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Notice of Appeal.

NOTICE OF APPEAL.

Filed August 25, 1925.

FIRST DISTRICT COURT OF THE CITY
OF JERSEY CITY.

LOUIS BURKE,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant.

10

In Tort.

To Jacob J. Singer, Esq., attorney of plaintiff:

SIR:

20

TAKE NOTICE, that the defendant Public Service Railway Company appeals to the New Jersey Supreme Court from the determination and directions of the First District Court of the City of Jersey City, which resulted in a judgment in the above-entitled cause in favor of the plaintiff and against the defendant Public Service Railway Company, of the sum of Two Hundred and Fifty Dollars (\$250) damages besides costs.

30

Dated August 19, 1925.

JOSEPH COULT,
Attorney of Defendant.

(Endorsed) "Service of a copy of the within notice is hereby acknowledged this twenty-second day of August, 1925.

J. J. SINGER,
Attorney of Plaintiff."

40

State of Demand.

SUMMONS.

The defendant was duly summoned.

STATE OF DEMAND.

10

FIRST DISTRICT COURT OF JERSEY CITY.

LOUIS BURKE,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY, INC.,

Defendant.

In Tort.

20

30 The plaintiff demands of the defendant the
sum of Five Hundred Dollars for that whereas
on or about the twenty-fifth day of May, 1925,
plaintiff was driving his horse and wagon in a
westerly direction on and along the right-hand
side of a certain street in the City of Jersey
City, Hudson County, New Jersey, known as
Grand street; that when plaintiff had reached a
point in said Grand street, near an intersecting
street known as Summit avenue, the horse and
wagon driven by plaintiff was run into by a
trolley car owned by the defendant, the Public
Service Railway Company; that the said de-
fendant, by its agents, servants or employees,
was driving said trolley #1244, rapidly and
carelessly and deliberately drove its trolley car
into contact with horse and wagon of plaintiff;
plaintiff could not avoid this accident and that
40 owing to the defendants, its agents, servants or

State of Demand.

employees' negligence, plaintiff's horse, wagon and harness were severely injured and damaged, and plaintiff was put to a great expense in procuring medical attendance and medicines for his said horse and was compelled to lay out and expend a large sum of money for repairs for his horse and wagon, to wit: the sum of two hundred dollars, and was likewise injured himself about the body and had to expend a large sum of money for medical service and medicines for himself. 10

Plaintiff's horse is completely worthless because of said accident.

Wherefore, by reason of the defendant's, its agent's, servant's or employees' negligence, plaintiff hath sustained damage to the extent of five hundred dollars. 20

J. J. SINGER,
Attorney for Plaintiff.

30

40

Transcript of Clerk's Docket.

TRANSCRIPT OF CLERK'S DOCKET.

FIRST DISTRICT COURT OF JERSEY CITY.

Before Myron C. Ernst, Esq., acting for Charles
L. Carrick, Esq., Judge.

10

STATE OF NEW JERSEY, }
HUDSON COUNTY, } No. 150052.
CITY OF JERSEY CITY. }

LOUIS BURKE,

Plaintiff,

vs.

20

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant.

In Tort.

Damages \$500.

Jacob J. Singer, Plff's Atty.

Jonathan W. Acton, Deft's Atty.

30 A summons was issued tested June 11, A. D. 1925, returnable June 16, A. D. 1925, at ten o'clock in the forenoon, at the Court Room of the said Court in the City of Jersey City. The constable returned the summons as follows, viz.: I served the within summons June 11, 1925, on David Alberts, agent of the defendant company, by reading the same to him and delivering to him a copy thereof. John A. O'Grady, Constable.

Plaintiff's demand was filed June 11, 1925.

40 August 11, 1925, both parties appearing, the trial of the cause was proceeded with as follows:

Transcript of Clerk's Docket.

Upon application of defendant, Edward W. Cooper was appointed and sworn as stenographer.

On the part of the plaintiff, Dr. Thomas E. Smith, Louis Burke and James Cerone were sworn and testified.

On the part of the defendant, Dr. Nicholas Furey, Dr. Richard English, Martin Carroll, Bernard Mellon, Earl Danforth and Elisha Taborn were sworn and testified. 10

WHEREUPON, it is on this eleventh day of August, A. D. 1925, by this Court considered and adjudged that said Louis Burke, plaintiff, recover against said Public Service Railway Company, defendant, the sum of Two hundred and fifty dollars damage and Sixteen dollars and thirty cents costs of suit.

