doctor set them back himself.

THE COURT: I think you would better go
40 right to the fountain head for that.

Q. Mrs. Fortien, you know you must not say

Mrs. Desire Fortien—Direct.

what other people told you. Just say what you know, please.

Q. What salary were you receiving at the time of the injury? A. Twenty-five dollars a week.

Q. How long was it before you got back to business? A. Up to the 15th of November.

Q. 1915? A. 1914.

Q. I beg pardon; 1914.

10

BY THE COURT:

Q. Well, have you calculated how many weeks you were out of work, Mrs. Fortien, or away from work? A. I was three months away from work.

Q. Did you receive any compensation from your employer at the time? A. No, sir.

Q. Do you know how many weeks you were not paid? A. I didn't count the weeks. From the 25th of July until the 15th of November.

20

BY MR. BURKE:

Q. And between July 25, 1914, and November 25, 1914, you did not receive any pay? A. No.

Q. What happened on November 15, 1914; did you go back to business? A. Yes; I found myself another job and went back to business.

Q. Another what? A. Another position. I didn't go back to the same place.

Q. You lost that position? A. I lost that position.

30

Q. Now what condition was your foot in when you went back to business on November 15th? A. It was painful yet.

Q. Were you able to walk as usual? A. No.

Q. Are you able now to walk as usual? A. No.

Q. What condition exists now? A. Why, my leg hurts—the ligaments—and sometimes the bone snaps off from the socket of the foot.

40

Mrs. Desire Fortien—Direct.

Q. Is there any pain there yet? A. Yes, sir, there is pain in the ligaments yet.

Q. Are you able to walk as you did before? A. No, sir.

Q. What is the difference now? A. I have to walk very slowly and I cannot easily go up and down.

10 Q. In West Hoboken were you attended by any physician? A. Yes, sir.

Q. By what physician? A. By Dr. Wirtz.

Q. He is a practising physician in West Hoboken? A. Yes, sir.

Q. How long were you attended by him? A. I was attended by him since the accident and he is still attending to me yet.

Q. Have you paid him any money for the attention? A. Yes, sir.

20 Q. How much? A. One hundred and fifty dollars.

Q. Have you paid any moneys out for medicines? A. Yes, sir.

Q. About how much? A. Forty-nine dollars and some cents.

Q. What treatment did Dr. Wirtz prescribe; what did he do? A. He had to put my leg in splints first, and then after he had to put it in plaster of paris twice, and then he had to keep
30 up bandaging it for a long time—for about a year he had to keep bandaging the leg.

Q. At the place where you fell where you say this hole was, you were on your way to what?

A. To take the ferry—or to take the car, I mean.

Q. The trolley car? A. The trolley car.

Q. In front of the ferry? A. In front of the ferry.

Q. Were there any other people in front of you and behind you or not? A. There was a lot of
40 people in front and a lot in back.

Mrs. Desire Fortien—Direct.

Q. Were the people around—were they close together or not? A. Yes.

Q. "Yes" means what? A. Yes means we was all very close.

THE COURT: Mr. Burke, I call your attention to the way the testimony appears now as to the physician's bill and medicines. It is as if this witness paid them. Is that the purpose of the showing, that she paid them? 10

MR. BURKE: I will ask her. The complaint alleges the husband paid them. I will find out.

Q. Who paid the bills for the doctors? A. My husband did.

Q. Who paid the bills for the medicines? A. My husband does. 20

Q. Do you know how far from the baggage room the place is where you fell? A. Well, where I fell it is about three feet on the asphalt from the wooden floor.

Q. How far from the baggage room? A. It may be ten feet.

Q. Now those posts that you see on the diagram is the place where you fell between the posts and the ferry house or not?

THE COURT: There is more than one line of posts? 30

THE WITNESS: Yes, sir.

THE COURT: She may be confused in that.

Q. I just want to get it—these posts directly in front of the trolley car. The place where you fell is inside of those posts, isn't it? A. Yes, sir.

Q. Between the post and the ferry house? A. Yes, sir. 40

Mrs. Desire Fortien—Direct.

Q. How much inside, about, do you know? A. It is about twenty-five to thirty feet from the edge of those posts.

MR. SCOTT: Now you have been testifying to those posts marked B.

THE COURT: Yes; practically run parallel with the face of the buildings.

10 MR. BURKE: They do, and they are under the shed. Here the shed comes out.

THE COURT: They can be indicated as the posts on a line approximately north and south. The others run approximately east and west.

MR. SCOTT: N. and S. (Indicating on map.)

20 Q. Now about where you fell is between the posts marked N. and S. and the ferry house. Have you seen the company doing anything there? A. No, sir.

Q. Haven't you seen any of their men doing anything?

MR. SCOTT: I object.

A. I saw the company—

MR. SCOTT: I object to that as leading.

30 THE COURT: Well, I suppose the shape it is in now it is leading.

MR. BURKE: I am trying to frame it so as not to be leading.

MR. SCOTT: She has already answered the question in a way. She said no.

MR. BURKE: She said the company didn't do anything.

40 THE COURT: Suppose you ask her if she saw any work being done, because if she did not you need not bother with the other thing.

Mrs. Desire Fortien—Cross.

Q. Did you see any work being done there?
A. I saw men of the company sweep.

Q. Sweeping what? A. Sweeping the whole asphalt between those posts there.

MR. SCOTT: May I ask the Court's permission to examine the witness at this point as to how she knows that the persons she saw were company men?

10

MR. BURKE: I think I am through, so that you may cross-examine.

THE COURT: If you are then Mr. Scott may take it up at that point and work backwards.

CROSS EXAMINATION BY MR. SCOTT:

Q. You travelled back and forth every morning to business, Mrs. Fortien? A. Yes, sir.

20

Q. You went over the Christopher Street ferry every morning? A. Not every morning, no, sir.

Q. How often before the accident? A. Before the accident? Sometimes twice a month, sometimes three times.

Q. During the month that you were injured, in July, how many times had you travelled over?
A. Well, that week I travelled three times.

Q. Three times? A. Yes, sir.

Q. When you went over on the boat those three times before the accident, do you remember what ferry slip you came in? Was it the same slip?
A. No, sir.

30

Q. On the other side? A. On the other side.

Q. That is on the downtown side? A. Yes, sir.

Q. Now on this morning you took the seven something boat from Hoboken? A. Yes, sir; it was—I landed on the New York side twenty to eight.

40

Mrs. Desire Fortien—Cross.

Q. Twenty minutes of eight? A. Yes, sir.

Q. Was that boat fairly well crowded? A. Yes, sir.

Q. And when the boat got into the slip do you remember which slip it got in, the north slip or the south slip—the uptown slip or the downtown slip? A. The uptown slip.

10 Q. Were you one of the first persons to get off the boat or one of the last? A. I was about the middle.

Q. About the middle? A. Yes, sir.

Q. Wasn't there quite a crowd ahead of you? A. Yes, sir.

Q. Men and women? A. Yes, sir.

Q. You were in the ladies' cabin coming over? A. Yes, sir.

Q. And after the boat fastened up at the dock
20 or the bridge, the people ahead of you started to get off and you started to get off? A. Yes, sir.

Q. You looked at that map with Mr. Burke before the case was called for trial to-day out in the hall? A. Yes, sir.

Q. Are you familiar with the—I mean you can tell us from the map just exactly your actions at the time and what you did? A. Yes, sir.

Q. Wait, I do not want you to get down if I can point it out to you without getting down.

30 You came in the upper slip? A. I can't see.

Q. If you will come over, please. You came in this upper ferry slip? A. Yes, sir; I was in the downstairs, I was sitting.

Q. Yes, but your boat came in the uptown ferry slip or north slip? A. Yes.

Q. And when the boat came in you got off and walked down this place marked "Walk"? A. Yes, sir.

Q. Now if you will, take your seat. And there
40 were quite a number of people in back of you also, were there not, Mrs. Fortien? A. Yes, sir.

Mrs. Desire Fortien—Cross.

Q. As you went down this walk can you tell us about how far it was from the place you got off the ferryboat until you got up to the baggage room? Do you know about how far that was? A. Well, there is a whole big distance, you know, which is—

Q. What would you say it was, about a hundred feet or a little more than that? A. From 10 where, the water front?

Q. Yes; where you got off the boat to the time you got up to the baggage room. A. From just where the boat lands?

Q. Yes; from where the boat lands. A. Well, I can't say how many feet exactly.

Q. But it is quite some distance? A. It is a little distance, yes.

Q. Did all the people from that side of your boat, or most of the people from the ladies' cabin, 20 walk up this walk? A. Yes, sir.

Q. Were they all close together at the time? A. Yes, sir; we was all close together.

Q. Were there any hustling or hurrying at the time? A. Well, we was all walking nice, you know. When you get out of the ferry you all walk quite pretty fair.

Q. Going pretty lively? A. Well, walking.

Q. Going to business? A. Yes; you cannot run, 30 because we are too close.

Q. I see. For how long a time did all the people keep close together—until you got out near the baggage room? A. Oh, we was all compact together then when I fall down.

Q. All compact together? A. Yes.

Q. You were going for the trolley car at that time? A. Yes, sir.

Q. Your business took you cross town? A. Yes, sir.

Q. Do you remember on that morning whether 40

Mrs. Desire Fortien—Cross.

it had been raining or not? A. It had been raining.

Q. Did we have a shower, do you remember?

A. Not at the time, but early in the morning there had been a shower.

Q. That is before you left home? A. Before I left home.

10 Q. Or while you were travelling to town? A. No; before I left home.

Q. Was it a fairly heavy shower? A. Well, it wasn't so very heavy.

Q. But it had been raining? A. Yes, sir.

Q. You proceeded with all the people to go down the walk toward the car? A. Yes, sir.

Q. Now do you remember who was in front of you just at the time that you fell? A. No, sir.

20 Q. Whether young women or men or boys or who? A. There was men and women, but I didn't pay attention to who they was.

Q. And at the time you fell there was some people right in front of you and on the side of you? A. Yes, sir.

Q. And in back of you? A. And in back of me.

Q. Were they going along about the same rate as you were travelling? A. Yes, sir.

30 Q. Just at the time you fell, about how far ahead of you were the persons who were walking ahead of you? A. They was right ahead of me.

Q. About how close were they? A. About that close (indicating).

Q. About five or six inches away from you? A. About half a foot, yes.

Q. About half a foot away from you? How many people would you say were ahead of you? A. Oh, I couldn't say, because there was too many.

40 Q. A large number? A. Yes.

Q. By a large number you mean ten or twelve,

Mrs. Desire Fortien—Cross.

something like that? A. No; I mean about a hundred.

Q. Oh, I see. Then you proceeded along. Did you have any bundles with you on that morning?

A. No, sir.

Q. The first thing that you knew was that your ankle turned over, or your foot turned over? A. My foot turned over and slipped.

10

Q. Your foot— A. Turned.

Q. The first thing you know you were walking along— A. Yes, sir.

Q. —and your foot turned over? A. Yes, sir.

Q. Right foot? A. My right foot.

Q. Did you immediately fall? A. What say?

Q. Did you as soon as your foot turned over immediately fall? A. I fall immediately.

Q. I see. You say your foot slipped? A. Yes, sir.

20

Q. At the time your foot turned over— A. Yes, sir.

Q. Was it very painful? A. It was very painful. I hear a cracking in my leg and when I try—you know when I was raised up, at least it was so painful I couldn't put my foot on the floor.

Q. But at that time it was painful? A. It was painful.

Q. I mean just as soon as you turned it over it was very painful? A. Yes, it pained right away.

30

Q. And about how long—then you say your foot slipped and you fell immediately. About how long after you fell did somebody come to help you up? A. Immediately. As soon as I fell.

Q. As soon as you tumbled over somebody came to help you up? A. Yes; two mens.

Q. Did you do anything from the time your foot turned over and the time the men picked you up? A. I tried to raise myself but in the mean-

40

Mrs. Desire Fortien—Cross.

time the two men grabbed me from under the arms.

Q. You tried to raise yourself? A. Yes.

Q. And how soon after they raised you up did they take you into the ferry house? A. Immediately.

10 Q. Well, when you use the word "immediately" will you just tell us what you mean, because immediately to you might be a little longer time than I think it is. About what do you mean by immediately? A. It might have been one minute.

Q. About a minute? And in a minute—about a minute after you fell and while you were trying to raise yourself, these men came and helped you up—tried to help you up? A. Yes, sir.

Q. Then did they take you to the waiting room? A. Not the two men who picked me up, but the
20 next man who was standing there.

Q. I see. And then this next party that you have referred to, he took you in the waiting room? A. Yes, sir.

Q. At that time you did not particularly observe the condition of this hole that you speak of, did you? A. When?

Q. You did not examine it at that time? A. Only I looked at my ankle, you see—when I looked down at my ankle I saw that there was a
30 hole there.

Q. Was there water in it? A. It was damp and black like.

Q. Was there any water in it at the time? A. A little water.

Q. Just a little? A. Yes, sir.

Q. And this "damp and black like," you have told us was something like axle grease? A. Yes.

Q. Was that on your shoe? A. Yes, sir.

Q. Well now, can you indicate on this piece
40 of paper with this pencil about how big that

Mrs. Desire Fortien—Cross.

hole was as you remember it? A. It was bigger than that paper.

Q. You said it was about as big as your foot?

A. Well, the width of it, but it was about that long (indicating).

Q. About from— A. From here.

Q. From here? A. From here to about there (indicating).

10

Q. Right across there (indicating)? A. Yes.

Q. About the length of that, was it? About? A. About that width.

Q. About that width? A. Yes.

Q. That piece of paper now—that is about the size of the hole? A. Yes, sir.

MR. SCOTT: May I have that marked for identification?

(Piece of paper marked A for identification.)

20

Q. This piece of paper representing the shape of the hole is longer than—is oblong in shape. Now which way was the long part of the hole? Did it run out—from the ferry out towards the street? A. No, sir.

Q. Or was it reversed? A. It run parallel with the post.

Q. If I take it this way, Mrs. Fortien—it ran that way? (Illustrating by laying piece of paper against the diagram on the easel.) A. Yes, sir.

30

Q. The longest part ran that way? A. Yes, sir.

Q. By “that way” you mean, according to the map, north and south—up and down? A. Yes, sir.

Q. Now will you tell us how the edges of that hole were? A. Well, I don’t know whether it was round or—that I did not pay attention enough for that.

40

Mrs. Desire Fortien—Cross.

Q. I see. Was it an oblong hole? A. It was like an oblong hole to me.

Q. Like an oblong hole? A. Yes, but I cannot—

Q. I see; and did it slope down towards the center? A. That I didn't pay attention to that.

10 Q. I see. You have told us it was about how deep? A. About an inch and a half.

Q. About an inch and a half deep? A. Yes.

Q. Uniformly throughout, would you say—throughout the whole surface was it an inch and a half? A. Oh, it was mounds in it a little, you know, it wasn't even surface inside.

20 Q. I see; but where—using this piece of paper, this Exhibit A-1 for identification—where was it an inch and a half deep; in the center? A. Like on the side here where there is—you know, there is a line where the asphalt—one asphalt meet another one, you see, and then there is the hole there, and that was on the edge there that I mean it is about an inch and a half.

Q. The edge? Was that the edge nearest the ferry? A. No, the edge furthest the ferry.

Q. The edge furthest away from the ferry? A. Yes.

Q. Was about an inch and a half deep? A. Yes.

30 Q. That is where I have marked, "an inch and a half"? A. Yes.

Q. That was about an inch and a half deep there? A. Yes.

Q. Now how was it right next, nearest to the ferry? A. Nearest to the ferry—

Q. Was it level? A. It was not level. Inside of that hole—

40 Q. Oh was it rough? A. Inside of that hole it was mounds and little holes and mounds and little holes.

Mrs. Desire Fortien—Cross.

Q. All throughout the whole surface? A. All throughout the whole surface.

Q. And this particular inch and a half place, how did you gather—did you measure that? A. I didn't measure.

Q. Not at that time? A. No, sir.

Q. Do you think there were any deeper holes than this inch and a half hole that you have talked about? A. It might have been. 10

Q. But you can't point out where? A. I couldn't.

Q. You say it had little mounds in it? A. Yes.

Q. And little depressions? A. Yes.

Q. Throughout it? A. Yes, sir.

Q. In other words, it was a hole as you have described it with little pieces of asphalt here and there all through? A. Yes, little mounds and little depressions and little hills again and little depression, and in the little depressions there was water. 20

Q. You didn't particularly notice how deep these other little depressions were? A. No, sir.

Q. How did you fix the depth of that hole as being an inch and a half at the particular point that you have told us? A. Well, because when I looked at my ankle I saw my foot in that hole, and I see how deep was my foot in that. 30

Q. You didn't make any particular measurements at that time? A. No, sir, no, sir.

Q. But you figured from your ankle? A. Yes, sir; it might be an inch.

Q. I mean your heel? A. From my heel.

Q. You figured from your heel it was about that depth? A. Yes, sir.

Q. You had a high-heeled shoe on? A. No, sir.

Q. At that time? A. No, sir; I never wear them. 40

Mrs. Desire Fortien—Cross.

Q. About how high was it? Was it an inch and a half high? A. No, sir; it is just what you call a commonsense heel.

Q. You have already told us that this hole or depression ran—the longest direction ran sort of north and south and that the worst part of the hole was that part away from the ferry? A. Yes, sir.

10 Q. Now, whereabouts in that hole would you say was this axle grease that you have told us about? A. Well, it was covered with it.

Q. The whole thing? A. The whole thing was black.

Q. But do you know whether it was axle grease or not? A. Well, it might have been oil, but it was some greasy stuff.

Q. It was some greasy stuff? A. Yes.

20 Q. Was it only in this particular place; I mean this hole there? A. Well, it was spreading outside of the hole too.

Q. Spreading outside the hole too? A. Yes.

Q. You have stated that you don't remember just how the edges of that hole were? A. No.

Q. Can you recollect at all whether right around the edges it dropped down immediately all around or did it go gradually down and then have these little lumps and depressions come up?

30 A. Well, I can't say that. I didn't look at that.

Q. What happened at the time was that you slipped—your foot slipped? A. I fall as a mass.

Q. Yes, but I mean your foot slipped, you didn't bump into anything? A. No, sir.

Q. You didn't trip yourself, you slipped? A. Yes; my ankle turned in the hole and slipped.

Q. Turned in the hole and slipped? A. Yes.

40 Q. And it wasn't that your toe stubbed anything and tripped you in any way? A. I don't understand.

Mrs. Desire Fortien—Cross.

Q. I say the toe of your shoe didn't hit anything or trip you that way? A. No, sir.

Q. This place where you fell—this hole that you slipped in, you have told us was about three feet out into the asphalt, if I remember correctly? A. Yes, sir.

Q. You know what the asphalt pavement is over there? A. Yes. 10

Q. And here is the baggage room? A. Yes.

Q. And here is wooden planking and here is the asphalt? A. Yes.

Q. And it was about three feet out? A. Yes.

Q. Would you say directly in front of the baggage room or more directly in front of this walk? A. It is in the front of that scale.

Q. Now the— A. The scale is right on the corner of the baggage room there. Yes.

Q. Right here? A. Yes—further down. 20

Q. Further down here? A. No; the scale is right on the corner there.

Q. Right here? A. No, sir—

Q. I do not like to bother you, but I would like—

(Witness leaves stand and indicates on map.)

A. The scale is right here.

Q. I see. A. And I fall right in the front there. 30

Q. I see. Much obliged.

(Witness resumes stand.)

Q. Now you say it was about three feet out on the asphalt? A. Yes, sir.

Q. That is a fact? A. Yes, sir.

Q. You don't know what this greasy substance was that you saw there? A. No, sir. It may be oil or axle grease, I ain't sure. 40

Q. You say it might have been oil? A. Yes.

Mrs. Desire Fortien—Cross.

Q. Or may have been axle grease? A. Yes; it was something greasy, black.

Q. It was something black? A. Yes.

Q. Might have been black dirt and water mixed? A. No, sir; it was greasy on my rubbers.

10 Q. And after you got about in November you went back to work at another position? A. Yes, sir.

Q. And there you secured a salary of about how much? A. I started at fifteen dollars again.

Q. Started at fifteen dollars?

Q. Did you secure a raise subsequent to that time? A. Yes; I got another raise; I got a raise of five dollars.

Q. How soon after that? A. Six months after.

20 Q. And have you had any other raise? A. No, sir.

Q. Since that time? A. No, sir.

Q. You still are getting twenty dollars now? A. Yes, sir.

Q. Your work is a designer? A. Designing trimmings.

Q. And aside from moving about your injury does not interfere with your work, does it? A. Yes, sir, greatly.

30 Q. Will you tell us how—aside from moving about? A. Well—

Q. And getting back and forth like that. You can design just as well? A. Yes; I have charge of the girls and it uncommodes me to give them the work. I am not only designer, but I am forelady in the meantime, and you see I have to give the work to the girls and going back and forth to them uncommodes me.

40 Q. But you can do the designing part as well as you did before the accident? A. Yes, but not supervising of the girls.

Mrs. Desire Fortien—Cross.

Q. About how much of your time is taken by your designing work? A. Well, sometimes two hours a day, and sometimes I do not have any designing at all, I have only to supervise.