August 25, 1925, notice of appeal and appeal bond filed by defendant. 20

(Certificate of clerk annexed.)

30

40

Dr. Thomas E. Smith, direct.

FIRST DISTRICT COURT OF JERSEY CITY.

LOUIS BURKE. <p style="text-align: center;"><i>vs.</i></p> PUBLIC SERVICE RAILWAY Co., INC.	}	No. 150052.
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Jersey City, N. J., August 11, 1925.

Before Hon. Myron C. Ernst, Acting District Judge.

Appearances:

Jacob J. Singer, Esq., Jersey City, N. J., attorney for the plaintiff.

20 J. W. Acton, Esq., attorney for the defendant.

Mr. Singer: If your Honor please and if there is no objection, I would like to put on my doctor who is here, Dr. Smith, out of order, so that he may get away.

The Court: Very well.

30 DR. THOMAS E. SMITH, 309 Barrow street, Jersey City, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Singer.

Q Where do you reside? A 309 Barrow street, Jersey City.

Mr. Acton: The doctor's qualifications are admitted.

40 Mr. Singer: Very well.

Dr. Thomas E. Smith, direct.

Q You attended a horse belonging to Mr. Burke, the plaintiff in this case? A Yes, sir.

Q On what day was that? A I saw him on the 27th of May.

Q Of this year? A Of this year.

Q What sort of horse was it? A He was a— it was what we term a flea-bitten gray horse, about sixteen hands high, weighing about 1,450 pounds and aged about ten years. 10

Q What was the condition of the horse? What did you find as the result of your examination? A I found him extremely lame in the hind leg and that portion of the haunch that we call the external angle of the ilium. That is this portion here, that square portion. I found that shoved in, and a fracture of that external angle, a fracture of the shaft of the pelvic bone and numerous small excoriations that did not amount to so very much. 20

Q What would you say the value of a horse of that nature would be, provided he were in good condition? A \$150 to \$175.

By the Court.

Q That is, if he did not have these defects? A Yes; that is prior to the accident, judge. 30

By Mr. Singer.

Q Now, what would you say the value of the horse was at the time of your examination? A About seven dollars and a half, good for beef.

Q In other words, in your opinion, that horse would be practically worthless for hard work? A Is now.

Q And is now? A Yes. 40

Dr. Thomas E. Smith, cross.

By the Court.

Q You say he would be worth \$7.50 for beef?

A Yes, sir. They would take him over on Johnson avenue.

Q Do you mean to say he would be sold for beef? A Yes. You get it in imported salami, after inspection, of course.

10

Q In other words, if they kill them and inspect them and find them not diseased? A With no disease, yes.

Q They sell them for imported salami; is that right? A Yes. It costs a little bit more. That is all.

The Court: I see. Very well.

Mr. Singer: That is all. Go ahead.

20

Cross examination by Mr. Acton.

Q You say this horse is how old? A About ten years.

Q You would not say seventeen? A No.

Q You are sure of that? A Yes. He might be twelve, about. He was not seventeen. He was in a good state of preservation.

Q Do you know Dr. English? A Yes.

30

Q A veterinary surgeon? A Yes, sir.

Q You and Dr. English did not examine this horse together, did you? A No.

Q You say you examined him May 27th? A May 27th, yes.

Q That was two days after? A Yes.

Q So that he did not grow that much older in two days. Now, you say that the exterior portion of the hip bone—I think you called it—
A The ilium.

40

Q The ilium? A Yes.

Dr. Thomas E. Smith, cross.

Q Would you say it was the left or the right?

A Right, as you sit behind him. What we would call the off side.

Q Yes, the off side. A Yes. To give you the description here, it is right here (indicating on diagram).

Q Yes. A Some people call it the hip joint, but it is not. 10

Q Show it to the judge. A (The witness indicates on diagram.)

Q That is the external angle of the ilium?

A Yes.

Q That is on the right side or the off side?

A The off side, yes.

Q That is the off side side from the one that you get on the horse? A Yes, exactly.