Q. Your position down to the other place, Mrs. Fortien, was designer? A. Yes.

Q. And forelady there? A. And forelady.

Q. And these girls, what do they do under you? 10
A. What are they doing?

Q. Yes; what do they do? A. Well, they put on the trimmings on the coats which the tailors have done.

Q. That you have designed? A. No, sir; I only design the trimmings, and there is another designer which designs the coats.

Q. And these girls put on these— A. All ornaments that I have designed previously, they put them on the coats. 20

Q. How do you have to supervise them, Mrs. Fortien? A. Because—

Q. I mean how do you do it? They bring the designs to you or you go to them? A. No, sir; it is not that kind—like that. They make ornaments, like buttons and frogs and belting, fancy belts with fancy hangers on it, and I have to go to those places and see that they are making those ornaments all right and they are placing them on the right place on the coat, and I have 30 to see that the coat is in perfect order to leave the house, because it don't go through any other hands but me, and I am the last person that gets hold of the coat and I have to see that the girl makes it good.

Q. How many of those girls do they have up there? A. Thirty-five, for my department.

Q. And they are all located on one floor? A. Yes.

Mrs. Desire Fortien—Re-Direct, Re-Cross.

RE-DIRECT EXAMINATION BY MR. BURKE:

Q. Mrs. Fortien, one more question. Those posts which are marked N. and S., do you go through those posts to the trolley car? A. Yes, sir.

Q. And do the passengers go through those posts to the cars on the street? A. Yes, sir.

10 Q. Have you been doing that for some time before the accident? A. Yes, but not always on that ferry.

Q. What's that? A. I didn't always travel on that ferry.

BY THE COURT:

Q. Whenever you did travel on that ferry, then what? A. Then that is the way I went out.

20 RE-CROSS EXAMINATION BY MR. SCOTT:

Q. Just one question. You told us before about seeing men doing cleaning around there. When before your accident did you see any men cleaning there? A. Oh—

Q. Before the accident? A. Oh, I often see them sweep there.

Q. I mean before the accident? A. Well, I couldn't say exactly if it is two weeks or three
30 weeks that I saw them sweep.

Q. And did those men have on uniforms? A. Yes; blue uniform with a blue cap.

Q. Blue uniform with a blue cap? A. Yes.

Q. Did they have anything on the caps? A. It has "D. L. & W."

Q. Where were they working when you saw them? A. I saw them with brooms—half broom, about that long, with kind of brush like.

Q. Where were they? A. Under the shed.

40 Q. Under the shed; and what they were doing at that time was sweeping? A. Sweeping.

Q. You never saw any men with D. L. & W. let-

John Blueck—Direct.

ters on a hat and blue uniforms doing any repair work, did you? A. No, sir.

Q. Doing any work with relation to the construction or putting down of cement? A. No, sir.

Q. Or asphalt there? A. No, sir.

Q. The only thing you ever saw was some Lackawanna men with brooms sweeping? A. Yes, 10
sir.

JOHN BLUECK, sworn.

DIRECT EXAMINATION BY MR. BURKE:

Q. Mr. Blueck, you are employed by Mr. Dahlgren? A. Yes.

Q. And Mr. Dahlgren is a photographer? A
Yes. 20

Q. So are you? A. Yes.

Q. Where is your place of business? A. 646
Park Avenue, New York.

(Photographs shown to Mr. Scott, and he examines them.)

MR. SCOTT: I will admit all of these right now. I will admit four of the photographs. I have no objection to four of them being offered without any further proof.

MR. BURKE: I will take what I can get
so far. 30

THE COURT: Pick them out and prove the others.

(Photographs marked Exhibits P-1, P-2, P-3 and P-4, respectively, and shown to the jury.)

MR. BURKE: These you won't admit?

MR. SCOTT: I will admit those were photographs taken on—

Q. You took these photographs last Sunday morning? A. March 12, 1916, 10 A. M. 40

John Blueck—Cross.

MR. BURKE: Your point is they are out of time?

Q. What are these pictures that I show you?

A. Those are photographs of the accident—the lady showed me where she broke her ankle.

Q. Where were they taken? A. At the Christopher Street ferry on the New York side, on the uptown slip, at the exit of the uptown slip.

10

Q. Did you take them yourself? A. Yes.

Q. Did you develop them yourself? A. Yes.

THE COURT: What is the objection to them, Mr. Scott?

MR. SCOTT: Why, I don't know whether—first I want to find out if the witness has already said he knew what the purpose of having them taken was; I think I have a right to know how he has taken those pictures, if he knew the particular reason; and my second objection is that they were taken in March, 1916, and I do not know whether they represent the condition as shown at the present time—might have been a small hole enlarged by this time.

20

MR. BURKE: I offer them.

MR. SCOTT: I have a right to examine on—

THE COURT: Yes; you may cross-examine, and then I may not admit them, except to have them marked for identification, that is, provided counsel's objection still remains after cross-examination. We will leave it to you, Mr. Burke.

30

CROSS EXAMINATION BY MR. SCOTT:

Q. Mr. Blueck, you took this on March 16th?

A. March 12, 1916, 10 A. M.

Q. What day of the week was that? A. Sunday.

40

John Blueck—Cross.

Q. Prior to that time had you been over to the Christopher Street ferry where these pictures are supposed to have been taken? A. Were I over there before?

Q. In regard to this accident? A. No, sir.

Q. Do you know what the condition of the place where these two pictures being offered now are supposed to represent was on July 25, 1914? A. 10
No, sir.

Q. You don't know whether the pictures taken on March 12, 1916, correctly represent the condition which was shown on these pictures as it existed on July 25, 1914? A. No, sir, I do not.

Q. Except what somebody told you? A. Just what I took on March 12, 1916.

Q. At the time you took the pictures you were informed as to what the picture was to be used for—in court? A. This lady had me to come over 20
and photograph this hole where she turned her ankle, she says.

Q. For use in court? A. Well, I knew they were for use in court.

Q. Didn't you know as a matter of fact that you were taking these to be used in court?

MR. BURKE: We will admit that.

MR. SCOTT: We want Mr. Blueck to admit it.

Q. Did you know it or didn't you? A. Yes, 30
I did.

Q. How long have you been a photographer, sir?
A. This fall six years.

Q. Is it possible in photography to so take a picture as to make it look a good deal worse than the situation exactly exists? I want to know if that is possible? A. Why, no, not if you show the plates. You can see the moment you look at the plate whether any retouching or reduc- 40
ing—

John Blueck—Cross.

Q. I say whether it is not possible and produce the result I spoke about? A. No, sir.

Q. I am not accusing you, sir.

BY THE COURT:

Q. Suppose this very hole that was indicated to you as being the one in which Mrs. Fortien slipped and fell—whatever happened—is it possible in photography, by so locating your camera, or by so arranging either the height or the lowness of your lens, or things of that character, that you could emphasize the size of that hole? A. No, sir; you cannot enlarge it.

Q. Or exaggerate it in any way by the location of your camera or the manner in which you take the photograph? A. You cannot. The shed shows the reproduction of the whole thing—at least the photograph shows the reproduction.

MR. SCOTT: Then I insist on my objection that I made there at the present time. There is no proof that the photograph correctly represents the situation at the time of the accident.

THE COURT: That is, it may have been—

MR. BURKE: If that is true I withdraw the witness. I do not think that objection would be made. If I want these pictures I am ready to show that. That is all.

THE COURT: They may be marked for identification now, if you wish, Mr. Burke.

MR. BURKE: If you will.

BY MR. SCOTT:

Q. One question I would like to ask before you leave. No, I won't ask it.

(Witness excused.)

MR. BURKE: If your Honor does not wish, I won't even mark them, because I may not—

THE COURT: All right.

Joseph Neglia—Direct.

JOSEPH NEGLIA, SWORN.

DIRECT EXAMINATION BY MR. BURKE:

Q. Mr. Neglia, what is your business? A. Shipping clerk.

Q. Shipping clerk for what concern? A. Hiller & Merz Company.

Q. Where is the Hiller & Merz Company located? A. 503 Hudson Street, New York City. 10

Q. How old are you? A. Thirty-one.

Q. Where do you live? A. 309 Green Avenue, Lyndhurst, New Jersey.

Q. Are you married? A. Yes, sir.

Q. On July, 1914, were you crossing the Christopher Street ferry of the Lackawanna Railroad? A. Yes, sir.

Q. You were going from your home, were you? A. Yes, sir. 20

Q. Going to your business? A. Yes, sir.

Q. Did you see anything happen on that morning? A. Yes, sir.

Q. Will you tell the court and jury what you saw? A. Well, just as we came out of the boat and we get in front of the baggage room, I was walking behind a lady, and of course I was looking down to see that I dodged a puddle of water that had formed there, and just as I was looking down I seen the lady turn on her foot and slip and go down under her and fall, and then two gentlemen— 30

Q. What lady did you see? A. Mrs. Fortien. Two gentlemen assisted her to stand on her feet and they was trying to make her walk, and I seen she couldn't walk, and I told the gentlemen to carry her in, but they didn't seem to like the idea—one said he had to catch a car and didn't have no time, and the other said he wasn't strong enough, so I said, "I will carry her in," and I 40

Joseph Neglia—Direct.

picked her up in my arms and carried her into the ladies' waiting room. While we were in there I noticed her foot was swollen, and I told her the best thing to do is to call an ambulance, and I told the porter in the D. L. & W. waiting room to call an officer it, that he would call an ambulance, but they could not seem to find an officer, and
 10 then I called up police headquarters and notified them there was a woman fell in front of the D. L. & W.'s ferryhouse, and that I thought that her leg was broken and required an ambulance. They told me to go out and look for an officer and he would call the ambulance up. Well then I did; I went outside, and just as I went out, why, then one of the porters came over with one of the officers.

Q. Can you indicate on the chart where the
 20 accident happened? A. Yes, I think I can.

Q. Will you please indicate? A. Just as we came in on the uptown slip—the boat was the “Orange,” and we came out along that walk there, and we came out on the asphalt right in front of the baggage room; right about there was a puddle of water, and naturally we came across on this side to get the car on the outside of the post; right about three feet away from the plank walk or the baggage room it seems there is a joint
 30 where the asphalt don't join together and it is kind of raised, and then there is a hole runs north and south about three—about three feet, I should judge, away from the boardwalk.

Q. Which side of those posts marked “N. and S.” was it? A. It was on the inside.

Q. Between the post and the ferry house? A. Yes.

Q. I show you a pillar or post marked “H”. What is that pillar or post? A. Well, that is a
 40 big pillar that holds up the canopy, as I would call it, an iron pillar.

Q. Is that a permanent canopy? A. Yes.

Joseph Neglia—Direct.

Q. The shed? A. Yes.

Q. How far out does that shed extend? A. Oh, away out—outside of these pillars here, I should judge about thirty or forty feet.

Q. About as far as that blue mark there on the diagram? A. Yes.

Q. What kind of a shed is that—permanent?
A. Permanent shed. 10

Q. Do you know how it is marked, the shed?
A. Well, on one side it is marked, "Entrance for teams."

Q. What part of the shed? A. On both ends here—on the face of it is marked on top "Hoboken Ferry," and below that is "Lackawanna Railroad."

Q. So that coming from New York, the West Street side, can you see this lettering on the shed? A. Yes. 20

Q. Do people pass through those posts to get to the ferry house? A. They have to pass to get into the ferry.

Q. How long have you been crossing that ferry?
A. Two years.

Q. That is some time before this accident? A. Before the accident? I crossed it about a month before that.

Q. Did you in that month pass through these posts? A. Yes. 30

Q. Did other people— A. Yes.

Q. —coming from the ferry? A. Yes, sir.

Q. Did you know Mrs. Fortien before the accident? A. No, sir.

Q. You have seen her since? A. Yes, sir.

Q. You have seen me since? A. Yes, sir.

Q. Did you look at the place where she fell?
A. Yes.

Q. On the morning when she fell? A. Yes.

Q. Will you tell the court and jury what
condition existed there? A. Well, what made 40

Joseph Neglia—Direct.

me look at the place more than in particular was after I seen Mrs. Fortien's ankle swell so I thought it advisable to remove her shoe, and in taking her rubbers and shoes off I got my hand full of what I would call axle grease, and I kind of wondered where I had got it off from my hands and I thought maybe she carried it in or
 10 the waiting room and looked around, and then when I went out to look for the officer I paid close attention to see whether there was any in the spot she fell, and when I got there, whv, I still see axle grease smeared over it, around the hole, and some on the inside where the water runs up, leaves streaks like.

Q. What kind of an appearing hole was it? Will you describe the appearance of it? A. Well, it seemed to me as if in putting down the asphalt
 20 it was not put down right and it bulged up and a piece had dropped out, and naturally in the traffic over it it kind of settled down again and the edge were kind of smoothed down.

Q. Had it any appearance of being fresh or not?

MR. SCOTT: I object.

A. No.

MR. SCOTT: I object to it as leading.

30 A. I wouldn't say it was fresh.

MR. SCOTT: I object and ask that it be stricken out.

THE COURT: One minute. Let us decide this thing. On the ground it is leading?

MR. SCOTT: He wants to know whether it is fresh. If it is charging the defendant with knowledge because of a worn condition, then I think that is making his case by leading questions, and while I recognize it is
 40 discretionary, it seems to me this witness is

Joseph Neglia—Direct.

an intelligent witness, and undoubtedly can tell us all about it without the assistance of Mr. Burke.

MR. BURKE: I would rather withdraw it, your Honor, than take any risk with it.

THE COURT: Very well.

Q. With reference to the condition as to newness or otherwise, did you observe the condition as to that? A. Yes, sir. 10

Q. What did you observe? A. Well, as I said before, the edge of the hole which I think it was more—being that baggage room there is an office of the United States Express and they used to back up their trucks up against the baggage room and then they have these little automobiles the company has for carrying trunks, it seems to me the wheels going into that hole it kind of wore off the edge off the hole, and the bottom of the hole it looked the same as when they put a fresh layer of concrete sidewalk and the top of that breaks off where it is rough, like big pebbles and stones, you know, stuck into it. 20

Q. Could you show the jury on this photograph the hole? (Handing witness photograph marked P-3.) A. Yes.

MR. SCOTT: Mark it with pencil, Mr. Burke. 30

THE COURT: On the diagram it was marked with an X.

MR. BURKE: Yes; just put X opposite. (Witness complies.)

Q. Now on the photograph marked P-1, can you indicate the hole on that photograph?

(Witness indicates.)

Q. Just mark an X on that. 40

(Witness complies.)

Joseph Neglia—Cross.

Q. Did you see Mrs. Fortien shortly after the accident, or how soon? A. I don't exactly remember; I should judge it was about two or three months after, or more than that.

Q. Was she at her home then or was she in business? A. That was on July 25th—it must have been about November or December when I
10 seen her again.

Q. On this morning were there many people going through this walk and over the place where Mrs. Fortien fell? A. Yes; there was more than usual.

Q. What's that? A. More than I usually see going across.

Q. Were they people who had been on the ferry-boat? A. Yes.

Q. And going off? A. That I couldn't say,
20 whether they were going home.

BY THE COURT:

Q. Going off? A. Going off, yes.

CROSS EXAMINATION BY MR. SCOTT:

Q. Mrs. Fortien has told us that that hole was about that large (indicating A for identification).
A. Yes, sir.

Q. Is that about right? A. Yes, sir.
30

Q. Your description as regards the edge of this hole, about it being run down by United States Express wagons and baggage and trucks—that is your theory of how it happened? A. That is how I should judge it happened.

Q. That is how you should judge it happened. You didn't see the thing actually done? A. No, sir.

Q. And you don't know whether it was that wagon or whether it was the United States Express wagon or what it was that did it? A. No, I
40 couldn't—only I have seen wagons in that place.

Joseph Neglia—Cross.

Q. Wagons in that place. What you thought it was was the traffic over it of some character?

A. That caused it.

Q. And that had worn down the edges of this?

A. Yes.

Q. Will you just show the jury, looking at this piece of paper, Exhibit A-1 for identification, just how it was worn down? Was it worn down all around the edge? A. Yes, all around. 10

Q. All around the edge? A. Yes, sir.

Q. Sort of worn down smooth around the edge? A. Smooth like and little cracks in it and so forth.

Q. Sort of smooth like all around the edge with little cracks here and there? A. Yes.

Q. Through the center of the hole—was it a depression toward the center of the hole? A. It was a little.

Q. You didn't measure about how deep the deepest point was? A. No, sir, I didn't measure. 20

Q. What would be your judgment, if you examined it enough, or would you care to give us what you think was the deepest part of that hole there, or don't you know particularly? A. Well, I wouldn't know particularly, but my judgment—I should judge it is from an inch and a quarter to an inch and a half.

Q. An inch and a quarter to an inch and a half, and the deepest point would be down toward the center? A. Toward the center I would call it the deepest. 30

Q. And that run down from the smooth edges toward the center? A. Yes, sir.

Q. Now this hole that you speak about—I will redraft that question. A. Wore down the edge—it was only about an inch or an inch and a half, but the rest don't slope down and up again.

Q. Tell us how much it is sloped? A. Well, it just slopes a bit on the edges like that, you know, 40

Joseph Neglia—Cross.

where she has been worn.

Q. The edges are worn? A. Yes; the edge of the hole, around the hole.

Q. That was worn smooth? A. Yes, sir.

Q. And the inner part, inside of those edges, is that a hole—would you say it was a hole? A. Yes, sir.

10 Q. From the edges down to the center, the deepest point, did it go down in a sort of bowl or saucer like? A. Well, saucer, I would call it.

Q. Like a saucer? A. Yes.

Q. You say the edges around here were asphalt? A. Yes, sir; that is what I take it to be, asphalt. I am no judge of it.

Q. What was the inside of the hole; was that asphalt, too? A. Well, that I wouldn't exactly say.

20 Q. It was the same substance as the outside? A. It was rough and hilly like and dirty, so I didn't investigate to see whether it was asphalt or not. That I couldn't say.

Q. Where would you say that axle grease was? A. Well, just about on the side of the hole, smeared all over it. I don't know whether she had done the thing in falling or whether somebody else had stepped on it before.

Q. Was it in the hole or around the hole? A. 30 On the outside of the hole and some in the hole.

Q. I see. On the outside and some in? A. Yes.

Q. You told us when you started to go out of the ferry house there was a puddle of water that you tried to avoid? A. Yes, sir.

Q. Where was that puddle of water, south or north—uptown side or downtown side—of this hole? A. I would call it the east from the hole.

40 Q. That is nearer the river? A. No; that

Joseph Neglia—Cross.

would be away from the river. It would be west.

Q. That is right. That would be east, toward West Street? A. Yes.

Q. About how far from the hole was this puddle of water that you are speaking of? A. Well, I should judge about a foot and a half to two—

Q. Foot and a half, and you were walking in back of Mrs. Fortien? A. Yes. 10

Q. Did you see this puddle of water before you got to it? A. Yes—not before I got to it, just a little ways from it I kind of seen the people favoring the one side and made me favor it and I seen what the cause of it was.

Q. Did Mrs. Fortien favor it? A. Yes.

Q. Veered out of her path? A. Seemed to go with the crowd.

Q. Went with the crowd; and at the time she fell you were right in back of her? A. Yes, sir. 20

Q. Did you examine the hole at that time—just prior to picking her up? A. I didn't what you would call examine it, but I looked at it.

Q. I see. Can you show us any other depressions in any of those pictures other than that one that Mrs. Fortien fell in? (Handing witness four photographs.) A. No.

Q. How about here (indicating)? A. Oh, that is outside. 30

Q. That is outside on the asphalt? A. That is outside in the street.

Q. That is larger? A. No; I wouldn't say that is larger or smaller. That would look more like water accumulated there.

Q. Can you find any? A. No, sir.

Q. Ever seen any United States Mail wagons passing over that place? A. Passing—I seen them back in it.

Q. Seen them pass and back into it? A. Yes 40

Joseph Neglia—Re-Direct.

Q. And taxicabs? A. No, no taxicabs, but the little automobiles the company has, I don't know what to call them, to carry trunks.

Q. And United States Express wagons? A. Yes.

Q. About how far from the end of the trolley tracks would you say this hole Mrs. Fortien fell in was? A. Well, at a rough guess I should judge about forty feet.

Q. Can you indicate on that map where that puddle of water was? You looked at this map before the court? A. I looked at that map, but I don't know the scale of the map.

Q. Well, the scale is up here—one inch to ten feet. A. One inch to ten feet.

Q. Where the puddle of water was? A. Well, that is where I judge. The distance by scale would be about there (indicating).

Q. Where I mark P—about there? A. Yes.

RE-DIRECT EXAMINATION BY MR. BURKE:

Q. Mr. Neglia, have you been passing over that ferry since the accident? A. Yes.

Q. Have the conditions with reference to that hole changed any?

MR. SCOTT: I object to what happened after the accident.

THE COURT: What is the purpose?

MR. BURKE: I may want to offer these pictures again.

THE COURT: It would be perfectly proper for that purpose, if he wants to show the condition.

MR. SCOTT: If that is the purpose I will withdraw my objection.

Q. What is your answer? A. I didn't notice

Joseph Neglia—Re-Cross.

very much change in conditions at the present state.

BY THE COURT: As to this particular hole?

A. Yes, the particular hole.

BY MR. BURKE:

Q. Is there any change in the condition? A. 10
Not such as you could notice it.

RE-CROSS EXAMINATION BY MR. SCOTT:

Q. Did you pay any particular attention to it, Mr. Neglia? A. Yes, I have.

Q. Particular attention? A. Yes.

Q. When? A. Right along.

Q. Since July 25, 1914, up to the present time, what particular attention have you paid to it? A. Because I didn't want to step in the same hole 20
myself.

Q. When did that occur? A. Morning and night—morning coming off, and night going home.

Q. When was that? A. Every working day I go to work.

Q. And have you particularly observed that hole? A. Yes, sir.

Q. It remains just the same as it was? A. About the same.

Q. Wear and tear of the wagons for nearly 30
two years have not made any change since? A. I beg pardon; there was no more wear and tear of wagons, because the United States Express Company do not back their wagons there, because it is out of business.

Q. I say wear and tear of wagons—of the trunk, as you called it—that hasn't changed the hole at all since that time? A. I haven't seen any impression.

Q. You haven't seen—I say it has not changed 40

Mrs. Desire Fortien—Cross.

the hole at all? A. No, sir; not that I could notice.

Q. In two years? The hole was just like it was at the time Mrs. Fortien fell? A. That is the way it seems to me.

Q. Is that the fact; the hole is just the same now as it was at the time Mrs. Fortien fell? A.

10 Well, that is a very hard question to answer.

Q. Yes or no. A. No. I would say no.

Q. How is it different? A. Because it is bound to change in two years.

Q. Has it changed? That is what I want to know? A. Well, has it? I have no data or no figures so I could impress upon my mind so I notice every particular, but it seems to me about the same to me.

Q. It seems to me the same? A. Yes.

20 Q. Would you say it has changed at all, and if so in what way? A. It has not changed in any way.

Q. Hasn't changed in any way, so therefore it is just the same as it was when Mrs. Fortien fell? A. Yes, just the same.

MR. SCOTT: I would like to ask Mrs. Fortien one question, with the permission of the court.

30

MRS. DESIRE FORTIEN, recalled.

FURTHER CROSS-EXAMINATION BY MR. SCOTT:

Q. Mrs. Fortien, would you at the request of the Railroad Company submit to having an X-ray taken, if we bear the expense of the photograph?

MR. BURKE: I object.

40

A. No, sir.

Mrs. Desire Fortien—Cross.

MR. BURKE: Just a minute. I object to that. I do not think that is what your Honor intended. I do not think your Honor intended—

THE COURT: No; Mr. Burke wanted to ask Mrs. Fortien.

MR. SCOTT: I thought that was exactly what the court suggested.

10

THE COURT: No; I suggested to Mr. Burke that he submit the matter to her and we can see what she said, and she could advise us what her answer was.

MR. BURKE: Suppose the witness would say no, the jury would have to get the impression—

THE COURT: I will take care of that, that the jury will not.

MR. SCOTT: I ask leave to apologize to the court for a misunderstanding of what the court said.

20

THE COURT: Very well. We will let the thing stand as it is, and get her answer from Mr. Burke later on. The jury is not concerned in her answer. I will say to the jury now that the jury are not to be concerned in whatever her answer is.

RECESS.

30

40

Pierre Fortien—Direct.

PIERRE FORTIEN, SWORN.

DIRECT EXAMINATION BY MR. BURKE:

Q. Mr. Fortien, you are the husband of Desire Fortien? A. Yes.

Q. And do you remember when your wife was hurt? A. Sure, I remember.

10 Q. After she was hurt was she able to do her housework? A. Eh?

Q. Was your wife able to do her housework after the injury? A. Yes, sir.

(Question repeated by stenographer.)

A. No; after the injury she can't work.

Q. Did you employ anybody to do the work in the house? A. Yes; two day every week, come—Monday and Saturday.

20 Q. Did you employ anybody steadily at first or not? A. Oh yes; that time my wife broke her leg I get one lady steady three week home.

Q. Was that a woman? A. Yes, sir.

Q. To do the housework? A. Yes, sir.

Q. How much did you pay her? A. I paid ten dollar a week for three weeks.

Q. After the end of the three weeks did you continue to employ anybody? A. Yes; two day every week, Monday and Saturday.

30 Q. How much a week did you pay when you employed the one for two days a week? A. I pay three dollar a day every week.

Q. Three dollars? A. One dollar and a half a day.

Q. How long did that continue? A. Oh, all the time come home, I have her every week to come Monday and Saturday.

Q. Until now? A. What?

Q. Up to date? A. Sure, up to date, every week I come, my wife cannot, you know.

40 Q. Did you pay the Doctor's bill? A. Yes, sir.

Q. To Dr. Wirtz? A. Yes, sir.

Pierre Fortien—Direct.

Q. How much was that? A. One hundred dollar fifty.

Q. One hundred and fifty dollars? A. Yes, sir.

Q. Did you have to buy crutches for your wife?

MR. SCOTT: I object.

A. I pay two dollar.

MR. SCOTT: I object to it as leading. 10

MR. BURKE: I will withdraw the question.

A. I pay two dollar—

THE COURT: One minute.

Q. Did you expend any other money? A. I pay the drug store.

Q. How much was that? A. Forty-nine dollar.

Q. Did you expend any other money? A. The time my wife broke her leg—the hospital—I take my wife to New York—I take home; it cost me five dollar for the carriage. 20

Q. Did you spend any other money? A. Oh, every day I spend money, you know—plenty money all the time; I can't tell you how much—something.

Q. How long was your wife in bed? A. Stay there three weeks, can't get out of bed three weeks—after they have crutches, you know.

Q. After the three weeks what? A. After the three weeks you know, have no more—she have crutches—go little better. 30

Q. Where did you get the crutches? A. At the hospital down in Jersey City, I forget the name—you know the hospital down in Jersey City—Sisters in.

Q. Did you pay for the use of them? A. No; they give me new; I gave two dollars.

Pierre Fortien—Cross.

CROSS EXAMINATION BY MR. SCOTT:

Q. What is your business, Mr. Fortien? A. I work in the garage, New York.

Q. Where do you live, in West Hoboken? A. I live West Hoboken, 710 Monastery Street.

Q. Have you a family? A. No, sir; I have one that is dead.

10 Q. You have no present? A. No; one boy is dead.

Q. You have worked at the garage business all the time? A. All the time for maybe fifteen years.

Q. And your wife goes to business? A. What?

Q. Your wife goes to business? Your wife, Mrs. Fortien, she went to business? A. Yes, my wife work day and I work nights.

Q. She worked in the day time and you worked at night? A. Night time, yes, sir.

20 Q. Before Mrs. Fortien was hurt did you ever have anybody come in and help you around the house? A. Before—no.

Q. Before? A. Nobody. My wife feel good, you know. I can work. My wife help me and I help my wife.

Q. You tend to the house during the day time? A. Yes, I sleep day, I can't work day; I don't sleep, you know.

30 Q. Then your wife attended to whatever was to be done when she came home at night? A. You know my wife come home at seven o'clock, half past six, and fix everything—same with morning. I help my wife, my wife help me.

Q. What time did your wife leave for business in the morning? A. At morning? We leave home seven o'clock.

Q. What time did she get home? A. At night? Came at night about seven o'clock.

40 Q. What time did you leave for work at night? A. What time I go to work?

Pierre Fortien—Cross.

Q. What time did you go to work at night? A. I go to work, I leave half past five.

Q. Half past five at night? A. Yes.

Q. What time did you come back in the morning? A. I come back sometimes five o'clock, sometimes seven, sometimes eight. I have no time. After everything finished. I have no time at all. Some time I leave early and some time late.

10

Q. Do you go to work the same time now as you did before the accident? A. Oh, yes; all the time I work—I work for twenty years—I never lose one day.

Q. Does your wife go to business the same she did before the accident? What time does she leave now to go to work? A. What time she go to work now?

Q. Yes. A. The same time.

Q. Same time? A. Same time.

20

Q. About seven o'clock. A. Seven o'clock in the morning.

Q. What time does she get back at night? A. Night? Leave over there six o'clock and come back home about seven o'clock. Take about one hour for to come back.

BY MR. BURKE:

Q. You are not a mechanic, are you? A. I inspector, look everything is in order. This place has four hundred machine. I look over to see if cleaned good. Somebody never do, and I come and have to look, you know.

30

MR. BURKE: That is the case.

MR. SCOTT: May it please the court, before Mr. Burke closes his case—have you another witness?

MR. BURKE: I was going to say with the exception of Dr. Poole. I expect him here and I have spoken to Mr. Scott about it. Mr.

40

Pierre Fortien—Cross.

Scott has consented that I may call him later on.

10 MR. SCOTT: Before Mr. Burke closes his case now, may it please the court, I desire to amend my answer by setting up the special defense of contributory negligence, and the contributory negligence that I desire to set up is the contributory negligence based upon the testimony of the plaintiff herself, not the other witnesses.

20 In our answer we state that we have not sufficient knowledge to know whether the woman was negligent, and having no eye-witness to the accident, that we are not in a position to truthfully set the question of contributory negligence up, and it is a question in my mind whether there is a necessity for setting up contributory negligence as a special defense when it is clearly on the ground that it is shown by the plaintiff's case; but I ask leave to amend my answer to set up the defense of contributory negligence, because from what I have now learned from the plaintiff herself I conceive under the law it shows that she was guilty of contributory negligence. I, perhaps, might be in laches, to the extent that immediately on Mrs. Fortien's testimony I did not ask that, but I do not see how the plaintiff can be
30 prejudiced at this time by setting up something that she knows herself and which she has shown us to be in my opinion a matter of contributory negligence.

MR. BURKE: I do not see any particular thing that Mr. Scott has pointed to to indicate contributory negligence.

40 THE COURT: We need not concern ourselves about that. If he has a right to such a plea and he has not made it out or it does not

Pierre Fortien—Cross.

appear, so much the less concern you should have about it.

MR. SCOTT: I just ask that my answer set it up.

THE COURT: So he may have the benefit of such a plea if he can make out to work such a benefit to himself. I see no good reason why the amendment should not take place. It is just an addition of another paragraph setting up generally contributory negligence? 10

MR. SCOTT: Yes.

THE COURT: As a bar?

MR. SCOTT: In that the plaintiff—

THE COURT: As I understand the rule you need not specify the facts that you intend to rely on—confining yourself to the ordinary statement that the plaintiff is barred from the right of recovery because of contributory negligence is a sufficient plea. That amendment may take place, then. 20

MR. BURKE: Now then, I will rest, your Honor, with the exception that I hope to call Dr. Poole if he comes.

THE COURT: That is agreed, Mr. Scott, that Dr. Poole is to be allowed to testify if he does arrive?

MR. SCOTT: Yes.

PLAINTIFF RESTS. 30

40

John T. Drake—Direct.

JOHN T. DRAKE, Sworn.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, you are a civil engineer? A. Yes, sir.

Q. Employed by the Lackawanna Railroad? A. Yes, sir.

10 Q. And you prepared the map which is on the easel? A. Yes, sir.

Q. And which both parties have been using by consent? A. Yes, sir.

Q. What is the scale of that map? A. Ten feet to the inch.

Q. Will you indicate on that map where the asphalt pavement is? A. All that portion of the map colored with dark color is the asphalt pavement.

20 Q. By dark color you mean the blue? A. Yes, sir; all this (indicating).

Q. And which is the east side of the map? A. This is the east side (indicating right hand).

Q. What street in the city of New York is next east of the ferryhouse shown on that map? A. West Street.

Q. If that asphalt was continued east how far would it extend? A. Well, across West Street; I don't know just how far that is.

30 Q. Across West Street? A. Yes, sir.

Q. How far south? A. Well, I couldn't tell.

Q. Well, about how far? What's that? A. Well, I don't know, Mr. Scott; it may extend for miles, for all I know.

Q. And do you know how far north it extends? A. I do not know, no sir.

Q. Will you look at the northerly ferry slip of the railroad company shown on that map and show us where the bridge is or tell us where the ferryboat dock is located? A. This is the bridge (indicating).

40

John T. Drake—Cross.

Q. Will you mark that B. (Witness complies.)

Q. Will you indicate with the letter F where the ferryboat itself touches the bridge? (Witness complies.)

Q. From the ferryboat to the asphalt along the southerly side of the map at this slip you have indicated what is known as a walk? A. Yes, sir.

Q. Will you tell the court and the jury what the distance is from the point of the ferryboat where it touches the dock to the asphalt pavement? A. About two hundred and fifteen feet, from the ferryboat to the asphalt. 10

Q. Take your seat, please. I show you defendant's Exhibit A for identification, and ask you if you will give me the measurements of that exhibit? A. It is fourteen and one half inches long and seven inches wide.

20

CROSS EXAMINATION BY MR. BURKE:

Q. Mr. Drake, with reference to the blue shaded portion of the map, all of that portion is covered over by the shed, isn't it? A. Not all of it, no sir.

Q. All of that portion which is surrounded by the dotted lines is covered by the shed? A. Yes, sir; covered by the shed.

Q. And you are familiar with the conditions around here, aren't you? A. Fairly so, yes. 30

Q. And at this shed there is the sign "Entrance," is there not? A. Yes, I believe there is.

Q. And to the north of this walk, immediately to the north, is the entrance for teams, isn't it? A. There is where the teams drive in, yes, sir.

Q. And one to go northerly from this walk would have to cross the place where the teams drive in and out? A. I don't know as you have to cross it. 40

John T. Drake—Cross.

Q. Well, can you see any other way out? A. You mean for you to go up West Street, for instance?

Q. Yes. A. Cross directly—

Q. No; I said to go north you have to pass the place where the teams drive in and out; isn't that so? A. I do not quite understand your meaning.

10

Q. Well, to go in this direction? A. Yes, he would cross the—

Q. You would have to cross where the teams enter and exit? A. To go across there you certainly would cross the teams.

Q. So that the passengers then come this way and pass these posts? A. The majority of the passengers do go out that way crossing the posts.

Q. In through these posts? A. Yes.

20

Q. Then you have indicated the street cars on the other side of the posts? A. Yes, sir.

Q. And when you said the walk was two hundred and some feet long you meant the entire space marked "Walk," did you not? A. I meant the space from the ferryboat, this point, to the asphalt.

Q. Yes. That is to a line going along the front of the ticket office? A. It actually does, yes, sir.

30

MR. SCOTT: I offer in evidence Exhibit A, for identification.

THE COURT: All right.

(Paper marked Exhibit D-1.)

John F. Shevlin—Direct.

JOHN F. SHEVLIN, sworn.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Shevlin, you are a police officer at the City of New York? A. I am.

Q. And on July 25, 1914, where were you stationed? A. I was on West Street from Christopher to 11th; that includes Christopher Street Ferry. 10

Q. On that day do you remember an accident occurring? A. I do.

Q. At that time did you make any record of that accident? A. I did.

Q. You were in court yesterday, Mr. Shevlin? A. Yes, sir.

Q. And you saw Mr. Neglia, who testified? A. I did. 20

Q. Did you see him on the day of this accident, on July 25, 1914? A. Yes, sir.

Q. Will you tell the court under what circumstances you saw Mr. Neglia?

MR. BURKE: That is not to repeat any conversation, I suppose.

Q. Will you state what Mr. Neglia did at the time you saw him? A. I first saw Mr. Neglia—he was in the Ladies' room of the Lackawanna Railroad. After I had taken this Miss Fortien's name and address, and taken her pedigree, the ambulance had removed her to St. Vincent's hospital, I, in company with this Mr. Neglia went out to the place where this woman had fallen and I asked him to point out the spot to me, just about where she fell, and he did. 30

Q. At the spot where Mr. Neglia pointed out where Mrs. Fortien had fallen was there a hole in the asphalt pavement the size of this Exhibit D-1? A. No, sir. 40

John F. Shevlin—Cross.

Q. Will you tell the court and jury just what your duties as a policeman of the City of New York are as regards the streets and pavements in the territory which you patrol or had the care of?

A. It is one of the strictest rules in the department after an accident has occurred to inspect the pavement, sidewalks, and also note conditions of weather.

Q. Have you any recollection as to the conditions of the weather at the time? A. I have. My report here shows it was raining on that day.

CROSS EXAMINATION BY MR. BURKE:

Q. Officer, you have not been subpoenaed to come here, have you? A. I have.

Q. Where do you live? A. I live at 360 West 15th Street, New York.

Q. When were you subpoenaed? A. I was subpoenaed for the first time the night before last.

Q. Have you the subpoena with you? A. Yes.

MR. SCOTT: Which subpoena do you mean?

MR. BURKE: To come here.

MR. SCOTT: The first one or the second one?

MR. BURKE: Let me have them both, if you have two.

A. I have one. (Produces paper.)

Q. Did you come over to New Jersey to be subpoenaed? A. I was subpoenaed—the subpoena was left at the station house for me.

Q. In New York? A. In New York.

Q. So that you were not subpoenaed in this state, were you? A. I was subpoenaed in the State of New York.

Q. I show you a photograph. How long have you been at this particular place, officer? A. How long have I been on post at West Street?

Q. Yes? A. Well, for the last seven or eight years, but I am not on post there at the present time.

John F. Shevlin—Cross.

Q. Yes. How long is it since you were on post there? A. Well, about two weeks ago—three weeks ago, possibly; but I have only been on post there, maybe, I don't think I have been on post there three weeks in the last six months.

Q. When you were there you were familiar with the shed at the Delaware & Lackawanna depot, weren't you? A. I was. 10

Q. And you know the posts that were there? A. I did, yes.

Q. You are familiar with the condition of the asphalt? A. I am.

Q. As far as you could see there was nothing the matter with the asphalt, was there? A. If there was I would have reported it.

Q. You did not see any depressions in the asphalt, or holes, did you? A. No, sir.

Q. You did not see this hole that the photogra- 20
pher shows in Exhibit P-1, did you?

MR. SCOTT: I object to the question on the ground that it contains an unwarranted assumption of fact, that the photographer did testify—

A. I don't see any hole there now.

MR. SCOTT: —that there was any hole.

Q. You don't see any there now? A. No, sir. 30

Q. All right. I show you plaintiff's Exhibit P-3. Do you see any hole in that photograph?

MR. SCOTT: I object on the same ground, that it contains an unwarranted assumption of fact, that it is a hole.

THE COURT: How can that be objectionable? He is asked if he sees a hole there.

(Question repeated.)

A. I do not. 40

Q. So that it is one of your duties, is it, to

John F. Shevlin—Re-Direct.

report conditions of the sidewalk? A. Yes, sir.

Q. And would that include a reporting of the conditions at the point where Mrs. Fortien fell?

A. Yes, sir, it would.

Q. And you never reported— A. I never reported a hole there, no, sir.

Q. —anything with reference to the conditions there, did you? A. No, sir.

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. Can you tell us what you did report, Officer, from your memorandum? A. I could read the whole report to you as I have it here.

Q. Was that the— A. A report I took right after the accident.

Q. Will you kindly read the report that you made? A. "July 25, 1914. Patrol post 31. Patrol 8 A. M. to 4 P. M. At 8.10 A. M. Desire Fortien, 710 Monastery Street, West Hoboken, New Jersey, forty years, France, married, forelady, accidentally fell in front of Christopher Street ferry and received fracture of right ankle. Attended by Dr. Halliman, St. Vincent's Hospital, and removed thereto in ambulance. Examined pavement and found same in good condition. The pavement was wet, caused by rain. Witness, Joseph Neglia, 447 Valley Brook Avenue, Lyndhurst, New Jersey."

Q. Mr. Burke has spoken about the subpoena. Will you state to the court and jury the process by which subpoenas are served on police officers in the City of New York to attend court. A. They are left at the station house; and to leave the state we have to obtain permission from the chief inspector.

Q. Was that permission given you, sir? A. It was granted, yes, sir.

John F. Shevlin—Re-Cross.

RE-CROSS EXAMINATION BY MR. BURKE:

Q. You knew that you did not have to come over here, didn't you? A. I made application.

Q. You knew you were not obliged to come here to-day? A. I knew that, yes.

Q. So that to accommodate this company you made application, did you, to the chief? A. Not exactly to accommodate the company, no. 10

Q. Well, wasn't that for accommodation? A. No accommodation at all; only I was asked to produce my record here, that is all.

Q. If it was not for accommodation, are you being paid? A. Well, I guess they could make me do that. I guess they could go to the police commissioner and do that.

Q. Are you being paid by the company? A. Not yet. Not that I know of. I never receive any compensation from anybody. I wouldn't take it, in fact. 20

Q. Then you applied for permission to come over here? A. Yes.

Q. To accommodate the company? A. Not to accommodate anybody.

Q. That is all.

MR. SCOTT: I offer at this time a certified copy of the weather report, certified to under the Act of Congress, for the day of the accident, to show that it was raining on that day. 30

MR. BURKE: I object to that, if the court please, because, suppose it was raining there—suppose it was raining that day—that would not excuse this company from liability in having this hole in which the plaintiff fell.

THE COURT: I do not know, Mr. Burke, what the jury may conclude about that from all the facts and all the circumstances. 40

John F. Shevlin—Re-Cross.