Q So you say the horse is no good now? A No, not for that kind of work or for any kind of work, because he walks sideways like a crab. 20

Q Where did you examine this horse? A Why, on the corner of Grand street and Monmouth.

Q That is the stable of the plaintiff, is it? A Yes, that is the stable of the plaintiff.

Mr. Singer: That is 365 Grand street.

30

By Mr. Acton.

Q It would take quite a blow, would it not, to break that bone? A Well, it would take a fall. It is not an uncommon thing. I have had thousands of them.

Q It could be done by a fall? A Oh, yes.

Q Could be done by a sharp blow with a heavy object, could it not? A Well, it would take quite a blow, coming in contact with some things heavy, yes. 40

Louis Burke, direct.

Q Something approaching from alongside of it would break it? A Yes.

Q Something falling down from on top would break it? A Hardly.

Q Hardly? A No. It would have to be a side blow.

10 Q That was on the left side? A On the off side, yes.

Mr. Acton: All right; that is all.

(A recess was taken until three o'clock P. M.)

Jersey City, N. J., August 11, 1925,

20

3 o'clock P. M.

LOUIS BURKE, 365 Grand street, Jersey City, N. J., the plaintiff, being duly sworn, testified as follows:

Mr. Singer: It is admitted that the trolley car that hit this wagon was No. 1244 and the motorman's name was Mr. Carroll.

30 Mr. Acton: I said I would not admit that, if the Court please. I want them to prove and swear that the car that hit them was 1244. They put that out in the state of demand, I notice. I think that is right, but I want them to swear to it.

Mr. Singer: All right. I will open up to the Court.

40 This is an action by Louis Burke against the Public Service Railway Company. It is alleged that the plaintiff was driving a horse and wagon on the street in Jersey

Louis Burke, direct.

City known as Grand street at the intersection of Summit avenue and Grand street, that he was driving on the right-hand side of Grand street in a westerly direction, when a trolley car owned by the Public Service Railway Company came along and hit him from the rear. In other words, the wagon driven by the plaintiff was in front of this trolley car and was hit, with the result that the driver, the plaintiff in this action, was thrown from the wagon and suffered some injuries—his horse was also thrown and was damaged to the extent of approximately \$140. 10

It was alleged that the plaintiff paid \$150 for it and that that was the full value of the horse at the time of the accident. It is further alleged that the horse is now worthless. 20

After hearing the evidence adduced by the plaintiff we ask your Honor to give us a judgment for the loss of time and for pain and suffering, for doctor's bills, cost of medicine, bills of the veterinary and for the value of the horse in question.

Mr. Acton: If the Court please, both of these trolley cars and the wagon that was hit were going south on Grand street, just passing the intersection of Summit avenue. Our story is that we were driving, by our motorman, an open car, and we were also taking in another open car which was on its way to the Plank Road shops. They were going around to the junction and from there into the shops. As we were going along there we signalled to this man, who 30 40

Louis Burke, direct.

pulled over near an automobile which was parked at the curb. He then stopped. As the end of the first trolley car came to him he pulled to his left to proceed again and then ran his horse and wagon into the front of the trolley car, the second trolley car.

10 The Court: The one that was being towed?

Mr. Acton: The one that was being towed; yes, sir.

The Court: What time of day was it?

Mr. Acton: Two-fifteen in the afternoon of May 25th, as I remember it.

20 The horse was not knocked down. The driver was not knocked off his seat or injured in any way. The left front hub of his wagon or some point thereabouts, as I understand it, came in contact with the outside edge of the lower running board of this second trolley car. There was no damage done at all and this man was not injured in any way during this accident.

By Mr. Singer.

Q What is your business, Mr. Burke? A Cooperage business.

30 Q How long have you been engaged in the cooperage business? A Oh, I am in it for the past twelve years.

Q Now, speak loud so that the judge and counsel on the other side may hear.

The Court: We want the stenographer to hear it, too. It may be important; you can't tell.

Louis Burke, direct.

By Mr. Singer.

Q Raise your voice. A I was going—

Q Now, just listen. Wait. Do not speak until you hear what we are saying to you. Raise your voice. Do not answer any question until it is put to you. Now, on May 25th last, what happened to you? A I was going up at the lower—out on Main street, between Summit—I was going up on the hill there, and the trolley car comes around behind me and smashes me, and I fell right between the shafts, and the horse fell. 10

Q What? A That trolley car—I fell around here on the shafts, between the shafts, and right away I was up. I got up from the wagon, and right away I picked him up; the horse fell behind me. The fellow did not stop his car, maybe; I don't know. Maybe he couldn't stop his trolley car. I don't know what was the matter. 20

Q What time of the day did this happen? A That happened about—I guess, May 25th, I guess.

Q What time of day? A It was about two-fifteen to two-twenty that time.

Q What street were you driving on in Jersey City? A I was going up to the west, to the hill on Summit avenue, on Summit and—I can't call the next street. I don't recall it— 30

Q In what direction were you going? A On the west, on the right side.

Q You were going in a westerly direction on the right-hand side? A Yes.

Q On what street were you driving, Mr. Burke? A On Grand street.

Q And you say that this accident happened near Summit avenue and Grand street? A Yes. 40

Louis Burke, direct.

Q You were going in a westerly direction, were you? A Yes.

Q You were in front of a trolley car? A A trolley car.

Q A trolley car of the Public Service Railway Company? A Yes.

10 Q Now, who handed you this card? A The motorman. The conductor and the motorman was on the car.

Q The conductor was the motorman? A That gave me this card.

Q And the car number was what? A The car number was 1244.

Q What was the motorman's number? A The motorman's number was 772.

Q And Mr. Carroll handed you this card? A Yes.

20

Mr. Acton: May I see it, please?

By Mr. Acton.

Q Whose handwriting is that? A That is the conductor.

Q The conductor wrote that out, did he? A Yes, sir; that conductor gave me that card.

Q Was that the conductor's number? A It must have been.

30

Q Wasn't that on his hat? A Yes.

Q Was that the number of the car? A Yes; there was two cars together. I don't know what car he gave me the number of, whether this is the last car or the first car. I don't know. There was two cars together.

Mr. Acton: All right.

Mr. Singer: I just want to offer that.

40

(The card referred to was received in evidence and was marked Plaintiff's Exhibit 1.)

Louis Burke, direct.

By Mr. Singer.

Q What are your earnings a week, Mr. Burke? A Well, sometimes in a week, I do not always make the same, fifty, sixty or seventy-five.

Q Well, what do you average the year round? How much do you make a week? A A week all year round? 10

Q Yes. A About sixty dollars.

Q What happened to your body after this accident? A The right side, the right hand, and the body, given a little shaking up.

Q When you say your right-hand side and your right side, what do you mean? Will you describe that more fully? Was it bruised? Was it black and blue or a cut? A No, it was hurted. 20

Q It was hurted? A Hurted, yes.

Q Did you require medical care? A Yes.

Q Who was your doctor? A Dr. Bailin.

Q From where? A From Sheffield avenue, Brooklyn. I live down there.

Q You live in Brooklyn? A Yes, sir.

Q You say you reside in Brooklyn? Do you? A Yes, sir.

Q What is your Brooklyn address? A Mine address? 30

Q Yes, where do you live? A Yes, Dr. Bailin.

Q Where do you live? A Oh, I live 356 Sheffield avenue.

Q Sheffield avenue, in Brooklyn? A Yes.

Q Where is your place of business? In Jersey City? A Jersey City.

Q Where is your place of business in Jersey City? A In Grand street, 365 Grand street. 40

Louis Burke, direct.

Q You have been in business in Jersey City for how long? A How long? About the last twelve years.

Q How many times did this Dr. Bailin treat you for the injuries which you allege you sustained as the result of this accident? A About
10 two weeks.

Q And how much did Dr. Bailin charge you per visit? A Three dollars a visit.

Mr. Acton: I object unless it is connected up.

The Court: Mr. Witness, when there is an objection you should not answer until the Court decides it.

Mr. Singer: On what ground does the
20 counsel object to that question?

The Court: I do not think it makes any difference; the answer is in.

By Mr. Singer.

Q What was the charge for each visit of your doctor?

Mr. Acton: That is leading.

Mr. Singer: No, that is not leading.
30

A Three dollars a visit.

By Mr. Singer.

Q How many visits did you make to his office? A Two weeks, fourteen visits.

Mr. Acton: Wait. I object to that unless it is shown to be medically due to this accident.
40

Louis Burke, direct.

By Mr. Singer.