MR. BURKE: On the further ground that this is simply a memorandum made by somebody, I don't know whom, he is not here to be cross examined.

MR. SCOTT: Certified to under the Act of Congress.

10 MR. BURKE: He is not here to be cross examined.

THE COURT: Do you object to it as to form?

MR. BURKE: I do.

THE COURT: What is the objection, that it is not properly certified to?

MR. BURKE: That this cannot be proven in this way. That it appears to be a type-written report made by a man named Marvin.

20 THE COURT: Mr. Scott, can you readily refer me to the Act of Congress?

MR. SCOTT: I think it refers in the certificate itself.

MR. BURKE: The report is signed also by Houston, Secretary of Agriculture, who says full faith and credit ought to be given to Marvin, who signs this, and then is appended some summary, which is not signed.

30 THE COURT: The whole question is whether it is such a certification as it provided for by an act of Congress which would go for and make for the authenticity of the certificate.

MR. SCOTT: "Pursuant to Section 882 of the Revised Statutes, I hereby certify that it appears from the records of the United States Weather Bureau, at Washington, D. C., that the attached copy of form 1030—"

40 THE COURT: Well, to save time I will do this. I will admit it, subject to the objection of counsel, and if you will show me before the close of the trial that this objection is

Frank O. McGrath—Direct.

well founded, of course, I will strike it out.
My impression is that it is proper certification, being in form proper.

(Paper marked Exhibit D-2.)

FRANK O. MCGRATH, SWORN.

DIRECT EXAMINATION BY MR. SCOTT:

10

Q. Mr. McGrath, you are baggagemaster of the Lackawanna Railroad at Christopher Street? A. Yes, sir.

Q. How long have you been there? A. Twenty-one years at that staton.

Q. Were you there on July 25, 1914? A. Yes.

Q. Did you hear of an accident happening there that day? A. I knew of the accident, I didn't see it. At the time I was busy in the office. 20

Q. The map on the easel shows in blue the asphalt pavement in front of the ferry house?

A. That is right, yes.

Q. Are you familiar with that asphalt pavement? A. Yes.

Q. And were you familiar with it on July 25, 1914? A. Yes.

Q. Will you tell the jury whether there has been any change in the condition of that asphalt pavement since July 25, 1914, to your knowledge? 30

A. Well, not on the passenger gangways there has not been any change? There has been changes in team gangways where the heavy trucking is.

Q. I call your attention particularly to the upper slip of the Christopher Street ferry? A. Yes.

Q. Where the walk is indicated here? A. Yes.

Q. And out towards the street cars? A. Yes.

Q. And south of a line of posts out to the 40

Frank O. McGrath—Cross.

Frank Barker—Direct.

street cars. What have you to say as to whether there has been any change made? A. There has not been any repairing done there.

Q. Or repairing done? A. There has been repairing north of that post and south of the post in the team gangways.

10 Q. But from this point here—

THE COURT: Isn't it marked in some way, except saying "this point here"?

Q. From the point of the head post north of that mark "N"—A. Yes.

Q. —down to the post marked "Z", has there been any change? A. That is, meaning the south slip?

20 Q. The south slip or the north slip? A. Neither place has there been. We made changes in the gangways; they have asphalted the gangways for the trucking—team gangways.

Q. It is in the same condition as it was then? A. Well, that particular part is, yes.

CROSS EXAMINATION BY MR. BURKE:

Q. North of the teamway, who made the changes? A. Repairing?

30 Q. Yes? A. The City of New York, that is the Dock Department of the City of New York.

FRANK BARKER, sworn.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Barker, where do you live, sir? A. 265 Grove Street, Jersey City.

Q. What is your business? A. Sidewalk inspector, City of Jersey City.

40 Q. At the request of the Railroad Company, the defendant in this case, did you examine the

Frank Barker—Cross.

asphalt pavement over at the Christopher Street ferry—in front of the Christopher Street ferry-house in the City of New York at any time? A. Yes, sir.

Q. And this map on the easel here shows in blue the asphalt pavement in front of the ferry-house and the north slip and the walk from the north slip out past the baggage room toward the street car track. Did you examine the asphalt pavement in that vicinity? A. Yes, sir, I did. 10

Q. When, sir? A. June the 28th, last year, 1915.

Q. Have you examined it since then? A. I have, day before yesterday.

Q. I show you exhibit D-1 in evidence. Will you tell the jury if you found a hole of the size of this exhibit, about, in some portions an inch and a half deep, in line with the walk from the northerly slip, about three feet out from the ferryhouse in the asphalt? 20

THE COURT: Three feet from the walk?

Q. From the plank walk? A. I did not see a hole anywheres near that size there.

Q. The Railroad Company has arranged to pay you for your services for this day's work? A. Not yet they haven't. 30

CROSS EXAMINATION BY MR. BURKE:

Q. Not yet, did you say, but soon? A. Well,—

Q. And you are pretty friendly with the Lackawanna Railroad people, aren't you? A. I wish I was.

Q. Are you or are you not? A. I am not.

Q. Did you see any depression anywhere in this asphalt? A. Not to my examination.

Q. And you—A. That is, I never saw a depres- 40

Frank Barker—Cross.

sion—to correct myself I never saw a depression what we would call as large as that.

Q. Did you see a depression anywhere? A. Oh, yes, a heel would make a depression in asphalt.

Q. Did you see any depressions any larger than what a heel would make? A. Well—a little larger, yes, but not any deeper.

Q. How many larger? A. Oh, there have been one, two, possibly three inches in circumference.

Q. Where was that? A. That was in several places, but not in the immediate vicinity that my attention was called to.

Q. Will you show on that map where some of those places were? A. I guess I could.

THE COURT: Does the witness understand that map and the scale on which it is drawn?
Do you, Mr. Barker, understand the scale?

A. I take it, your Honor—I take it from the baggage room I could see about where it is.

THE COURT: The scale is one inch on that map represents ten feet actually.

A. Well, the only one that I saw, if there was one, would be about on the edge of the asphalt way down in this end. That was probably about three—about four inches in diameter—but not what you would call a depression—wouldn't be a quarter of an inch or possibly an eighth of an inch in depth.

Q. Now let's see, Mr. Barker. You saw a run there of a couple of hundred feet of asphalt, did you? A. Well, I didn't go over the whole asphalt. I scanned it, yes. I looked it all over, yes.

Q. Is that all you did, just scanned it? A. Well, I was there to look at it thoroughly, and I guess I did, as I generally do looking at any walk.

Frank Barker—Cross.

Q. When you were doing your scanning, where were you doing it? A. All over it. I walked all around it.

Q. Then you did more than scan it? A. Yes; I gave it a look over.

Q. You walked over about two hundred feet of it? A. No, I walked from the ferry entrance to the end of the baggage room, that is, going north and south. 10

Q. Well, how many feet was that, about? A. About possibly seventy-five or a hundred.

Q. So you looked at about a hundred feet of it? A. I did, yes.

Q. Were there any wagons backing into the express office? A. Not at that time.

Q. They do back in there, don't they? A. I suppose so, I don't know.

MR. SCOTT: I object. 20

BY THE COURT:

Q. Do you know? A. No, I don't know.

Q. Your answer is you don't know? A. I don't know.

BY MR. BURKE:

Q. And in that hundred feet of asphalt the only depression you could see was a little bit of a depression that you spoke of before? 30

MR. SCOTT: I object, on the ground it contains an unwarranted assumption—I withdraw my objection.

Q. That is true, isn't it? A. Well, yes, that is true.

John G. Anneman—Direct.

JOHN G. ANNEMAN, sworn.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Anneman, you are employed by the Lackawanna Railroad? A. I am, yes sir.

Q. One of their photographers? A. I am.

10 Q. Do you know where Christopher Street is in New York City? A. I do.

Q. I show you three photographs and ask you if you took them? A. I did.

Q. Now at the time you took these photographs did you take what the particulars of the accident were for which the photographs were to be used? A. I did not.

MR. BURKE: Did you say you did not?

A. I did not.

20 Q. Will you kindly look at that map, Mr. Anneman, and see if you can tell us whether you understand it? A. That map there?

Q. Yes. A. Oh, yes, I understand that.

Q. When were these photographs taken? Do they show? A. It is on each photograph, March 22, 1915.

30 Q. I ask you whether those photographs correctly represent the situation as depicted at the time you took them? A. They represent correctly the situation from where they were taken.

Q. Now you kindly look at this photograph "C 2512", and go to the map and show where you stood when you took that photograph, or where your camera was? A. Mark the map?

Q. Yes, if you will.

THE COURT: Mark it "C 2512", which is the number of the photograph.

MR. SCOTT: "C 2512."

40 (Witness indicates on map.)

John G. Anneman—Cross.

Q. And while you are at the map—A. I wouldn't say that is exact, now; that is just approximate.

Q. While you are at the map, Mr. Anneman, will you mark where your camera was when you took this photograph "C 2511"?

(Witness indicates on map by marking "C 2511")

10

Q. Where you have indicated on the map the position your camera is located at, you have indicated by a circle and cross together with a line and arrow. Does the circle and cross show where the camera was placed? A. Where the camera stood approximately, as near as I could tell.

Q. And the arrow is the direction the camera was pointing? A. The direction in which I took the picture, as near as I can tell.

20

MR. SCOTT: I offer those.

CROSS EXAMINATION BY MR. BURKE:

Q. You did not develop them yourself, did you? A. I did, yes, sir.

Q. Why did you take the pictures at this particular point? A. To show the conditions at that point.

Q. To show what? A. The conditions existing at that point.

30

Q. Why did you want to show the conditions existing at that particular point? A. I knew that there had been an accident under there. I knew that some one—I had been told that some one had fallen there. I did not know the exact spot. I showed the conditions the best that I knew how.

Q. So when you told Mr. Scott a little while ago that you did not know about an accident you were mistaken, weren't you?

40

MR. SCOTT: I object. I think that is improper and argumentative.

John G. Anneman—Re-Direct, Re-Cross.

THE COURT: I do not think any such question was asked him.

MR. BURKE: I will withdraw it.

MR. SCOTT: Is your examination now the preliminary examination before the offer?

MR. BURKE: I do not object to the offer.

THE COURT: Let them be marked.

10 (Photographs marked Exhibits D-3 and D-4.)

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. Did you take any other pictures? A. I took one of them.

Q. Is that the picture? A. That is the photograph.

Q. Marked "C 2510"?

20 (Photograph shown to Mr. Burke.)

MR. SCOTT: I think Mr. Burke has no objection to this?

MR. BURKE: No.

(Photograph marked Exhibit D-5.)

THE COURT: Will you show where it was taken from?

MR. SCOTT: I think it shows for itself. Have you any more questions, Mr. Burke?

MR. BURKE: Yes.

30

RE-CROSS EXAMINATION BY MR. BURKE:

Q. You are an expert photographer, aren't you?

A. Well, I have been in business five years.

Q. You have taken pictures before for the Lackawanna, haven't you? A. Oh, yes.

Q. You usually know why the picture is taken, don't you? A. No, not always.

Q. You are not interested in that? A. I know they are taken for accident purposes to show con-

40

John G. Anneman—Re-Cross.

ditions existing, and I am told where to take from—sometimes.

Q. You did not know that you would be expected to come to court? A. Yes.

Q. And tell about this? A. Oh yes.

Q. Oh, you did know that? A. Yes.

Q. So you knew there had been an accident?

A. I knew there had been an accident. 10

Q. You knew where the accident was claimed to have taken place? A. No.

Q. Didn't you know that? A. No.

Q. You knew you had to come to court about the accident? A. I did.

Q. You knew you would be asked to testify? A. I did.

Q. And it never occurred to you to find out the place where the accident was alleged to have taken place, so that when you took this particular spot you took it at random, didn't you? A. I 20
done it under directions.

Q. Why don't you take the pictures of this location because you knew there had been an accident there? A. Why.

Q. Didn't you know there had?

MR. SCOTT: The witness has already testified.

(Question repeated by the stenographer.) 30

A. No particular location.

Q. You just happened to pick out this location?

A. I was directed to take pictures from them points.

Q. I show you this exhibit D-5. It would have been possible for you to have shown up a little more light in there under the shed? A. No, hardly. I got all the light I possibly could. I gave that about four seconds exposure.

Q. Do you mean to tell this jury that you could 40

John G. Anneman—Re-Cross.

not have shown up more light in under that shed than you have shown in that picture?

MR. SCOTT: I object to the question. The witness has testified to that fact, and the question is improper, that he means to tell the jury. The form of the question is improper.

10

THE COURT: I will permit it.

MR. SCOTT: I ask for an exception.

THE COURT: You may have it. Answer the question.

A. I showed to the best of my ability all in under there that I possibly could.

Q. West Street is about how wide, do you know, in front of that entrance? A. I could not say. I haven't the least idea.

20

Q. There is a couple of hundred feet of open space there, isn't there? A. Oh, yes.

Q. And what time of day did you take these pictures, in the morning or in the afternoon? A. Just about eleven o'clock.

Q. About eleven o'clock? A. About eleven o'clock.

Q. The sun was then shining in under there, in under that shed? A. No, the sun was pretty well up. It was down on top of the shed, too.

30

Q. When you took two of the photographs you took them from under the shed, didn't you? A. Yes; two was in under the shed—not under the roof.

Q. From where did you take this photograph I have, Exhibit D-5? A. I took it from the car tracks.

Q. From where? A. About the center.

Q. Can you show on that? A. No; on this—about—

40

Q. Where were you? Can you show on this photograph? A. No, no, I can't say.

John G. Anneman—Re-Cross.

- Q. How far were you from these posts, about?
 A. That I couldn't say, but just a general view.
 Q. I mean can you indicate about where you stood?

THE COURT: That would not be possible, Mr. Burke, because if he could he would appear on the photograph. He must have been somewhere out of range. 10

- Q. How far out, about? A. From these posts, was I standing?

- Q. Yes. A. That I didn't ascertain or measure on that; it is just a general view.

- Q. Give us an idea, how far from the post were you when you took that picture? A. May I see the photograph again? (Examines picture.) Oh, I should judge about thirty-five or forty feet.

- Q. About forty feet? A. About forty feet. 20

- Q. If you had come in within about five feet wouldn't you have shown it better?

MR. SCOTT: I object to the question as indefinite, because the word "it" in there refers to no specific or particular thing or object.

THE COURT: Well, maybe you can make that you are referring to any number of things there. 30

- Q. Couldn't you have gotten a clearer and more distinct view of the conditions under the shed if your machine had been about five feet out of the ferryhouse entrance shed? A. If there were no sun on my plates I could have got a better and more distinct view.

- Q. If there wasn't what? A. No sun. If I got in the shadow.

- Q. Yes. The contrast of light is too great to get any detail where you have the two extremities. 40

John G. Anneman—Re-Cross.

Q. So that by standing at a point five feet from the outline of the shed you say that you could not have gotten a more clear view? A. Providing it was no sun on my picture I could have got a clearer view.

Q. At that time you said the sun was just about high? A. Just about high, yes.

10 Q. So that if, assuming the sun was about high, you certainly could have gotten as good a view as you did thirty-five feet out of the street? A. I don't understand the question.

Q. You could have gotten as good a view five feet from the shed as you could have gotten thirty-five feet out in the street, couldn't you? A. I don't know as I understand your question yet.

Q. You can't answer it?

20 THE COURT: He says he don't understand your question.

A. I don't quite understand it.

Q. Is that the best answer you can give? A. May I have the question repeated?

(Question repeated by stenographer.)

A. As good a view, yes.

30 Q. What particular reason did you have for going out thirty-five feet away from this shed to take a photograph showing the conditions underneath the shed? A. Why, I was just ordered to show just general conditions.

Q. This photograph D-4, does that show a break in the concrete line there (indicating.) A. That shows a break in the concrete line.

Q. What are these marks here? A. That is where one piece of concrete came up just a little higher than the other, I presume; I did not examine it closely.

40 Q. Yes, and what does this indicate, this dark

John G. Anneman—Re-Cross.

point here? A. That is just about the same thing, uneven—

Q. Now how far away were you when you took this picture? A. Well—

Q. About in feet, at least?

MR. SCOTT: From where, Mr. Burke?

Q. From this location? A. I was about even 10 with that—

Q. Well, about, in feet? A. How far away from what point?

Q. From this point? A. From that point?

THE COURT: "From this point" means nothing.

Q. Pointing to the break in the concrete line?

MR. SCOTT: Will you mark it?

Q. Marked "A". 20

MR. SCOTT: "A" on photograph D-4.

A. I don't quite understand which point you are referring to, that point there or this point there.

Q. That doesn't make very much difference. How far are these two breaks apart? A. Oh, a few feet?

Q. Now where did you stand, how far away from these breaks? 30

THE COURT: How far away from your camera was the nearest one of those breaks?

A. May I refer to the map?

Q. Can't you tell without referring to the map?

A. Not as accurate as if I refer to the map.

Q. Where you fifty feet away? A. No.

Q. Were you twenty-five feet away? A. That I couldn't say.

Q. Were you ten feet away? A. That I couldn't say. 40

John G. Anneman—Re-Cross.

Q. Was there any particular reason for not showing more of that surface than you show on this photograph?

THE COURT: I don't understand your question, Mr. Burke, do you mean in length or do you mean parallel.

10 MR. BURKE: I mean in length, north and south.

A. If I had got back any further it would cut off the shed that was right near. I couldn't show any further south.

Q. You were back under that shed, weren't you? A. Back as far as I could get and show anything.

20 Q. Was there anything to prevent you from going back as far as you wanted along West Street there? A. No.

Q. Now I show you photograph D-3, was there anything to prevent you from showing more of the north and south line on this photograph from this post which I have marked B?

MR. SCOTT: On Exhibit D-3.

Q. On Exhibit D-3? A. To prevent me showing further north or south?

Q. Yes. A. Nothing to prevent me.

30 Q. With reference to the baggage room, what does this show, do you remember?

THE COURT: I take it Mr. Burke wants to know if you can indicate on that photograph about where the baggage room is. You mean what, the northerly end of it?

MR. BURKE: Northerly end of it, yes.

40 A. Why, it is just about off that picture at the extreme left. It is not there to the best of my knowledge.

John G. Anneman—Re-Cross.

Q. Well, where is the northerly end of the baggage room which you say is to the left of the scene of the picture? Where is the northerly end of it with respect to that pillar or post which has been marked B? A. Why, it is to the left of the post.

Q. To the left of it and beyond it or this way? A. It is beyond the post, to the best of my knowledge. 10

Q. How much, if you go beyond—which would it be, to the north? A. To the north.

Q. How much north of the line of that post would it be—the north line of the baggage room? Maybe the more exact way would be if you can locate that post marked B on the map. A. Oh, yes. (Witness indicates.) Marked Z.

Q. Let's get this right. The post marked B on Exhibit D-3 in the post marked how on the map? A. "Z". 20

Q. Marked Z on the map. If that is correct, I suggest that you make that marking on photograph D-3 instead of B, make it Z, so there will not be any confusion.

(Mr. Burke marks as directed.)

THE COURT: The record will appear then that that post on Exhibit D-3, which was originally marked B, is now marked Z, and that post corresponds to the post marked Z on the plan or map. 30

BY MR. BURKE:

Q. Take these photographs D-3 and D-4, if you wanted to hide—not to show a hole or depression south of what is shown on this picture—if you wanted to do it, you would take the pictures just as you have taken them, wouldn't you? A. South? 40

Q. Yes? A. If I want to show something on here?

John G. Anneman—Re-Cross.

Q. If you did not want to show something south of that, you would just take the picture as you have taken that, wouldn't you? A. Why, I show everything south of this.

MR. SCOTT: I object on the ground it is argumentative.

10 THE COURT: Well, did you understand the question?

(Answer repeated by the stenographer.)

THE COURT: It is too late.

BY THE COURT:

Q. May I ask you a question. Taking the two photographs, Mr. Witness, that is D-3 and D-4 do they match up or connect up anyway by placing the two side by side? A. In no way.

20 Q. In no way. The photograph D-3, is that the most northerly end as shown on the map? A. That is the photograph of the most northerly end of the shed.

Q. And the photograph D-4 is looking southwardly? A. Is looking east.

Q. Looking direct east? A. Directly east.

Q. Then there is a space between the locations in which these two are taken? A. This one here was taken from right up in there—can't exactly
30 show—they are taken at right angles to each other.

Q. I see. That settles it.

BY MR. BURKE:

Q. You did not expect to get as good results from a photograph taken with your machine in the dark end of that shed as you might have gotten if your photographs had been out further towards the West Street? A. Yes, better.

Q. And why is that? A. Why, because if it
40 was out a little further toward West Street I

John G. Anneman—Re-Re-Direct.

would have got some sun and it would have fogged my shadows.

Q. Your idea is that you take a better picture if your machine is in the dark? A. Not in total darkness, no.

Q. But it is pretty dark under that shed, isn't it? A. Well, I just judge the value of the light in giving the exposure.

10

Q. I show you your own photograph D-5; does not that show it is pretty dark under that shed? A. It is quite dark.

BY THE COURT:

Q. In photography, Mr. Witness, lights and shadows are relative things, are they not, one dependent on the other? A. One dependent on the other.

Q. So that if the place where and from which you are taking your photograph, where your camera or lens may be, is extremely bright, the object which you are taking, unless it is in the same degree or a greater degree of light, would show an extreme of shadow, wouldn't it? A. It would.

20

Q. And lights and shadows are therefore comparative things in photography? A. They are.

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. Taking this photograph D-4 with you to the map, will you indicate on the map as near as you can the area of view that this photograph D-4 takes in or covers? A. (Witness complies by marking on the map with pencil.)

30

Q. You have run the area of the view out by projecting two lines out toward West Street? A. I have.

Q. And one line going northeast I have marked "O", and the other line going southeast I have marked "T"; is that correct? A. That is correct.

40

John G. Anneman—Re-Re-Cross.

THE COURT: Now will you ask him the same question with regard to the other photographs?

10 Q. I show you photograph marked D-3 for identification and ask you to indicate the area of the view that is shown on the map as shown in the photograph. A. (Witness complies by marking on map with pencil.)

Q. You have indicated the area of the view on the map of photograph D-3 by projecting two lines, one northwest and one northeast, the one northwest the northerly end, I have marked with a letter "S", and the one northeast I have marked with the letter "Q"; is that correct? A. That is correct.

20 Q. And on this Exhibit D-3, how far north towards the top of the map does the view extend? A. Right there (indicating.)

Q. Will you mark that "AA" A. (Witness complies.)

Q. And the extent of the view as shown in the photograph D-4 as projected by you runs across to the other side of West Street? A. It does.

MR. SCOTT: I desire to offer the photographs to the jury.

30 THE COURT: You may.
(Photographs shown to the jury.)

RE-CROSS EXAMINATION BY MR. BURKE:

Q. I understand the surface area is not tied up in any way in these pictures? A. I don't quite understand what you mean, tied up.

Q. You have not connected the surface area in these pictures have you?

40 THE COURT: By that you mean just what I was reaching for, that by putting these

Douglass McKnight—Direct.

two pictures D-3 and D-4 side by side they do not show a continuous picture?

MR. SCOTT: They are not supposed to be. They are not offered as joint pictures.

THE COURT: They are not, and from the showing upon the diagram it appears also that they do not.

MR. BURKE: Yes, that is all.

10

DOUGLASS MCKNIGHT, sworn,

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. McKnight, what is your business? A. Carpenter.

Q. Connected with what department of the Lackawanna Railroad? A. I am carpenter around the ferries.

20

Q. Marine department? A. Yes.

Q. And do you know where the Christopher Street Ferry is over in New York? A. Yes, I do.

Q. I would like to show one of the photographs D-4 as soon as the gentlemen are through. I show you photograph Exhibit D-4—I will withdraw that question. Do you know what is known as the bulkhead near the Christopher Street ferry? A. Yes.

30

Q. What is the bulkhead—will you state? A. We call that the sea-wall—that belongs to the city—and we come up to it. They approach here. We do not connect on there.

MR. BURKE: I object to that.

MR. SCOTT: I consent that the expression "it belongs to the city" be stricken out.

THE COURT: It may be stricken out.

Q. What is this bulkhead? A. That is com-

40

Douglass McKnight—Direct.

posed of stone. That is, down under the wall spiles are cut off and then built up with stone within two feet of the asphalt on the top.

Q. Have you seen the bulkhead over at the Christopher Street Ferry? A. Have I seen it?

Q. Yes? A. Yes; fifty times.

Q. I show you a photograph D-4 for identification, and ask you if you can point out where the bulkhead is? A. Right there (indicating).

Q. Can you indicate it with a line? Before you mark it, Mr. McKnight—how does it run, north and south? A. North and south.

Q. In that photograph can you mark with a line all the way across the photograph where the bulkhead is? A. Here is a driveway for the horses. There is the bulkhead, you see.

Q. I will run it right across? A. Right straight through there. Right straight along there, way down to the south end.

THE COURT: Suppose you mark the one end of the line with "D",—and the other "H".

A. Here is the bulkhead right there.

Q. "B"? A. Right there.

Q. And "H"? A. Right there.

Q. Now, with respect to the bulkhead, where is the asphalt? A. Right there (indicating.)

Q. Does it come up to and meet the bulkhead, the asphalt? A. We meet the bulkhead—we meet the asphalt with our woodwork there.

Q. Can you also point that out on the map? A. Yes, sir.

Q. Where the bulkhead is? A. Yes.

Q. Are you familiar with that map, Mr. McKnight? A. I never saw one—sitting back there, and I haven't very good eyesight.

Q. The blue represents the bulkhead? A. There

Captain Abbott L. Hickman—Direct.

the boat comes in to this bridge. This bridge is about fifty feet, and then here is the tract until we get to the asphalt.

Q. The blue, Mr. McKnight, there is—A. I want the jury so it will understand all this. This lays in here on a rail like. The works up and down with the tide, and this is stationary until we get up here, and this is the asphalt. That is the asphalt. 10

Q. The blue, Mr. McKnight, is the asphalt? A. Yes.

Q. Will you show the jury by running your pencil along the map, having in mind where the asphalt is, where the bulkhead is? A. Yes sir; right straight along here. (Indicating.) Right straight down until they get to Christopher steamboat dock.

Q. Kindly mark that "B" and "H"? A. Yes. 20

Q. Is that correct; the line running from "B" to "H" is bulkhead? A. Yes.

(No cross examination.)

CAPTAIN ABBOTT L. HICKMAN, sworn,

DIRECT EXAMINATION BY MR. SCOTT:

Q. Captain Hickman, you are assistant manager of the Marine Department of the Lackawanna Railroad? A. I am. 30

Q. And you know where Christopher Street ferry is? A. Yes.

Q. Familiar with Christopher Street ferry? A. Yes.

Q. And the ferry house? A. Yes.

Q. As assistant manager of the defendant company have you charge of the repair work done by the Marine Department? A. Yes. 40

Captain Abbott L. Hickman—Direct.

Q. And at the ferries? A. Yes.

Q. And for how long a time have you had charge of such work? A. About eleven years.

Q. I call your attention to this map and ask you if you are familiar with it? The blue represents the asphalt in front of the ferryhouse at the Christopher Street Ferry? A. I never saw
10 the map before.

Q. Well, the blue represents the asphalt? A. Yes.

Q. The upper part shows the north slip, the lower part shows the south slip? A. Yes.

Q. The baggage room is indicated by the word "Baggage room", and the northern team driveway and northern passenger walk is shown by lettering. I call your attention to the asphalt in front of the ferry house. I would like you to tell the jury
20 what you have ever done with respect to the repairs to the asphalt? A. We have never done anything.

Q. Why? A. Because it don't belong to us.

(No cross examination.)

MR. SCOTT: I now desire—Mr. Burke has kindly consented that I did not need to bring
30 the subscribing witnesses to two certain documents and papers—to make formal proof of them, and for the purpose of having the matters so they may go to the jury I offer now in evidence a lease of the Hoboken Ferry Company to the defendant, the Delaware, Lackawanna & Western Railroad Company, of the ferryboats and the properties of the Hoboken Ferry Company. Included in that lease from the Hoboken Ferry Company to
40 the defendant company was the ferryboat

Colloquy.

"Orange" on which Mrs. Fortien was carried across the river, and also leasing the ferry rights and franchises the Hoboken Ferry Company had.

I also offer in evidence an Indenture of Lease made the 18th day of July, 1905, between the City of New York and the Hoboken Ferry Company, leasing to the Hoboken Ferry Company, the ferry franchises in the City of New York, which includes the Christopher Street, Barclay Street and Twenty-third Street ferries. 10

MR. BURKE: They are both objected to, your Honor, because they are incompetent, irrelevant and immaterial in this case.

MR. SCOTT: Not as to the form.

MR. BURKE: No, not the form.

THE COURT: I understand they are not objected to as to form, but still your objection is so general that it means everything and nothing to the court. 20

MR. BURKE: Yes. The reason I think it is irrelevant and immaterial and does not affect the issues in this case is—

THE COURT: First, let me ask counsel for what purpose he is offering them?

MR. SCOTT: As regards the offer of the Hoboken Ferry Company lease I desire to offer that for two purposes, one showing that we were operating the ferry-boat on which Mrs. Fortien was a passenger, and she has testified that she was riding on the "Orange". 30

THE COURT: For that purpose it would be mere surplusage then. You also admit that very thing then, do you not, in your answer?

MR. SCOTT: Yes. And then further that the lease of the Hoboken Ferry Company to the 40

Colloquy.

Lackawanna Railroad Company, leases a certain franchise from the City of New York to operate ferries between Hoboken and New York City, with certain rights in the property of the City of New York involved in the case now before the court.

10 THE COURT: Well, for that purpose, does that show any more than what seems to be admitted in the case?

MR. SCOTT: Yes. It shows the lease from the City of New York, from the Dock Commissioners of the City of New York—shows that the City of New York leased to the Ferry Company all the property up to the bulkhead as shown and indicated on the map and by the witnesses—the slips and the piers up to the bulkhead.

20 THE COURT: You are now referring to the second offer?

MR. SCOTT: The second paper was the lease from the City of New York to the Hoboken Ferry Company, and that lease has been turned over to the defendant company by the Hoboken Ferry Company.

THE COURT: Under the first offer?

MR. SCOTT: Yes, under the first offer.

30 MR. BURKE: I submit, sir, it does not make any difference whether the city leases this property to them or whether the city owns it or who owns it. This company has put up a shed, they have marked it "Entrance", they have put up posts, and their own man has testified that the only way people could get out is through those posts, otherwise they would have to cross where the teams are, and the defendant company cannot tell these passengers—and that is what it means—
40 "This is the way out", and then if anything

Motion to Direct a Verdict.

happens, come into court and say, "We do not own it." They are in charge of it. They have it, they are controlling it, they are sweeping it. It is the only way out. They are bound to provide a safe way out. They could dump us into the Hudson River and say, "We do not own the river."

Under the Trautwein—under the case of 10
Trautwein and the other cases it don't make a bit difference.

THE COURT: Well, it could not be harmful to you, then, even if it is in the case. It amounts to nothing.

MR. BURKE: That is my thought about it. I think probably it is my duty to object to it going at all.

THE COURT: All right, I will take it subject to your objection, because I want to 20
look it over and have a chance to examine it. It may be I will agree with you, and maybe I do now on general principles. But at least I will admit it subject to your objection, and it may be marked.

(Papers marked Exhibits D-6 and D-7 respectively.)

BOTH SIDES REST.

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Motion to direct a verdict.

MR. SCOTT: I would like to make a motion for a direction of verdict.

THE COURT: Let the jury retire for a few moments.

MR. SCOTT: The first reason, in view of the amendment that I was permitted to make—I will just state my reasons first, and then if the court desires me to argue— 40

Motion to Direct a Verdict.

THE COURT: I would like to have all your reasons first.

10 Mr. SCOTT: The first reason is that the plaintiff was guilty of contributory negligence, if we assume, for the sake of the argument, that the place where she fell was a ferry exit, because under the case of Hoboken Ferry Company v. Fiest, 58 New Jersey Law, page 198, the courts have said that ferry exits are places of known danger, and in this case Mrs. Fortien was walking in a crowd—the crowd, she says was, although she variously estimates it, a large crowd, and that she was so close to the persons in front for her—she was six inches from the person in front of her—and not in a position to exercise the care that was commensurate with a person in walking, if the court holds that the place where the accident happened was a ferry exit and therefore a dangerous place.

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30 Second, I desire to ask for a nonsuit on the ground that the proximate cause of the accident was the plaintiff slipping. The court will expressly recollect that Mrs. Fortien positively denied that she tripped. She said she slipped. It was her tripping—either on some axle grease or in the water produced by rain which had recently fallen or was falling at the time, and if we assume that she fell on the axle grease, there is absolutely no evidence whatever as to the length of time that axle grease was there or that the defendant company had notice of it; and I take it under the Bamberger case in 81 Law, as regards safe places, that you must bring something home to the defendant, and I believe that there is no evidence whatever bring-

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ing home to the defendant the axle grease, if she slipped or fell on that.

THE COURT: The trouble is, Mr. Scott, I do not recall her testimony as you recite it to me now. She did say she did not trip, but in a part of her testimony she says that her ankle turned in this alleged hole, and as it turned her foot also slipped.

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MR. SCOTT: "It was a hole about the length of my foot, about an inch and a half deep, and all smooth inside, but must have been some axle grease in it, because my shoes and rubbers were full of it, and that is where I slipped."

THE COURT: But there is another place where she speaks of it.

MR. BURKE: Page 7, down at the bottom.

MR. SCOTT: "You didn't trip yourself, you slipped? A. Yes; my ankle turned in the hole and slipped." If she slipped from the axle grease, and we contend the proximate cause was the axle grease, I do not take it that there can be any liability, and if it was on account of the rain, the recent rain, or the carrying in of dampness or wetness by other passengers, surely we cannot be charged for that.

20

The third reason—

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THE COURT: If the proximate cause was the hole, these other things followed in succession.

MR. SCOTT: My third reason is this, that under the case of *Yetter v. The Railroad Company*, in 76 New Jersey Law, at page 249, it says that if the ferry company has provided proper exists, that is its full duty, and our contention, as I take it, under the evidence, is that this one hundred and sixty feet up to

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10 this asphalt is the ferry exit that we provided, and there is no negligence shown or no charge made that the accident happened in a ferry exit. If our liability is to be extended, Mrs. Fortien might have just as well gone across to West Street, the other side of West Street, where the asphalt is all alike, as the evidence shows, and tumbled just before she went up the sidewalk curb over there, and charged us with liability. On the ground we had provided proper exits and complied with our duty, and the accident did not happen in a ferry exit, I take it, we have complied with our duty.

20 And the fourth reason is that because the defendant, having fully complied with its duty to furnish a proper and sufficient exit, the accident happened on adjacent public property over which we had no authority or control, there can be no liability. And the last reason—I do not say the most important, but the reason which I am particularly desirous of impressing on your Honor, is my fifth reason, and that even if the court should hold that the defendant was bound to maintain the place where the accident happened in a reasonably safe and

30 suitable condition, this accident happened in the State of New York, and therefore is governed by the law of the State of New York, and that the law of the State of New York with respect to common carriers maintaining reasonably safe places, is the same or analogous to the duty of a municipal corporation over in the State of New York. For a hole of the nature and character and

40 size that the plaintiff has testified to, and which has been shown and identified and

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particularized as the size of this exhibit D-1,—the cases in New York are uniform in holding that for such negligence or for such a hole, six inches or seven inches wide and fourteen inches long, and in some places—one place an inch and a half deep, and the rest of it hilly, and mountainy or moundy, and some places smooth inside—the cases have uniformly held that that is not such negligence as could predicate liability upon the part of a municipality in New York, and that under the evidence of a hole of that character—assuming a hole exists at all—there is presented no question of fact for the jury. 10

I have authorities which I have brought with me to substantiate this last point, which I consider, as I say, while not perhaps the most important, a vital point in my argument. 20

THE COURT: As I understand you then, Mr. Scott, upon your fifth point, you contend that the law of the place of the happening is the law which controls?

MR. SCOTT: Yes sir.

THE COURT: And that place was—

MR. SCOTT: Christopher Street, New York City.

THE COURT: New York City and that the obligation or the rule of conduct and rule of care of the defendant company in the State of New York is not the rule that would be applied in the State of New Jersey had the accident happened here? 30

MR. SCOTT: To put it in another way, they have said that the duty is analogous or similar or the same; that as regards the care of the premises, a railroad corporation must be held to the same degree of care as municipal corporations. 40

THE COURT: And generally what is that rule that the court has marked out in New York?

10 MR. SCOTT: Defects, which we have called slight defects, such as a defect of this character, are not such defects as a municipality could be held liable for; and they have gone further and said that there is no question that such a hole presents a question of fact for the jury.

(Argument.)

THE COURT: I will deny the motion.

MR. SCOTT: May I have my objection noted, as the grounds of appeal?

THE COURT: Yes.

Court's charge to the jury.

20 Gentlemen of the Jury:

This is an action brought and maintained by Desire Fortien and Pierre Fortien, her husband, against the Delaware & Lackawanna & Western Railroad Company for the purpose of recovering damages for injuries which the plaintiff alleges she sustained, and damages which the husband alleges he has had and suffered, growing out of those injuries to his wife, which injuries they allege were caused by and proximately resulted from a negligent act upon the part of the defendant company.

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It is alleged by the plaintiffs that the happening occurred at the Christopher Street ferry of the defendant company in the city of New York, on July 25, 1914. Just how it happened will be a question for you to pass upon, and, therefore, I shall make no reference whatever, gentlemen of the jury, as to what the testimony may be upon

Charge.

that point. Before going to that point or any other, I think it is wise and exceedingly proper, not that you do not know, but lest you should forget or have it escape your attention, that you are to keep in mind, not only in this case in which you are sitting, gentlemen, but in all cases that it is of no consequence to you whatever as to who are the parties to an action; the fact that one of the parties may be a corporation or may be an individual, or may be an association of individuals is of no consequence, and by all means is a thing which you should not take into consideration and it ought not to move you and must not move you in one direction or the other. It is your particular right and duty to determine from all of the testimony what the truth is and what the facts are. In doing that, of course, gentlemen of the jury, it is necessary for you to determine just what credibility, just what degree of certainty you are to place upon what each and every witness may have testified to. That is to be arrived at, generally speaking, by the exercise of your good common sense as men of affairs, and men of broad minds and general knowledge, having had to do through your lifetime with other human beings and knowing how they are moved and how they act. There are certain things which I may call your attention to which you may use and should use in coming to such a determination. They are, what interest, if any, of the witnesses may have in the outcome or result of the action in which they are testifying; another is, in what manner they have testified, whether they have done so freely or over-freely, showing over-anxiety to express themselves in favor of either one side or the other, or to the contrary, that they have not so freely testified and have been reluctant to testify, in an effort to conceal what they may

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Charge.

know about the matter in issue. Again, you may take into consideration, and should, what opportunity each of the witnesses has had to observe and know of that of which they are speaking. Now, those are not all of the things, gentlemen, that you may use to test the goodness and the virtue and truth that there may be in testimony, but they are some of the things. I have summed it all up when I say to you and did say to you that you must use your good common sense as men of affairs in aiding you in judging of human nature. But you are, nevertheless, to give to the testimony of each and every witness the full faith, the full credit, the full weight of truthfulness and believability to which it is entitled, without prejudice one way or the other. Now, that, gentlemen of the jury, is the only way in which you can test and determine the testimony and the weight that is to be given to it so far as truthfulness is concerned, and it is a thing which you must do honestly and conscientiously before you are in any position to pass properly upon the issues that are before you. Now, I say that preliminarily, gentlemen, to what else I have to say, so that you will have it before you continuously not only during my charge to you, but when you go in the jury room, so that you may apply it and apply it properly and in that respect perform one of the many duties that are cast upon you in a proper manner.

Now, there are a number of facts to be determined in this case by you; probably the first one, in order, for your consideration is this: It is said by the plaintiff that the proximate cause of what happened to her was a hole in the asphalt pavement, at a distance of somewhere in the neighborhood of three feet east of the place where the planking at or near the ferry house ended. It

Charge.

is sufficient for me to say to you that her contention and allegation is that the proximate cause of what did happen to her was the existence of this hole, the location of which she has testified to, and the kind, size and character of which hole she has also testified to. Now, she does not stand alone in the description and in the location, and upon the question of whether or not such a hole existed; there is some testimony which may go to show that no such hole did exist. Therefore, I say to you, gentlemen, that is the first question of fact for you to pass upon, because if no such hole existed, then, of course, there cannot be a recovery. And right at this time, gentlemen—and although I may have to repeat it to you as I go from step to step of my charge, yet I must at this time make it plain to you—the burden in respect to the settlement of this particular fact requiring your settlement—the burden of establishing it is upon the plaintiff. She and her witnesses by such testimony as they produce must, by a fair preponderance of the evidence satisfy you on that first fact, as well as others which I will mention, and if she has not, then she can not recover. So that, gentlemen, the first thing, as I suggested for you to consider is the question whether or not the plaintiff has satisfied you that this, or such a hole as she described, and so located as she described, actually existed. If she has not satisfied you of that then you need not consider the case any further, because then she has not made out her case, and then your verdict must be for the defendant.

Now, if she has satisfied you as to that, and in that manner, then I am going to take you directly to the next question, which seems to me to be next important, and be at that point or is that line which has been marked out to you and which

Charge.

is the ending of the planking of the ferry house and the beginning of the asphalt. It also appears in the testimony undisputedly, I think—I have no recollection of there being any controversy about it—that passengers in leaving the ferry-boat, from this slip particularly, proceeded along this walk-way to the end of the planking and
10 thence upon the asphalt, and through as it has been stated, or between these posts, out into the street, at or near which point the lines or trolley seem to end or seem to approach.

Now, of course, gentlemen of the jury, actions of this character have as their basis a right of recovery only provided it is shown that the accident and resulting injuries grew out of and were the proximate result of some negligent act upon the part of the defendant company.