Q How many times did Dr. Bailin treat you for these injuries which you allege occurred to you as a result of this accident? A Fourteen times.

Mr. Acton: Just a minute, if the Court please. I want to object to that. What he may state about his injuries is not evidential. 10

The Court: Well, the witness has already answered.

Mr. Acton: I think I made a timely objection.

The Court: When there is an objection you must not answer. Do you hear me, Mr. Burke? 20

The Witness: Yes. What?

The Court: When the lawyer says he objects, don't you answer until I tell you to answer.

The Witness: All right, judge.

By Mr. Singer.

Q How much do you owe Dr. Bailin for the two weeks' visits? 30

Mr. Acton: I object, unless it is connected up as being due to injuries caused by this particular accident.

The Court: I will sustain the objection.

By Mr. Singer.

Q How much do you owe Dr. Bailin for medical services rendered for the injuries which you allege occurred to you because of this accident? 40

Louis Burke, direct.

Mr. Acton: I object to that, if the Court please.

The Court: Yes, I am not sure what—

Mr. Singer: All right; I will withdraw that question.

10 Q How many times did you see Dr. Bailin for those injuries?

Mr. Acton: Just a minute; I object.

The Court: You have not shown what the injuries are.

Mr. Singer: I said the injuries which he sustained. I brought that out on direct examination, as I recall it.

20 The Court: He said that he received injuries on his hand and on his right side; he did not say what they were.

By Mr. Singer.

Q What were the injuries which you received because of this accident on May 24th or May 25th? What happened to you? A I fell off the wagon and hurt myself.

30 Q Where did you hurt yourself? A On the right side and right hand.

Q Did you hurt yourself anywhere else? A And on the body.

Q What else happened to you? Did anything else happen to you? A The horse.

Q I mean to you personally? A To me, that is all. That is the right side and the right hand.

Q Because of these injuries did you consult a doctor? Did you see a doctor? A Yes, sir.

40 Q What doctor did you see? A Dr. Bailin.

Louis Burke, direct.

Mr. Acton: I am willing to admit that it was Dr. Bailin he went to see.

By Mr. Singer.

Q How many times did Dr. Bailin— A I told you two weeks—

Q One minute. How many times did Dr. Bailin see you and treat you for these very injuries which you allege resulted from this accident?

10

Mr. Acton: I object now, if the Court please. How does this witness know what the doctor treated him for? Let him tell us what the doctor did for him. Is that doctor here? If the doctor is not here I must insist that the witness state facts within his knowledge.

20

The Court: Let us hear the question.

(The question was read by the stenographer.)

A Two weeks.

The Court: Why doesn't that cover it? "For those very injuries which you say resulted from this accident."

30

Mr. Acton: He says the doctor treated him for those injuries. How is he going to tell you that he had those injuries? He has the injuries which he says he sustained, and I want to know what the doctor treated him for, not on this man's say so.

The Court: No. You do not know what the doctor treats you for often, and many other patients do not know.

40

Louis Burke, direct.

Mr. Acton: That is exactly my point, your Honor. Unless it is connected up I must object to it.

10 The Court: Mr. Singer's question calls for anything that grew out of this accident. I think it is a fair question and I will allow it.

Mr. Acton: Exception.

The Court: Now, read him the question, so that he will understand.

(The question was again read by the stenographer.)

A Two weeks.

20 The Court: That is not an answer. How many times in the two weeks?

By Mr. Singer.

Q How many times did he treat you; was it once, twice— A Fourteen times.

Q What was Dr. Bailin's charge? A Three dollars a visit.

Q How much do you owe Dr. Bailin? A Nothing.

30 Q Have you paid him? A I have paid him all.

Q How much have you paid him? A Forty-two dollars.

Q Have you spent any money for medicines? A Yes, sir.

Q How much? A Ten dollars.

Q Now, you spoke of a horse that was damaged as a result of being hit by this trolley car. How much did you pay for that horse? A \$150. What I have damaged?

40

Louis Burke, direct.

Q How much did you pay for this very horse you used on May 25th? How much did you pay for your horse that you were driving on the day of this accident? A \$150.

Q How long did you have this horse? A A year.

Q Before the accident? A Before the accident. I had him just in July, say, July was a year when I bought the horse. 10

Q In other words, do I understand you to mean July of 1924? A July of 1924 I bought him.

Q Qf last year? A Yes.

Q Who did you buy the horse from? A Mr. Friedman.

Q Where is this Mr. Friedman? A Brooklyn. 20

Q Is he a Brooklyn man? A Yes.

Q Is he a horse dealer? A No. He is a man what had a lot of horses and he sold trucks, and he had that horse and I bought that horse from him.

Q Now, before this accident which you allege occurred to you on the 25th day of May, 1925, was this horse in good condition? A Yes, sir.

Q What happened to your horse? A That side (indicating) is all in; can't work. 30

Q Was the horse thrown after the accident? A Was he what?

Q Was he thrown onto the ground? A Yes, thrown right off the—

Mr. Acton: I object to counsel leading, if the Court please.

The Court: Yes; let him tell what happened. 40

Louis Burke, direct.

By Mr. Singer.

Q What happened to your horse? A He was fall, and he hurts that side and all weak and was in like—and nothing to work.

10 Q Were you able to take the horse back to the stable that day? A I walked him down just to the stable and let him stay there.

Q What is the address of this stable you took him to? A On the what? I walked him to the stable.

Q What is the address of this stable? A The same place; I keep him in my place, same place.

Q Your same place on Grand street? A Yes.

20 Q How many days after the accident did you call Dr. Smith? A He was about seven times in the stable.

Q How many days after the accident? A Yes.

Q Did you call Dr. Smith to attend to your horse? A Seven times.

Q Mr. Burke, please listen to the question, won't you? You claim that this accident occurred on the 25th of May; is that correct? A Yes.

30 Q How many days after May 25th did you call in Dr. Smith to examine your horse? How many days after? A After, on the third day.

Q About the third day? A Yes, on the third day, I guess so.

Q Dr. Smith examined your horse, did he? A Yes, sir.

Q And he told you what was the matter with the horse, did he? A Yes.

Q What did he do? A He said that—

40 Mr. Acton: I object.

Louis Burke, direct.

Mr. Singer: All right, never mind. We have his testimony.

Q How much did you pay Dr. Smith? A Dr. Smith, twenty-five dollars.

Q Twenty-five dollars? A Medicines and all.

Mr. Acton: You did not ask the doctor about that this morning.

10

Mr. Singer: I neglected to, but I am asking him now.

Q How much did you pay the doctor? A Twenty-five dollars.

Mr. Acton: Have you the bill?

By Mr. Singer.

20

Q How many times did Dr. Smith see your horse? A About seven times.

Q You have had a great deal of experience with horses in the past, have you not? A Yes, sir.

Q You can distinguish a good horse from a bad horse? A Yes.

Q What is the value of your horse now? A Nothing.

30

The Court: What is the idea of that? He said he was worth about \$7.50.

By Mr. Singer.

Q Would you take \$8.50 for your horse? A I would take five; I would take five for him.

Q Now, did this trolley car that hit you sound any gong at the time you were hit or a

40

Louis Burke, cross.

moment prior to your being hit? A I don't understand.

Q Did you hear any bell sounded from this trolley car that hit you? A No, no. He did not give me any bell at all, I guess.

Q Now, your horse is a slow-moving horse,
10 of course, isn't he? A He can't work.

Q How many days were you confined at home? Did you have to stay in your own house?
A Yes.

Q How many days were you confined to your house? A It was about three days.

Q About three days? A Three days.

Q And how many weeks were you unable to attend to your own work? A Two weeks.

Q Two weeks? A Altogether.

20 Q Two weeks? A Two weeks.

Q You are all right now, are you? A Yes, sir.

Mr. Singer: Cross examine.

Cross examination by Mr. Acton.

Q On this day when this accident happened you were driving your horse with a bid load of
30 barrels, weren't you? A There was a load on.

Q A full load? A Was a load on.

Q A full load? A What do you call a full load? I don't know what you call a full load. I can't put any thousand barrels on.

Q What did you have on? A Oh, I had about forty or fifty barrels, small ones and big ones together.

Q You pile them up to make a pyramid, don't you? A Was not piled up—only about a foot
40 and a half high, that is all.

Louis Burke, cross.

Q About a foot and a half high? A Yes.

Q Forty or fifty barrels? A Yes.