20 Now, while I have said to you that the first point or fact to be decided by you is whether or not this alleged hole actually existed, or whether or not the plaintiff has satisfied you thereof, and, secondly, if it did, and she has satisfied you thereof, then whether or not it was the proximate cause of what happened to her—that is all very true, and I haven't a word of that to take back, but even then there can not be a recovery if you find upon both of those points favorably to the
30 plaintiff—there yet can not be a recovery unless it be shown that the hole existed and was the proximate cause of the injury and that hole was chargeable to the defendant company as negligence upon its part, as it must appear, and you must be satisfied by a fair preponderance of the evidence on the part of the plaintiff that it was the negligence of the defendant company which brought about or permitted the existence of the
40 hole in question; because if that is not shown, then even if all the others are shown, there can not be a recovery.

Charge.

Now, it is necessary for me, gentlemen of the jury, to repeat to you or to read to you what the courts have said upon the question of negligence, and the care required of such a company under such circumstances as appeared in this case.

First, it has been held "that the duty of a railroad company as a carrier of passengers does not end when the passengers is safely carried to his place of destination. The company must also provide means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe." 10

Again, it has been held "that this rule"—speaking of the very rule which I have just read to you—"of course, applies to other common carriers of passengers, including ferry companies." The court in that opinion refers in this manner to a recognized text book in this language: 20

"In 19 Cyc. 510 it is stated that a ferryman must maintain suitable landing places for the ingress and egress of passengers and must use care to keep them in reasonably safe condition, and the duty as to the safety of landing applies not only to immediate means of getting on and off the boat, but requires the ferry man to use care to furnish safe passageways between the ferry house and street." 30

You see, there is this thing which a passenger, such as the plaintiff was in this case, may look forward to have been done on the part of a company such as this defendant; that is, that such a company as this defendant would use reasonable care to keep its passageways and the means of ingress and egress to and from its ferry houses in reasonably safe condition. She had the right to assume that the defendant company had 40

Charge.

performed that duty and to assume that the means of passageway, the means of egress and ingress—in this particular case of egress—from the landing place and ferry house or the company were reasonably safe for her to use.

Now, there has arisen or there has been suggested in this case that if this hole existed and
 10 it was the proximate cause of what happened to her, yet it existed at a place outside of the property of the defendant company. But the testimony is, as I before narrated it to you, that there was this line of posts which were still further to the eastward, toward the street side of the ferry house, than the place where the plaintiff has described this hole as being, and it has further been testified that not only this plaintiff, but
 20 this company made use of that means of egress from the ferry house, passing between these posts to the street beyond. It is also a fact that the law of the state of New York, being the state in which this occurrence took place, is the law which controls in this action. I am about to read to you a portion of an opinion in a case in the State of New York; it is the case of *Selinger v. Manhattan Railway Company*, wherein the Court said this:

30 “The plaintiff tripped upon the steps of a stairway leading from one of the defendant’s platforms to the street. Assuming that the stairway was constructed by the city and remained its property and should have been and perhaps to some extent is cared for by the city. I am of the opinion that this does not excuse the defendant from liability. The duty of a railway company towards its passengers extends to the exercise of reasonable care in affording them safe approaches to the stations and platforms, and this duty in my
 40 opinion applies not only to such approaches

Charge.

as may have been constructed and owned by the company, but to those constructed and owned by other persons, if constantly and notoriously used by passengers as a means of approach. Use indicates the expressed or implied invitation by the carrier, and more especially when the carrier indicates the approach by signs as one to be used—the adoption and indication of such an approach as one to be used casts upon the carrier the duty of exercising a reasonable amount of care and inspection to see that the approach is kept in a safe condition and even if it had no right to make repairs without permission, and is not called upon to seek such permission, it can at least provide against injury to its passengers by erecting such barricades or giving such warnings as will guard against accident.” 10

The point I want to make to you is this. The duty of such a company as the defendant is, as I have already said to you, to use reasonable care to keep its passageways and means of egress and ingress to and from its stations and ferry houses and places of landing in a reasonably safe condition—that right immediately inures to one who is a passenger of such a company, and such a person as is a passenger has a right to assume and presume that the company has performed that duty, and the ways that it invites or places open to and permits its passengers to use as means of egress or ingress, that is, going from or coming to its stations and ferry houses, are in a reasonably safe condition for use by such passengers. If it has not done so and thereby an inquiry accrues and happens to one, then the defendant company is liable, or such a company would be liable. 20 30

Now, of course, gentlemen of the jury, there is also a duty which the law imposes upon one who is a passenger, and that duty is that he or she 40

Charge.

- must also use reasonable care in the use of those ways and means which have been provided by the company; she or he must use that reasonable care which a reasonably prudent person would or should use time, place and circumstances considered. If one who is a passenger does not use that care, and if it is shown in this case—and the
- 10 burden is on the defendant in that respect to satisfy you by a fair preponderance of the evidence—if it is shown in this case that this plaintiff, the wife, did not use that reasonable care, or that care which a reasonably prudent person would or should have used, considering the time, place and circumstances, and because thereof met with this injury, and contributed to what happened to her, then she can not recover; and if that has been shown, it is entirely immaterial as to
- 20 whether or not the degree of negligence—if any there has been shown against the defendant—is greater than that which has been shown against her. Now, by that I mean this—of course, you need not go to the question, possibly—you may not go to the question of whether or not she was guilty of contributory negligence until you have passed upon the other questions, but necessarily you need not go that way, gentlemen; you may, in the first instance, take up and examine the testi-
- 30 mony as to her conduct, and if you find that she was negligent and that that negligence contributed at all to her injury, then you need not consider whether the defendant was negligent or not, because then she can not recover. Or if you go—if you reach it in another direction, gentlemen, and by another way, and consider first the question as to whether or not the defendant company was negligent and that negligence was the proximate cause of what happened to her, and you decide
- 40 that that is so, and then you consider the ques-

Charge.

tion of negligence of the plaintiff and you find that she was negligent, then it is entirely immaterial how slight her negligence may have been or how great the negligence of the defendant may have been; the mere fact, if you find it to be a fact, that she was negligent and that that negligence contributed to her injury, bars her and prohibits her from having a verdict at your hands. 10

Now, gentlemen of the jury, you will keep in mind, of course, in considering the question of negligence—so far particularly I am speaking now as the defendant company is concerned—you will keep in mind the degree of care which I have said to you rests upon it. That degree is reasonable only. Do not consider for one moment that that casts upon the defendant that degree of care which makes them insurers of the safety of the life and person of the passenger. That is not so. If that were so then they would have to use every agency possible so as to make their premises not only sure, but beyond that and to the point of surety safe. That is not the care which is required of them. They are only required to use that reasonable care which will keep those parts of their premises in reasonably safe condition. 20

Now, gentlemen of the jury, if after finding all the facts and applying the rules of law which I have given you, you find that the plaintiff is entitled to recover, then what she is entitled to recover what she may recover for will be these items. She will be entitled to recover for pain and suffering, mental and physical, which she may have endured, which she may now be enduring, or which it is probable she will endure in the future. As to the time over which compensation is to be measured for that pain and suffering, as well as to the quantity of 30 40

Charge.

the measure—dependent, of course, upon the degree of the pain and suffering—you must have been satisfied by the plaintiff. She must have satisfied you upon those points by a fair preponderance of the evidence. If she has satisfied you, for instance, that she has had pain and suffering as a proximate result of injuries which in turn

10 were the proximate result of the negligence of the defendant—if she has satisfied you she has had such pain and suffering, she is entitled to compensation for that pain and suffering which she has shown you she has had in the past. If she has shown you that she has had it in the past and still has it, then she is entitled to compensation for that pain and suffering which she has had and which she is now enduring, as she may have shown you. If she has shown you both of

20 those things and has also shown you that she is still suffering and probably will suffer in the future, then she is entitled to compensation for the pain and suffering which she has had, is enduring, and probably will endure in the future, as she may have shown you that by a fair preponderance of the evidence. Not only as to the question of time, but also as to the degree or intensity of such pain the burden is upon her.

30 Again, she is entitled to have compensation for the loss of earnings which she may have lost as the proximate result of the injuries which she has received. The burden is again and still upon her, gentlemen of the jury, to satisfy you, first that she has met with a loss of earnings as the proximate result of these injuries, in order to recover at all. If she is entitled to recover for presently continuing and existing loss, she must have satisfied you by a fair preponderance of the

40 evidence that she is now meeting with such a loss and that such loss is the proximate result of her

Charge.

injuries. If she is to receive anything for the future because of loss of earnings, she must likewise and to a like degree have satisfied you that she will lose and that that loss will be brought to her as a proximate result of her injuries. She is entitled to have at your hands, if anything, for loss of earnings, just that sum of money which will compensate her for the loss which she has shown you she has had or is having or will have in the future, according as she may have shown you and according to the extent that she may have satisfied you that that loss has, is and will come to her. 10

Now, on the part of the husband. If the wife is entitled to recover, then he may be entitled to recover as he may have shown you, if he has, that he has met with a loss. Of course, if you find that the wife is not entitled to recover, then the husband is not entitled to recover. He can only recover provided you find that the wife is entitled to recover. If he is entitled to recover, he is entitled to have such sums of money as he may have shown you he has lost or expended by way of physician's bills in and about effecting a cure for his wife, moneys expended for medicines, moneys expended for services which his wife did not or could not perform because of disability growing out of the injuries of which she complains. He is entitled to have upon that score and those scores, gentlemen, just that sum of money which will compensate him and make him whole, or that money which he may have shown you he has expended or will be obliged to expend growing out of and being the proximate result of the injuries to his wife. 20 30

To sum up the whole question of damages, gentlemen, you are to keep in mind that by a verdict in a case of this character, or in a verdict 40

Charge.

in a case of this character, you are not to add anything by way of punishment to the defendant. With that you have nothing whatever to do. Plaintiffs in an action of this character are entitled to have at your hands, if they are entitled to a verdict or verdicts, just that sum of money which will compensate them for the loss which they may have shown you, if they have, they have or will meet with as a proximate result of the injuries growing out of the occurrence of an accident. They are entitled to just that and nothing more. They are entitled to be put back in the position which they would have been in, so far as money will do so, that they would have been in had the thing not occurred. That is all they are entitled to, nothing more, nothing less.

20 There are some requests to charge, gentlemen of the jury, which I am willing to charge you, and in charging them I will charge them in connection with whatever I may have said upon the subject, if I said anything upon the subject, to which they apply:

30 "You can not find the defendant company liable if you find that the injury to the plaintiff was caused solely by her slipping on the axle grease which she says was present at the place where the accident happened, because there is absolutely no evidence in this case as to how long the same had been there or that the defendant company had notice that it was there or that it had been there such a length of time as to charge the defendant with notice.

40 "You can not find the defendant company liable if you find that the injury to the plaintiff was caused solely by the rain which had occurred or was occurring at the time she met with her injury.

"You can not find the defendant company

Charge.

liable if you find that the injury to the defendant was caused solely by the other passengers of the boat from which the plaintiff had alighted tracking the water of the rain that had fallen or was falling at the time she received her injury.

"The plaintiffs are bound to prove their case by the preponderance of the evidence and it is not until they have so done and so satisfied you that you can take up and consider the matter of damages. 10

"In ascertaining if the injury to the plaintiff Desire Fortien affected her capacity to earn money as a floor lady and designer you must take into consideration the fact that she is now earning within five dollars per week what she was earning before the accident.

"There is no presumption in the law that merely because a man's wife is injured he has suffered a loss of services and society of his wife. That must be proved by the husband plaintiff. And in considering the evidence on that point you must not lose sight of the fact that the plaintiff, Desire Fortien, was a woman who daily attended business with the exception of the time when it appears from the testimony she was laid up on account of her injury." 20

With that, gentlemen, you may take the case.

(The jury retired to their room, and were later returned to the court room for further instructions.) 30

THE COURT: Gentlemen of the jury, in my great desire to present everything to you that I could possibly think of that you would have to use during your deliberation, one matter escaped me, and my attention has been called to it. It has reference to your verdict, if you find one for the plaintiff, upon the score of loss of earnings for the future. If the plaintiff is entitled to a verdict upon that score, then that which you find for her 40

Charge.

for future loss you will capitalize; or, putting it another way, when you have ascertained what her loss will be, if anything, in the future, you will then have a gross sum in hand, as it were, which you have found to be her loss. Now, that is not the sum which she is entitled to have as her verdict, because, you see, she is only entitled to a

10 verdict for that if she has been incapacitated so that she will not be able to earn. If she had not been incapacitated she would have continued to earn, and she would have continued to earn a recompense or wage week by week over some period in the future, and she would be getting that compensation week by week. Now, when you have found what her whole loss, if any, will be in the future, she is not entitled to have that whole

20 sum at this time, because she would not have it at this time if she were not incapacitated, but you are to take that sum that you so find and find its present worth, that is, what lesser sum it is worth to-day, and it is that lesser sum, that present worth, if anything is to be added to your verdict for loss of future services, that is to become a part of your verdict.

Now, while I am talking about verdict, gentlemen, I should add this, too: If you find for the defendant, then you will express your verdict

30 simply by saying that you find for the defendant. If you find for the plaintiffs, then you will express your verdict in this way: That you find for the plaintiff, Desire Fortien, and against the defendant in the sum of so much money, whatever it may be; and if you find in favor of the husband, that you find a verdict in favor of the plaintiff, Pierre Fortien, and against the defendant in the sum of so much money.

40 With that you may again retire.

(The jury retired to consider of their verdict.)

Defendant's exceptions.

MR. SCOTT: I desire to except to that part of the Court's charge which deals with the passage-way where the plaintiff was injured, as calling it a means and designating that it should be reasonably safe, without the qualification that they must first make a determination that the place where the accident happened was a means.

Second, that portion of the Court's charge which dealt with the law regarding the duty of the defendant company to provide safe means from the ferry house to the street; the objection being that the place where the accident happened was the street.

And that portion of the Court's charge that assumed that the place of the accident was a place of egress and ingress.

And to that portion of the Court's charge in which he dealt with the law of the State of New York, and cited a case against the Manhattan Railway Company as laying down the rule of law which applied to the present case; it being contended by the defendant that the rule of law which applied to the case was the rule of law stated to the Court on its argument for a direction of a verdict under the fifth cause for a direction of a verdict.

I desire to accept to the Court's refusal to charge defendant's requests 1, 2, 3, 4. You did not charge 9, but I do not desire to except to it; I do not think it is correct.

10

20

30

Defendant's requests to charge.

10 1. By virtue of the lease between the Hoboken Ferry Company and The Delaware, Lackawanna and Western Railroad Company, the defendant herein, dated December 31st, 1909, and the lease between the city of New York and the Hoboken Ferry Company, dated the 18th day of July, 1906, the premises of the defendant company for which it was chargeable extended merely to the bulkhead at which said ferries were located, and if you find as a fact that the accident of the plaintiff happened East of said bulkhead, that is in the opposite direction from the river, then your verdict must be for the defendant company.

20 2. The mere fact that the lease of the city of New York, dated the 18th day of July, 1906, allowed the plaintiff to build certain superstructures upon the property of the city of New York is immaterial in considering the liability of the defendant company, unless you should find that the building of the said superstructure, their construction and maintenance, was the proximate cause of the accident to the plaintiff.

30 3. I charge you as a matter of law that the property east of the bulkhead of the ferries operated by the defendant company, upon which it has been shown there had been laid an asphalt pavement, was not owned by, or in the possession of, or a part of the ferry grounds and premises of the defendant company or its lessor.

4. Under the facts in this case I charge you that the defendant company, or its lessor, was under no obligation to keep the asphalt pavement east of the bulkhead in repair and that the same was a part of the public street under the control of the city of New York.

Exhibit D-6.**HOBOKEN FERRY COMPANY.**

Dated December 31, 1909.

Lease of ferry property—all the shore end property in Hoboken and New York, and seventeen ferry boats.

THIS INDENTURE, made this 31st day of December, in the year of our Lord one thousand nine hundred and nine, by and between THE HOBOKEN FERRY COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, hereinafter called the "Ferry Company," party of the first part; and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, hereinafter called the "Railroad Company," party of the second part;

WITNESSETH, that the Ferry Company, for and in consideration of the sum of One Dollar, to it in hand paid by the Railroad Company, the receipt whereof is hereby acknowledged, and of the sums of money hereinafter agreed to be paid by the Railroad Company, and of the performance of the covenants and agreements hereinafter set forth, hath, and by these presents doth, rent, demise, and to farm let, unto the said Railroad Company, its successors assigns:

A.

All those certain tracts, pieces or parcels of land, situate, lying and being in the City of Hoboken, County of Hudson and State of New Jersey, and the buildings, improvements, rights, liberties, privileges and franchises connected therewith or appurtenant thereto, described as follows:

1. All that certain tract, piece or parcel of

Exhibit D-6.

land, together with the buildings and improvements thereon erected, situate, lying and being in the City of Hoboken, County of Hudson and State of New Jersey, a part of which lies under water, and a part of which has been filled in and reclaimed, and which is known and described as follows:

10 BEGINNING at a point which is three hundred and twenty-five (325) feet easterly from the westerly side of River street measured at right angles from said westerly side of River Street and which point is also ninety-seven (97) feet and fifty-hundredths ($50/100$) of a foot southerly from the northerly side of Newark Street extended measured at right angles from said northerly side of Newark Street extended; and running

20 Thence (1) northerly and parallel with said westerly side of River Street seventy-two (72) feet and fifty hundredths ($50/100$) of a foot to a point in the southerly line of lands now or late of the German Trans-Atlantic Steam Navigation Company;

30 Thence (2) running easterly and along said land now or late of the German Trans-Atlantic Steam Navigation Company and on a line parallel to the said northerly line of Newark Street extended and distant twenty-five (25) feet southerly therefrom one hundred and ninety-one (191) feet and seventy-five hundredths ($75/100$) of a foot more or less to the exterior line for solid filling established by the Riparian Commissioners of the State of New Jersey; running

40 Thence (3) southerly and along said line for solid filling about three hundred and fifty (350) feet to the northerly line of lands conveyed by the Hoboken Land and Improvement Company to the Morris and Essex Railroad Company by deed recorded in the office of Register of Deeds of Hudson

Exhibit D-6.

County, New Jersey, in Liber 163 of Deeds, at page 201; and running

Thence (4) westerly and along the line of said property of the said Morris and Essex Railroad Company ninety-five (95) feet and fifty-six hundredths ($56/100$) of a foot to a point where said line intersects the easterly line of land conveyed by the Hoboken Land and Improvement Company to the North Hudson County Railway Company by deed recorded in said Register's office in Liber 442 of Deeds, at page 483; and running

Thence (5) northerly and for part of the distance along said easterly line of the property of the said North Hudson County Railway Company and parallel with said westerly line of River Street two hundred and forty-one (241) feet and eighty hundredths ($80/100$) of a foot; and running

Thence (6) northwesterly ninety-seven (97) feet and forty-one hundredths ($41/100$) of a foot to the point or place of beginning.

With the right, liberty, privilege and franchise to exclude the tide water from so much of lands above described as lies under tide water by filling in or otherwise improving the same, and to appropriate the lands above described to its exclusive private uses.

And also all and singular the lands under water lying between the present exterior line for solid filling and the exterior line for piers as fixed by the Riparian Commissioners of the State of New Jersey, and bounded by the north line of the above described tract extended easterly to said pier line and bounded on the south by a line described as follows:

BEGINNING at a point in the present exterior line for solid filling where the same is intersected by the division line between the above described

Exhibit D-6.

tracts and lands under water leased by the State of New Jersey to the Morris and Essex Railroad Company April 28, 1874.

Thence (1) along the northerly line of lands under water so leased to said Morris and Essex Railroad Company south seventy degrees and twenty-five minutes east five hundred and twenty-five (525) feet more or less to the present exterior line for piers established November 25, 1872, with the right, liberty, privilege and franchise of building piers only on the lands last above described, that is to say, that which lies between the exterior lines already fixed and above mentioned.

And if and where said exterior line shall be fixed at any other place or places further out into said river, also any and all lands under water, lying between the present exterior lines above described and the new exterior line or lines that may be hereafter fixed, the same to be used for solid filling and for piers respectively agreeably to the terms of such extension.

Together with all other right, title, privilege and advantage in and to said lands under water, granted by the State of New Jersey to the Hoboken Land & Improvement Company by grant dated May 23, 1885, and recorded in Book 405 of Deeds for Hudson County, New Jersey, page 344, &c. And also all the riparian rights which are the subject of a grant from the Riparian Commissioners of the State of New Jersey.

2. A free and unobstructed but not exclusive right of way and easement of passage over the following described premises and every part and parcel thereof, being all those certain pieces, parcels or tracts of lands, situate, lying and being in the City of Hoboken, County of Hudson and State of New Jersey, bounded and described as follows:

FIRST TRACT: BEGINNING at a point in the east-

Exhibit D-6.

erly line of River Street seventy-five (75) feet easterly from the westerly line of River Street, said point also being in the northerly line of Newark Street extended; and thence running

(1) easterly and along the northerly line of Newark Street extended two hundred and fifty (250) feet;

Thence (2) southerly and parallel with River Street and to and along the westerly line of the property of The Hoboken Ferry Company fifty-four (54) feet; 10

Thence (3) westerly and parallel to the northerly line of Newark Street extended two hundred and fifty (250) feet to the easterly line of River Street;

Thence (4) northerly and along the easterly line of River Street fifty-four feet to the point or place of beginning. 20

SECOND TRACT: Beginning at a point in the easterly line of River Street seventy-five (75) feet easterly from the westerly line of River Street and two hundred and twenty-five (225) feet southerly from the northerly line of Newark Street extended:

Thence (1) running easterly and parallel to the northerly line of Newark Street extended three hundred and twenty-five and fifty-four hundredths (325.54) feet to the property of the Hoboken Ferry Company; 30

Thence (2) southerly and along the said property of the Hoboken Ferry Company, parallel to River Street one hundred (100) feet to the property of the North Hudson County Railroad Company.

Thence (3) westerly and parallel to the northerly line of Newark Street extended and along said property of the North Hudson County Railway 40

Exhibit D-6.

Company three hundred and twenty-five and fifty-four hundredths (325.54) feet to the easterly line of River Street;

Thence (4) northerly and along the easterly line of River Street one hundred (100) feet to the point or place of beginning.

10 TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title and interest property possession, claim and demand whatsoever as well in law as in equity, of the Ferry Company in and to the same and every part thereof, with the appurtenances.

20 3. All that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Hoboken, in the County of Hudson and State of New Jersey, bounded and described as follows, to wit:

30 BEGINNING at a point in the center line of Fourteenth Street produced distant six hundred and sixty-one (661) feet easterly measured along the center line of Fourteenth Street produced from the westerly line of Washington Street, which said center line is forty (40) feet northerly from the southerly side of said street as located and constructed between Hudson and Washington Streets as said streets are laid down on a map of property belonging to the Hoboken Land and Improvement Company located in Hoboken, Hudson County, New Jersey, made by Chas. B. Brush and filed in the Hudson County Register's office;

40 Thence (1) running southerly and parallel with said Washington Street one hundred and seventy-five (175) feet;

Thence (2) easterly and parallel to said center

Exhibit D-6.

line of Fourteenth Street produced about five hundred and fifty-three (553) feet more or less to the line for solid filling established by the Riparian Commissioners of the State of New Jersey;

Thence (3) northerly and along said line for solid filling about three hundred and fifty-five (355) feet to a point distant three hundred and fifty-five (355) feet measured northerly and at right angles from the aforesaid second course and southerly boundary of this tract; **10**

Thence (4) westerly and parallel to said center line of Fourteenth Street produced about four hundred and ninety-three (493) feet to a point distant six hundred and sixty-one (661) feet from the west line of Washington Street produced;

Thence (5) running southerly and parallel to Washington Street one hundred and seventy-five (175) feet to the place of beginning. **20**

And all of the lands under the waters of the Hudson River in front of the above described tract and between the northerly and southerly side lines thereof produced eastwardly as far as the exterior line for piers established by the Riparian Commissioners of New Jersey; subject only to the restrictions with respect thereto set forth and reserved in the grant from the State of New Jersey and the said Riparian Commissioners to the said Hoboken Land & Improvement Company, by which grant title to said lands was acquired, and all riparian rights appurtenant to any part of the above described premises which are the subject of grant from the Riparian Commissioners of the State of New Jersey: **30**

Subject to the existing rights and privileges of The Public Service Railway Company to maintain and use the tracks and structures erected by the said company and its predecessors under and **40**

Exhibit D-6.

by virtue of sundry licenses and terms granted by the party of the first part.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, 10 all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Ferry Company, in and to the same and every part thereof, with the appurtenances.

4. Also all the rights and privileges of said The Hoboken Ferry Company of wharfage and cranage growing out of or accruing from or appurtenant to the property described as Numbers 142, 143, 144, 145, 146 and 147 West Street, in the City, County 20 and State of New York, fronting on said West Street and extending about one hundred and thirty-one feet southerly from the southerly side of Barclay Street; and all the right, title and interest of the Ferry Company in and to the rights and privileges growing out of or accruing from or appurtenant to the property constituting the southerly twenty feet of Barclay Street.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto be- 30 longing or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Ferry Company, in and to the same and every part and parcel thereof, with the appurtenances.

*Exhibit D-6.***B.**

1. All those certain leases and lease-holds, interests and all and singular the lands and hereditaments and all and singular the other premises demised or expressed to be demised in and by the following leases.

a— An indenture of lease bearing date the eighteenth day of July, 1905, executed by the City of New York unto the Hoboken Ferry Company of the ferry commonly called and known as the Barclay Street Ferry in the City of New York. 10

b— An indenture of lease bearing date the eighteenth day of July, 1905, executed by the City of New York unto the Hoboken Ferry Company of the ferry commonly called and known as the Christopher Street Ferry in the City of New York. 20

c— An Indenture of lease, bearing date the twenty-third day of December, 1903, executed by the City of New York unto the Hoboken Ferry of the ferry commonly called and known as the Twenty-third Street Ferry, in the City of New York.

TOGETHER with all and singular the tenements, hereditaments, edifices, buildings, fixtures, rights, ways, waters, lands under water, piers, privileges and appurtenances under said several indentures of lease, and the lands and premises the subject thereof belonging or in any wise appertaining and the rents, issues and profits thereof, and also all the estate, right, title, interest, term and terms of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity of the Ferry Company, of, in and to the said demised lands 30 40

Exhibit D-6.

and premises and every part and parcel thereof, with the appurtenances, and also the said indentures of lease, and every clause, article, covenant therein expressed and contained.

- 2: The ferries and the sole and exclusive rights to maintain and operate a ferry or ferries from any point on the New Jersey shore of the Hudson
- 10 River between the south line of any property at any time vested in Hoboken Land and Improvement Company on the south, being a point in Jersey City in the exterior line for solid filling, established by the Riparian Commissioners of the State of New Jersey, which point is in the center line of Eighteenth Street (formerly North Tenth Street) extended easterly to the said exterior line for solid filling, and the north line of any property at any time vested in said Improvement
- 20 Company on the north, being a point in the Township of Weehawken, marked by a granite monument on the original division line between the properties formerly belonging to the said Improvement Company and James G. King which monument is also on the easterly line of the New York and Fort Lee Railroad, which monument may be more particularly located and described by reference to map entitled, "Map showing the partition of Highwood among the Divisees of
- 30 James G. King, Sr., Weehawken, Hudson County, N. J., scale 1" to 80'; Spielman & Brush, Surveyors, dated October 13, 1875," and filed in the office of the Register of Hudson County, December 24th, 1875, and known as Number 761, according to the new system of numbering maps in said office. Said monument being in the easterly line of the New York and Fort Lee Railroad and 25 feet southerly at right angles from the southerly line of a plot of land distinguished upon
- 40 said map as Section A2, in Plot 8, all as shown upon said map.

Exhibit D-6.

3: The rights, franchises and privileges for the operation of the ferries known as the Barclay Street Ferry, the Christopher Street Ferry, and the Twenty-third Street Ferry, between the railroad terminal in the City of Hoboken, New Jersey and Barclay Street, Christopher Street and Twenty-third Street, in the City, County and State of New York, and also for the ferry between Fourteenth Street, Hoboken, and Twenty-third Street, New York. 10

And also all ferry houses, ferry racks, floats and bridges and ferry fixtures and all ferry material and stores, including timber, coal, wood, and iron and all machinery, tools, implements and plants owned by said Ferry Company in connection with said ferries and all office furniture, stationary, and fixtures appertaining thereto.

4: All those seventeen ferry boats now in service on said ferries and named as follows: "Scranton", "Elmira", Binghamton", "Scandania", "Ithaca", "Orange", "Montclair", "Lackawanna", "Hopatcong", "Hamburg", "Bremen", "Bergen", "Netherlands", "Hoboken", "Paunpeck", "Musconetcong", and "Secaucus"; 20

TOGETHER with their engines, boilers, machinery, masts, bowsprits, sails boats, anchors, cables, tackle, apparel and furniture. 30

TO HAVE AND TO HOLD the same and all and singular the above described and demised premises unto the said Railroad Company, its successors and assigns, for the full term of twenty years from the first day of January, 1910, (beginning at the first moment in said day) to the thirty-first day of December, 1929, at the yearly rental of

Dollars (), payable in equal monthly payments of Dollars 40
() per month, and of

Exhibit D-6.

the payment of the taxes, insurance and rentals hereinafter agreed to be made by the said Railroad Company.

And the said Railroad Company doth covenant, grant and agree with the said Ferry Company, its successors and assigns, under penalty of forfeiture and damages, as follows:

10 a— That it will promptly pay and discharge the yearly rental of

() above reserved at the time and in the manner aforesaid.

20 b— That it will also pay all taxes, assessments and water rents lawfully levied or imposed upon said demised premises or any part thereof as additional rental for the use of said premises, within ninety days after the same become a lien thereon, and exhibit receipted bills therefor to said Ferry Company, and in case of default in the payment of such taxes and assessments and water rents or any of them, the said Ferry Company shall have the right upon five (5) days notice in writing of its intention, to pay the same and collect the amount of such payment from said Railroad Company as rent in arrear for said demised premises, but no such payment shall be made by said Ferry Company pending any appeal or proceeding on the part of the Railroad Company contesting the validity of said liens or the amounts thereof.

30 c— That it will pay all rents and franchise taxes accruing to the City of New York during the term of this lease upon the leases hereinbefore described in Paragraph 1 of Section B of this lease, of the demised premises, within
40 ten (10) days after the same become due and payable, and that in case of default in the

Exhibit D-6.

payment thereof, the said Ferry Company shall have the right upon five days notice of its intention in writing, to pay the same and collect the amount of such payment from said Railroad Company as rent in arrear for said demised premises.

d— That it will keep buildings and structures erected and to be erected on said demised premises and the ferry boats aforesaid at all times in good condition and repair at its own expense. 10

e— That it will not during the term of this lease reduce the rates of fare for passengers and vehicles upon said ferries below the rates now charged.

f— That at the expiration of this lease or other sooner determination thereof, it will quit and surrender said demised premises and ferry boats unto said Ferry Company, its successors or assigns, in good condition and repair, damage by the elements excepted. 20

And the said Ferry Company doth hereby covenant and agree with said Railroad Company, its successors and assigns, as follows:

That the said Railroad Company, on paying the said yearly rent, together with the other payments mentioned, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid. 30

AND IT IS FURTHER COVENANTED AND AGREED between the parties to these presents as follows:

a— The said Railroad Company shall have the right to change the location and character of the ferry slips and racks at the Hoboken Terminal, and also to establish a ferry or ferries from Hoboken to any other point or points in 40

Exhibit D-6.

the Borough of Manhattan or Brooklyn in the City of New York, and to make, from time to time, such changes in the demised premises as may in its judgment be necessary or expedient.

10 b— This indenture may be abrogated and surrendered by the Railroad Company at its option at any time during the said term or three months notice in writing under its seal and the hand of its president of such intention.

c— The Railroad Company hereby assumes all outstanding obligations of said Ferry Company relative to news-stands, telephone booths, bootblacking establishments and privileges of a similar character upon said demised premises and boats.

20 IN WITNESS WHEREOF the said parties have caused their corporate seals to be hereto affixed, attested by their respective Secretaries, and these presents to be signed by their respective Presidents, the day and year first above written.

THE HOBOKEN FERRY COMPANY,
By W. H. Truesdale,
President.

Attest:

30 A. D. Chambers,
Secretary.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
By W. H. Truesdale,
President.

Attest:

A. D. Chambers,
Secretary.

Exhibit D-7.

INDENTURE, made the 18th day of July, in the year of our Lord, one thousand nine hundred and five, between THE CITY OF NEW YORK, acting by the Commissioner of Docks of said City, party of the first part, and THE HOBOKEN FERRY COMPANY, party of the second part.

WHEREAS the Commissioners of the Sinking Fund of the City of New York adopted the following resolutions on the 16th day of May and the 18th day of July, 1905, respectively, viz.: 10

“WHEREAS, Section 826 of the Greater New York Charter provides that the Commissioner of Docks shall have power and is authorized to lease in the name of and for the benefit of the City of New York, in the manner provided by law, the franchise of any ferry or ferries belonging to said city, for the highest marketable price or rental, at public auction or by sealed bids, and always after public advertisement and appraisal, under the direction of said Commissioner, but not for a term longer than ten years; and 20

“WHEREAS, it is further provided in said section that whenever it may be determined by the unanimous vote of the Commissioners of the Sinking Fund, upon the recommendation of the Commissioner of Docks, that the interests of the City will not be best promoted by leasing the franchise of a ferry in the manner in said section thereinbefore directed, it shall be lawful for said Commissioners of the Sinking Fund, by resolution adopted by such unanimous vote, upon the recommendation of the Commissioner of Docks, to lease such franchises by private agreement for terms not exceeding twenty-five years, and under such conditions as in their judgment will best protect and further the interests of the City and the traveling public; and 30

“WHEREAS, under date of December 6, 1905,

Exhibit D-7.

the Commissioner of Docks has recommended that the interests of the City will not be best promoted by leasing the franchises of the ferries, from and to the foot of Barclay street and Christopher street, North River, Borough of Manhattan, to and from the Delaware, Lackawanna & Western Railroad terminal in Hoboken, New Jersey, at public auction or by sealed bids and after public advertisement and appraisal under the direction of the Commissioner of Docks; now therefore be it

10

"RESOLVED, that pursuant to the provisions of Section 826 of the Greater New York Charter, the Commissioners of the Sinking Fund by unanimous vote, determine that the interests of the City of New York will not be best promoted by leasing the franchises of the hereinbefore mentioned ferries, at public auction, as provided in Section 826 of the Greater New York Charter; and be it further

20

"RESOLVED, that pursuant to the provisions of Section 826 of the Greater New York Charter, the Commissioners of the Sinking Fund by unanimous vote hereby approve of and authorize a lease to the Hoboken Ferry Company, of a franchise to operate ferries from and to the foot of Barclay street and Christopher street, North River, Borough of Manhattan, to and from the Delaware, Lackawanna & Western Railroad Terminal in Hoboken, New Jersey, upon the following

30

"TERMS AND CONDITIONS.

"The lease to be for a term of ten years from March 1, 1905; the rental to be \$ per annum for the Barclay street ferry and \$ for the Christopher street ferry. The lease to contain a clause that at the expiration of five years, the company shall make application to the Commissioner of Docks for a readjustment of the rental and shall submit to said Commissioner an annual statement showing the net earnings for the first five years of the lease. Thereupon the Commissioners of the Sinking Fund, upon the recom-

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Exhibit D-7.

mendation of the Commissioner of Docks, may, if in their opinion the facts presented warrant the same, readjust the rental for the succeeding five years of the lease.

"In case the Hoboken Ferry Company and the Commissioners of the Sinking Fund shall not be able to agree upon the terms for the succeeding five years then the matter shall be left to appraisers to be appointed, one by the Company, one by the Commissioners of the Sinking Fund, and the two to select a third, whose decision shall be final. 10

"The lease is also to contain a clause that the Hoboken Ferry Company shall remodel the Christopher Street Ferry House to the satisfaction of the Commissioner of Docks; and be it further

"RESOLVED, that the Commissioner of Docks is hereby authorized and directed to execute such lease when approved by the Corporation Counsel. 20

"RESOLVED, that the resolution adopted by this Board, at meeting held May 16, 1905, approving of and authorizing a lease to the Hoboken Ferry Company, of a franchise to operate ferries, from and to the foot of Barclay street and Christopher street, North River, Borough of Manhattan, to and from the Delaware, Lackawanna & Western Railroad terminal in Hoboken, New Jersey, be and the same is hereby amended by inserting after the words 'to and from the Delaware, Lackawanna & Western Railroad terminal in Hoboken, New Jersey' and before the words 'upon the following terms and conditions,' the words 'with the wharf property owned by the City at the foot of Barclay and Christopher streets, North River, Borough of Manhattan, and used in connection with the ferries.' 30

NOW, THIS INDENTURE WITNESSETH, that the said party of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned and contained on the part of the said party of the second part, its successors 40

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and assigns, well and truly to be paid, performed, observed, fulfilled and kept, according to the true intent and meaning of these presents, hath granted, demised and to farm let, and by these presents doth grant, demise and to farm let unto the said party of the second part, the privilege or franchise to operate ferries from and to the foot
 10 of Christopher street and Barclay street, North River, Borough of Manhattan in the City of New York over and across the waters of the North or Hudson's River, to and from the Delaware, Lackawanna & Western Railroad terminal, Hoboken, in the State of New Jersey, together with all that certain wharf property owned by the City of New York at the foot of Barclay and Christopher streets, North River, Borough of Manhattan, and used in connection with the ferries.

20 TO HAVE AND TO HOLD the said privilege or franchise, together with the said wharf property, unto the said party of the second part, its successors and assigns, for and during and unto the full end and term of ten years, from and after the first day of March in the year 1905, YIELDING and PAYING therefor, yearly and every year during the first five years of said term for the said privileges of franchises together with the wharf property, the sum of

30 dollars for the Christopher street ferry and the sum of

dollars for the Barclay street ferry, and during the second five years of said term such sum for the Christopher street ferry and such sum for the Barclay street ferry, together with said wharf property as may be fixed and determined as hereinafter provided for, the said several yearly rents or sums of money to be paid in four equal quarter-yearly
 40 payments in advance on the usual days of pay-

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ment, to wit: on the first day of March, the first day of June, the first day of September and the first day of December, in each and every year of said term.

The said party of the second part, for itself, its successors and assigns, doth covenant, grant, promise and agree to with the said party of the first part, its successors and assigns, that the said party of the second part, its successors and assigns, shall and will well and truly pay or cause to be paid to the said party of the first part, its successors or assigns, yearly and every year during said term, the said yearly rents or sums of money hereinbefore mentioned, at the several and respective times above limited and appointed for the payment thereof as aforesaid. 10

AND that the said party of the second part, and its successors and assigns, shall and will at its or their own proper costs, charges and expense, build, erect, make and furnish, and at all times during the term hereby demised will well and sufficiently uphold, maintain and keep in good order and substantial repair the necessary bridges and floats and other fixtures at each landing place of the said ferries, and will, during the whole of said term, maintain and operate said ferries. And the party of the first part assumes under this instrument no responsibility to provide or furnish the said bridges, floats, or fixtures, or any or either of them, or to permit the use therefor of any such property belonging to the City of New York, the said party of the second part taking all the responsibility with reference thereto. 20 30

AND the said party of the second part shall and will dredge and keep dredged the slips adjacent to the hereinbefore described wharf property and used for the purposes of said ferries, so that there shall be at all times, during the said term in the 40

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said slips in every part thereof to the exterior end of the ferry racks at least ten feet depth of water at mean low water, and so that the entire water space in the slips occupied, shall at all times be kept clear and free to that depth from sewage and all other material injurious or dangerous to, or destructive of, life, health or comfort.

- 10 AND said party of the second part, its successors and assigns, shall and will, at all times during said term, put, keep and maintain the said wharf property herein demised, and every part thereof, and the structures thereon, in good and sufficient repair and condition. And all such repairs, rebuilding and dredging, during said term, shall be done at the sole cost, charge and expense of the said party of the second part, or its successors or assigns. And in case said party of the
- 20 second part, or its successors or assigns, shall neglect or refuse to make such repairs or do such dredging for ten days after notice to make or do the same shall have been given by said party of the first part, or any proper officer, agent or employee of said party of the first part, then the said parties of the first part may make such repairs or do such dredging, and the full cost and expense thereof shall and will be paid on demand by the said party of the second part, or its successors
- 30 or assigns, to the said party of the first part. And in case said party of the first part, its officers, agents or servants, in making such repairs or doing such dredging, shall necessarily or reasonably occupy or use said wharf property or the slip adjacent thereto, or any part of them or either of them, the party of the first part shall not be liable to pay any rent, compensation or damages for such use and occupation. nor shall its agents or servants; and said party of the
- 40 second part, its successors and assigns, shall not

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be entitled to any deduction or abatement from the rent hereinbefore agreed to be paid, on account or by reason of such use and occupation, nor by reason of epidemics or sickness prevailing in said City, or any other occurrence whatever which may happen during the term herein demised, except as herein stated.

AND the said party of the second part doth further covenant and agree to and with the said party of the first part, its successors and assigns, that if at any time during the aforesaid term any accident to person or property shall occur on or in proximity to the aforesaid wharf property by reason of the negligence of the parties of the second part, its agents or employes and in any action brought to recover damages therefor judgment shall be recovered against the said party of the first part, then and in every such event, upon a written demand being made upon it or them, the said party of the second part, its successors or assigns, shall and will pay to the said party of the first part, its successors or assigns, the amount of any and every such judgment that may have been so obtained against the said party of the first part, together with all reasonable and proper costs, expenses and counsel fees, to which the said party of the first part may or shall be subjected in the defense of such action or actions; provided, however, that the party of the first part shall have given notice in writing to the party of the second part of the pendency of such action and shall have afforded the Counsel of the said party of the second part a reasonable opportunity, if so requested, to co-operate with the Corporation Counsel of the City of New York in the defense of such action.