Q A foot and a half higher than what is that? A Whatever they are—I don't know what you call a barrel. Anything is a barrel, but I had small ones.

Q You had small ones as well as big ones? 10
A Yes. No, the small ones is smaller than the big ones.

Q Are you deaf? A No.

Q Can you hear good? A Yes.

Q Can you hear me now all right? A Yes, sir.

Q Have you any trouble hearing what we said before? A No, but that kind of talk I don't know what it means.

Q You were on Grand street, weren't you? 20
A Yes, sir.

Q Going up the hill? A Up the hill.

Q That is quite a hill? A Yes.

Q Your horse was on a walk, is that right? The trolley car came up from in behind you? A Behind me, yes.

Q You did not hear any bell, did you? A No.

Q Did you see the trolley car? A No.

Q You never saw it until it hit you? A No. 30

Q Did you keep on moving up until the trolley car stopped? A Did I what? I could not move.

Q Did your horse keep on walking until the trolley car hit you? A Oh, as soon as it smashed, of course, the horse came right down and fell; he could not walk. He knocked him into the car.

Q It knocked the horse into the car that was alongside of the street, didn't it? A Yes. 40

Louis Burke, cross.

Q You had stopped in back of that horse, hadn't you? A What is that?

Q You had stopped in back of that automobile, had you not? A Stopped?

Q Yes. A Yes.

Q In back of the automobile? A No.

10 Q Before you reached the automobile? A No; I stopped when he hit me. Then I could not walk no more. The horse stopped, I mean.

Q You did not pull up on one side and wait for this trolley car to go past you, did you? A No. As soon as the trolley car hit me I was put to one side. Of course, it smashed me on one side to go ahead.

Q Now, wait a minute. What part of the trolley car hit what part of your wagon? A
20 What?

Q What part of your wagon was hit by the trolley car? A In the back.

Q In the back where? Was it the left wheel? A What?

Q Was it on the left wheel? A I was on the right.

Q On the left rear wheel were you it? A She hit me on the—yes, you see, I was right on
30 the right side and she was coming when she hit me.

Q What part of your wagon did they hit? A On the right side.

Q Your wheel on the right side of your wagon? A No. I was on the right side, but the trolley car, as she hit me—I don't know. If she hit me in the back wheel or about the behind, I don't know. All I know I was in front
40 of the trolley car and the trolley car was behind me.

Louis Burke, cross.

Q How long were you in bed after this accident? A What?

Q Did you get to bed and stay there after this accident? A Yes, sir.

Q How long did you stay in bed? A Three days.

Q Were you three days in bed? A Yes. 10

Q What day of the week did this accident happen? Was it a Monday or a Wednesday or a Tuesday? A I guess that was on—on Tuesday, I guess. I don't know.

Q Is that right? A I guess so.

Q So you stayed in bed Tuesday? You stayed in bed Wednesday, Thursday and Friday; is that right? A Yes.

Q Three full days after the accident happened? A Three days. 20

Q Monday afternoon after the accident happened or Tuesday? Which was it, Monday? A Yes, sir.

Q It was a Monday? They say May 25th was a Monday, so we will call it Monday. Monday afternoon you drove your horse to the stable, didn't you? A Yes.

Q With your wagon? A Yes.

Q And you unloaded the barrels? A Yes, 30
sir.

Q You went home late that afternoon, didn't you? A Yes, sir.

Q Then you went up to the doctor on Tuesday, didn't you, or did the doctor come to your house? A The same day, came by my house.

Q And you stayed in your bed Tuesday? A Yes, sir.

Q Wednesday? A Yes.

Q Thursday? A Yes. 40

Louis Burke, cross.

Q And then how long did you stay around the house without going out? A I was staying around down there about ten days, about twelve days, staying around the house.

Q You mean you did not come over to Jersey City for ten or twelve days after that? A Oh, 10 sure, sure. I had to come down to Jersey City—not when I was in bed, but every day after that I used to come around to see what was the matter with the horse and concerned with the business; I had to come around.

Q I see. How long after the accident did you phone to Dr. Smith? A Dr. Smith, yes.

Q How long after the accident did you telephone for him? A I was phone for him.

Q How soon? A On the third day, when I 20 came back from the house.

Q You were there when the doctor was there? A Yes, sir.

Q Did he tell you what was wrong with the horse? A Yes, sir.