AND the said party of the second part, for itself, and its successors and assigns, doth covenant,

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promise and agree, that in the event of any bulkhead or pier, belonging to the said party of the first part, being damaged or injured by collision of any boat of the party of the second part, its successors or assigns, or otherwise, through the act or omission, carelessness or negligence of the said party of the second part, its successors or assigns, 10 its and their officers, agents or servants, then and in that event and in every such event, the said party of the second part, its successors or assigns, shall and will immediately repair and restore the bulkhead or pier so injured to its previous condition, at its and their own cost and expense and to the satisfaction of said party of the first part, its proper officer or officers, agent or servant. And in case of failure so to do, the party of the first part may make such repairs and restoration, 20 and the party of the second part, its successors or assigns, will pay the full cost thereof on demand.

AND IT IS FURTHER COVENANTED AND AGREED by and between the parties hereto, that if at any time during the aforesaid term the party of the first part, or its proper department, officers or officer shall decide to extend or project or change the present bulkhead line, or to build any new pier or piers, bulkhead or bulkheads, and fill in 30 behind the same, in accordance with any law or ordinance of the State or City now enacted or hereafter to be enacted, the party of the second part, or its successors or assigns, on being served with a three months' notice, in writing, setting forth the extent of the change decided upon, and demanding the vacating of all or any portion of the wharf property hereby granted, shall and will at or before the expiration of such three months, vacate the said granted wharf property or the 40 portion thereof so demanded, without delay, and

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the party of the second part, its successors and assigns, shall not claim, nor shall the party of the first part be liable to pay, any damage on account of such surrender and vacation of the said wharf property, or any portion thereof, nor on account of any structures and improvements that may have been erected by the party of the second part. And in case the whole of said wharf property shall be taken, the party of the second part, its successors and assigns, shall not be required to pay any rent for any time after the said wharf property shall have been surrendered and vacated, but in case only a portion of the said wharf property, or only a temporary possession of the whole or a portion of said wharf property shall be required by the said party of the first part for the purposes aforesaid, then and in such case the party of the first part will make a reasonable deduction from the rent herein agreed to be paid.

AND ALSO, that said party of the second part, its successors and assigns, at its and their own proper costs and expense, shall and will at all times during the said term, find, furnish and provide, maintain, keep and navigate such and so many good and substantial steam ferry boat or boats as shall be requisite and necessary to carry, transport and convey across the said waters between the places aforesaid with safety, convenience and expedition, all passengers, horses, cattle, carts, carriages and wagons, goods, merchandise and other things whatsoever, desiring or requiring carriage, transportation or conveyance. which boat and boats shall and will in all particulars comply with the Navigation Laws of the United States and shall and will be such as the Commissioner of Docks (for the time being) of the said party of the first part shall approve, as to capacity, safety and

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comfort; and also will keep the said steam ferry boat or boats at all times during the term hereby granted and demised in good repair and will furnish the same at all times with a sufficient number of proper implements, tackles and necessities, at the proper costs and charges of the said party of the second part, and the number of daily trips to be made between the said points shall be such as the Commissioner of Docks of the said City may from time to time prescribe, but in no case and in no season of the year to be less than two rounds trips, one in the morning and one in the evening, unless hindered by fire, strikes, acts of God or public enemy.

AND the said party of the second part, for itself and its successors and assigns, doth covenant, promise and agree, that each and every of the boats which shall be regularly used and employed on the said ferry, shall have a good and sufficient force pump, or other effective fire apparatus, with not less than four hundred feet of hose, of the quality and dimensions used by the Fire Department of the City of New York. And whenever required by the Chief Engineer of said Fire Department, or any or either of his assistants, the said boat or boats shall and will attend at fires in the City of New York, and the said apparatus and hose shall and will be used to aid in the extinguishment of such fires under the orders and directions of such Chief Engineer, or some one of his assistants. And for the service so rendered, the party of the second part, its successors or assigns, shall be entitled to demand and receive from the party of the first part, its successors or assigns, the sum of Twenty Dollars for each and every hour each boat is engaged therein. But no time less than one hour shall be included in any computation of the time of service engaged.

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AND ALSO that the said party of the second part, its successors and assigns, shall and will, during the said term hereby granted, provide and maintain a sufficient number of sober, honest, skillful and able-bodied men, who shall be competent to manage the boat or boats used on the said ferry; and also, that the said men so to be employed, shall at all reasonable times, give their constant and ready attention at the said ferry, on both sides, for the prompt and expeditious transportation of passengers, horses, cattle, merchandise, goods, effects and things as aforesaid, across the said water. 10

AND ALSO that the said party of the second part, its successors and assigns, shall conduct and manage said ferry so far as the same is operated as such from New York City to New Jersey agreeably to such reasonable rules and regulations as from time to time during the said term shall by law, ordinance, order or resolution of the said party of the first part or their successors in Board of Aldermen convened, be made or passed in relation to said ferries, the number of boats to be used or employed thereon and the rates of ferriage to be charged thereon from New York to New Jersey, which rates shall not be greater than those now charged on said ferries, a schedule of which is hereto annexed, and subject to all reasonable provisions regarding the landing of said boats and passengers in the City of New York. 20 30

AND ALSO quietly and peaceably yield and deliver up the possession of the said ferry franchises and wharf property and everything hereby demised, and surrender the ferry franchises, wharf property and privileges and the use, possession and exercise of any and all rights and privileges under the said franchises or this Indenture, into the possession of the said party of the first part, 40

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its successors or assigns, without fraud or delay, at the end of said term.

AND ALSO that the said party of the second part, its successors and assigns, shall not nor will, nor shall nor will any or either of them, during the said term, transfer, assign, or set over, let or underlet, or in any other manner convey this
10 present lease, or any part thereof, or any estate or interest therein, or in any part of the same without the leave or consent of the said party of the first part, its successors or assigns; first had and obtained in writing duly signed by the Commissioner of Docks of said City.

IT IS HEREBY FURTHER MUTUALLY COVENANTED AND AGREED by and between the parties to these presents, and these presents are upon the express understanding, that nothing herein contained shall
20 be construed or interfere in any manner with any previous grants of rights made by the said party of the first part, nor with the right to grant any future ferries to and from New York City elsewhere, wheresoever, except to and from the specific points of the ferry hereby demised; nor to operate further than to grant possession for the term aforesaid, of the estate, right, title or interest which the said party of the first part may have or
30 lawfully claim in the said ferry franchises or privileges and the wharf property hereby demised by virtue of their several charters and the various Acts of the Legislature of the People of the State of New York.

IT BEING FURTHER EXPRESSLY COVENANTED, AGREED AND UNDERSTOOD by and between the parties hereto, that the right to use the piers on the sides of the slips occupied, or to be occupied for the purposes of said ferries, or the surface of said
40 piers or either of them, or any portion of such surface for any purpose whatsoever, is not in-

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cluded in the lease or demise of wharf property herein contained, the wharf property hereby demised and leased being merely the bulkhead at which the said ferries are located, together with the exclusive use of the slips thereat.

The party of the second part further covenants and agrees for itself, its successors or assigns, that it or they will on the first day of March, 1910, make application to the Commissioner of Docks of the City of New York for a readjustment of the rental of the within lease and shall submit to the said Commissioner an annual statement showing the net earnings of the said lessee for the first five years of the said lease and that thereupon it is mutually covenanted and agreed between the parties hereto, that the Commissioner of the Sinking Fund, upon the recommendation of the Commissioner of Docks, may, if in their opinion the facts presented warrant the same to be done, readjust the rental for the succeeding five years of the lease, and

IT IS FURTHER MUTUALLY COVENANTED AND AGREED between the parties hereto, that in case the party of the second part herein and the Commissioners of the Sinking Fund of the City of New York, shall not be able to agree upon the terms of rental for the succeeding five years of the within lease, then and in that event it shall be left to appraisers to be appointed, whose decision shall be final, such appraisers to be appointed, one by the party of the second part, one by the Commissioners of the Sinking Fund of the City of New York and the two so appointed shall select a third.

The party of the second part further covenants and agrees that it will remodel the Christopher street ferry house to the satisfaction of the Commissioner of Docks.

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PROVIDED NEVERTHELESS, and these presents are upon the express condition that if the said yearly rents so reserved, or any part thereof, shall be behind or unpaid, or if default shall be made by the said party of the second part, its successors or assigns, in the payment of the rent herein and hereby reserved upon any day or days whereon the said rent shall become due and payable, or if the said party of the second part, or its successors or assigns, does or should neglect or omit to pay, perform, fulfil or keep any or either of the payments, articles, covenants, clauses, agreements, matters or things herein contained, while on the part and behalf of the said party of the second part, its successors and assigns, are to be paid, performed, fulfilled and kept during the said term hereby demised, according to the true intent and meaning of these presents; that then and in every and all such case or cases, all the covenants, articles, stipulations and agreements on the part and behalf of the said party of the first part, or its successors, herein mentioned and contained, to be by them done, performed or complied with, shall be, at the option of the party of the first part, utterly null and void; and it shall be lawful to and for the said party of the first part, or its successors, to re-enter upon the premises hereby demised, and to have, possess and enjoy the same again as fully and completely as though these presents had never been made, anything herein contained to the contrary thereof in anywise notwithstanding.

AND that upon a written notice to be made and given by the Commissioner of Docks of the said party of the first part, demanding payment of the rent due and payable, as herein provided, from the said party of the second parts, its successors or assigns, or the performance or fulfillment by said

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party of the second part, or its successors or assigns, of any of the articles, covenants, clauses, agreements, matters or things herein contained on the part of said party of the second part, its successors and assigns, to be performed or fulfilled, and the same remaining unpaid, unperformed, or unfulfilled for the space of ten days ensuing the service of said notice, that then and in that event this lease and everything herein contained shall thenceforth, at the option of said Commissioner of Docks of the City of New York, cease and determine and be wholly void. 10

IN WITNESS WHEREOF the Commissioner of Docks has executed these presents in duplicate for and in behalf of the City of New York and has caused the seal of the Department of Docks and Ferries to be hereunto affixed, attested and proved by its Secretary, and the party of the second part has caused its corporate seal to be affixed and these presents to be executed by its President the day and year first above written. 20

THE HOBOKEN FERRY COMPANY,
By W. H. TRUESDALE, *President.*

A. D. CHAMBERS, *Secretary.*

Form Approved,

W. S. JENNEY,
General Counsel. 30

ALLEN W. SPOONER,
Commissioner of Docks.

GEO. W. STERLING,
Act. Corporation Counsel.

Attest:

J. W. SAVAGE, *Secretary.*

E. J. T.

Approved as to form.

NEW JERSEY COURT OF ERRORS AND APPEALS.

DESIRE FORTEIN and PIERRE FORTEIN,

Plaintiffs-Appellees,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Defendant-Appellant.

10

BRIEF OF APPELLANT.

Statement.

This is an appeal from the judgment entered on the verdict of a jury in a personal injury case for \$3,500, the accident happening to the appellee, Desire Fortein, under the following circumstances:

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The appellant both in connection with its train terminal service also served the City of Hoboken with a ferry service running from Hoboken, New Jersey, to the City of New York, it having the privilege or franchise of landing its ferry passengers at Barclay and Christopher Streets in New York City.

30

Under a lease from the City of New York to The Hoboken Ferry Company (Exhibit D-7, p. 127), which was taken over by the appellant (Exhibit D-6, p. 113), the appellant secured privilege to operate ferries from and to the foot of Barclay and Christopher Streets, together with the privilege to use all the wharf property owned by New York City at the foot of said streets in connection with said ferries (p. 130, l. 1 et seq.).

40

The property leased by the City of New York included the ferry-slip, piers and ferry-house structure and extended from a point in the Hudson River easterly to the sea-wall or bulkhead at which said ferries were located (p. 137, ll. 3-5).

From the bulkhead easterly out into West Street was the superstructure of the ferry-house building and beyond the bulkhead and under the
10 ferry structure shed were certain traffic posts owned by the appellant. These traffic posts were placed on the asphalt pavement, which was a continuation of the pavement of West Street proper.

The ferry-boats entering the northerly slip of the Christopher Street ferry stopped at what is known as the bridge (p. 59, ll. 3-5), and from this point debarkation of passengers was made and the passengers were obliged to walk a distance of 215 feet before they came to the asphalt
20 pavement (p. 59, ll. 9-13).

The bulkhead mentioned in the lease of the City of New York is what is known as the sea-wall (p. 85, ll. 31-2), and is composed of stone (p. 86, ll. 1-3). Over the bulkhead certain woodwork or planks had been laid (p. 86, ll. 32-3), and this woodwork over the bulkhead was met by the asphalt pavement (p. 86, ll. 31-4).

The asphalt pavement extended from the bulkhead east across West Street (p. 58, ll. 27-29), and for a great distance both north and south on West Street (p. 58, ll. 32-7).
30

The appellant had never exercised any supervision of the repairs to this asphalt because it did not belong to it (p. 88, ll. 15-23).

On the morning of July 25, 1914, the appellee, Desire Fortein, became a passenger on the appellant's ferry-boat Orange, plying between Hoboken and New York City and destined for its Christopher Street ferry-slip.
40

After the boat docked the appellee proceeded to go up the walk from the ferry bridge or dock, a distance of 215 feet, crossed the board or plank-ing over the bulkhead and

“was about three feet from where the board stops on that asphalt” (p. 13, ll. 27-30),

when she tripped in a hole in the asphalt.

The hole in which the appellee slipped was about $14\frac{1}{2}$ inches long and 7 inches wide (p. 59, ll. 18-19, p. 27, ll. 17-18). 30

The deepest part of this hole was only $1\frac{1}{2}$ inches deep (p. 29, ll. 33-4), and the entire surface of the hole were little holes and mounds (p. 28, ll. 38-40).

The undisputed evidence showed that the place where the appellee fell was on the asphalt pavement beyond the bulkhead; that the bulkhead was the limitation of the appellant's ferry property; that the appellant never assumed the duty of laying or repairing or maintenance of the asphalt pavement, and that the asphalt was in reality the property of the City of New York and a continuation of West Street in New York City. 20

ARGUMENT.

POINT I.

The appellant owed no duty to care for or repair the asphalt pavement where the appellee fell. 30

At the conclusion of the case the appellant requested the court to direct a verdict the evidence being uncontradicted that the appellant had complied with its duty in the premises by providing a proper exit for its passengers, and that the accident happened not on its exits but on property over which it had no authority or control (p. 93, l. 34, et seq.). 40

The situation is not analogous to the case of *Yetter v. Gloucester Ferry Company*, 76 N. J. L. 249, because in that case the pier from the boat to the park appear to have been the sole available means provided by the Ferry Company by which Yetter was able to reach the Park, while in the instant case after the appellant's boat Orange had docked the appellant had provided a safe walk of 215 feet over which the appellee had
 10 traveled in safety and had crossed the bulkhead and had gone upon the asphalt pavement of which the appellant had neither ownership or control.

The place where the accident happened being in no sense a landing place supplied to the appellee.

The trial court in denying the motion and in his charge to the jury relied upon the case of *Schlesinger v. Manhattan Ry. Co.*, 98 N. J. L. 840 and 48 Misc. 505.

20 The facts in which case were as follows: The plaintiff tripped upon a stairway leading from one of the defendant's platforms to the street.

The main defense relied upon was that the stairway upon which the accident happened had been constructed by and was owned and maintained by the city of New York.

That the case cited was not an authority controlling the instant case is apparent when one reads the opinion of Greenbaum J., when he said:

30 "It was peculiarly within the power of the defendant to produce convincing and incontrovertible proof of the actual facts as to ownership and maintenance of the stairway and its failure to do so would scarcely warrant the court in indulging in ingenious and subtle inferences favorable to the defendant in respect of these matters" 49 Misc. at 507.

In the case of *Skottowe v. O. S. L. Ry. Co.*, 22 Oreg. 430, the defendant's landing place was reached by a long elevated incline and a narrow road-
 40 way which rested upon timbers. Part of the way

was bridged and the land under it was a public street, but only so far as it was plotted out. The plaintiff fell from the bridge.

The court then held it was the duty of the railroad to furnish safe and proper means of ingress and egress even though some part was constructed upon a public highway,

“if the same be in their possession or under their control.”

10

In *Beard v. C. & P. R. R. Co.*, 48 Vt. 101, the plaintiff was at the defendant's station when there was a platform extending from the east side of the station to the track. She attempted to pass down certain stairs which led through the station to the street. In descending to the street, she fell from the lower platform to the street.

The court considered that the head of the stairs were on the defendant's premises and that it mattered not that the bottom of the stairs was beyond the line of ownership of the defendant, because the defendant

20

“owned and had exclusive control of the platform and stairs.”

In *York v. C. A. St. Co.*, 22 Can. S. C. 167, the defendant's liability was predicated upon the fact that the place was under the defendant's sole control by lease.

In *Penn. R. R. Co. v. Hamill*, 56 N. J. L., 370 30 the place where the injury occurred was on a “much-used path,” on the property of the defendant.

In the case of *D. L. & W. R. R. Co. v. Trautwein*, 52 N. J. L., 169, it appears that although the passageway upon which the plaintiff was injured was not created or maintained by the defendant, it was on the company's grounds and led to the public street, p. 147, ll. 16-17, and the question

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presented by the instant case was not there decided.

The case of *Quinby v. B. & M. R. R. Co.*, 69 Me. 340, seems to us to control the instant case.

It was an action for negligence in not keeping in good repair and in a safe condition their bridges and necessary approaches to its station depots.

The court said:

10 “The burden is on the plaintiff to show that the walk when he received his injury was constructed by the defendants, or was in their possession and control as one of the approaches to their station” (p. 342).

The plaintiff received his injury 40 feet north of the north line of the defendant’s location.

20 “Under this state of facts,” said the court, “we think it is clear that the defendants were under no obligation to keep the sidewalk in repair north of its location. It was no part of their bridge. It was a part of the public street under the control of the city. The defendants had no right to enter upon it to make any changes or repairs” (at p. 342).

Under the case cited and the uncontradicted evidence it is manifest that the appellant was not under a duty to either repair or maintain the place where the appellee fell, that it had no right to control its condition and hence was under no liability for its existent condition.

30 The court therefore should have directed a verdict on the ground here urged.

POINT II.

The hole in the asphalt was not such as could charge the appellant with liability.

The accident to the appellee happened in the State of New York and therefore the duties and obligations of the appellant must be measured by the law of that State for as said by this Court in *Ferguson vs. C. R. R. Co.*, 71 N. J. L., 647; 10

“That in regards to the rights involved in actions, the law of the place where they originated is to govern p. 651.”

What the law of New York is with respect to the duties of a railroad company, assuming for the sake of the argument of this point there is any liability on the appellant's part has been stated by the Court of Appeals in New York in the case of *Bateman vs. N. Y. C. & H. R. R. Co.*, 20 47 Hun, 429 to be as follows;

“The walk upon which the plaintiff was injured was maintained by the defendant upon its own land as a sidewalk for passengers coming and going between its passenger depot and the public street. *We think the measure of care due from the defendant to its passengers whom it invites to use it, is the same that is required of a municipal corporation with respect to its public sidewalks which it is by law required to maintain.*” 30

See also,

Palmer vs. Penn Co., 111 N. Y. 488.

The importance then of the size of the hole as described by the plaintiff-appellee is thus made manifest.

From her we learn it was 14½ inches long and 7 inches wide, its deepest part was about 1 inch and its generally surface was covered by a lot of little mounds (p. 28, ll. 38-40; p. 46, ll. 21-23). 40

As an additional reason for a direction of a verdict this appellant contended that it was entitled to same because for a hole of the nature and character of that in which she fell the law of New York had held there was no liability—in other words the character of the hole having been established, presented nothing upon which the jury could predicate liability pp. 95 and 96.

10 This leads us therefore to a consideration of the cases in New York with respect to adjudications in this subject.

In *Hamilton vs. City of Buffalo*, 172 N. Y., 72, the hole or depression was 34 inches long, 12 inches wide and about 4 inches deep, (p. 74), the Court of Appeals sustaining the non-suit said;

20 “We are of opinion that the non-suit was proper. There was a depression in the pavement, * * but the hole or depression, as it is called, was so slight as not to suggest to the mind of an ordinary careful and prudent man that it was dangerous p. 74.”

In *Beltz vs City of Yonkers*, 148 N. Y., 67, the hole in the sidewalk was about the same size as in the *Hamilton* case, *supra* and about 2½ inches deep.

The Trial Court in the above case reversed the judgment saying that for such slight defects a municipality was not chargeable with negligence.

30 In *Duffy vs. City of New York*, 149 App. Div., 478, the hole which caused the plaintiff's injuries was caused by the wearing away of the asphalt covering of the walk. At its deepest point it was not more than 3 or 4 inches deep, (p. 480) and this, said the court,

“is not such a defect in the highway as will render the city liable for injury suffered therefrom, at p. 480.”

40 In *Weldon vs N. Y. N. H. & H. R. R. Co.*, which

was an action for slipping on a defective concrete step while passing through the station to his train.

In the above case the depression or slope of the step was about $1\frac{1}{2}$ inches.

The court on reviewing the evidence said that if the defect described did apply to the step in question from which this plaintiff slipped, a cause of action had not been established.

Because the law of the place when the accident happened regarded the hole into which the appellee fell not to have been such a defect as to charge it with negligence the verdict requested should have been directed for this reason now urged. 10

POINT III.

No liability having been shown to exist on behalf of the appellant the judgment below should be reversed and judgment ordered to be entered accordingly. 20

Respectfully submitted,
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Attorney of Appellant.