Q You were there when this Dr. English came there? A Yes, sir, sure.

Mr. Acton: I have no further questions. 30 Mr. Singer: That is all.

Mr. Acton: With the Court's permission, Dr. Feury is over here and wants to get away, if I may put him on.

The Court: All right, in just a minute.

By the Court.

Q Where were you when this trolley car hit you? A Summit avenue and Grand street.

40 Q You were going up Grand street? A Yes.

Louis Burke, re-direct.

Q And you were just coming through Summit avenue? A Yes, I was just past Summit avenue.

Q You were just past Summit avenue? A Yes, past Summit avenue about twelve or thirteen feet, something like that.

Q Now, where were you? Where was the trolley? A The trolley car was behind. 10

Q Where were you? Were you on the tracks or on side of the tracks? A In the tracks.

Q Were you in both tracks? A No, in half track, half on the track and half on the right side.

Q What do you mean by on the right side? A On the right side.

Q Towards the other tracks or on the sidewalk? A Towards the sidewalk. 20

Q Half on the sidewalk and half on the both tracks? A Yes, and we could not pass there.

Q Were you going out that way? A Yes.

Q Were you turning in that way? A No, I was going right ahead.

Q And had one trolley car been ahead of you? A No, sir; no trolley car was ahead of me.

The Court: All right. 30

By Mr. Singer.

Q When the judge asked you about the location and position of your wagon— A Yes.

Q Let's get that plainer, if you possibly can. You know there are two tracks on the right side and there are two tracks on the left side? A Yes.

Q Is that correct? A Yes.

Q On that street? A Yes. 40

Louis Burke, re-direct.

Q Now, your right-hand wheels, as I understand—

The Court: They were near Grand street.

Mr. Singer: On the right side.

10 The Court: On the right-hand side going up?

Mr. Singer: On the same right track, see?

The Court: Yes.

Q The position of your wagon was here. Well, I don't want to testify for him. Will you kindly describe the position of your wagon exactly on the right-hand side near the point of this accident? Can you do it any better than the way you
20 have explained it to the judge?

The Court: Oh, I understand it.

Mr. Singer: All right, that is all right if your Honor understands it.

The Court: Yes. The rear wheel was going up Grand street, say, between the curb and the track and the other wheel is between the first and second tracks?

30 The Witness: Yes.

The Court: The trolley car he said was behind him.

The Witness: Yes.

Mr. Singer: The trolley car was behind him?

The Court: Yes.

Mr. Singer: And the right side wheels of his wagon were going towards Bayonne and the left wheels were on the other side
40

Louis Burke, re-direct.

of the extreme right track going up that same street.

The Court: No. It was to the left of the track, because Grand street going out toward Bayonne is on the right-hand side.

Mr. Singer: I don't know whether your idea is correct. 10

The Court: I want to get it right. That is my idea.

Mr. Singer: That is very important. We might as well get it right now.

Q This is the junction here, is that correct?

A Yes.

Q We will assume that that is the junction and this is Summit avenue. This is the right-hand side. Your story, as I take it, is that you were going in a westerly direction? A Yes, sir. 20

The Court: Towards Bayonne?

The Witness: Towards Bayonne, yes.

By Mr. Singer.

Q And this is the extreme right-hand track?

A Yes.

Q Now, assuming that this is your wagon and these are the wheels; is not that the exact position of your wagon? 30

The Court: That is the way I got it.

A No, here. Is that the right side?

The Court: You understand. That is Grand street and here is the track.

The Witness: I was half way here and half way to the curb.

Mr. Singer: Oh, I see. That is right. That is right. 40

Dr. Nicholas F. Feury, direct.

The Court: I understand.

Mr. Singer: That is all.

10 DR. NICHOLAS F. FEURY, 47 Duncan avenue, Jersey City, N. J., called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Acton.

Q Are you a licensed physician practicing in the State of New Jersey? A I am.

Mr. Acton: Are the qualifications of the doctor admitted? I understand they are.

20 Mr. Singer: Yes.

By Mr. Acton.

Q Did you have occasion to examine Mr. Burke? A I did.

Q Louis Burke? A I did.

Q Where did you examine him? A I examined him at 365 Grand street on the 29th day of May at 11:30 A. M.

30 Q What was he doing when you got there, do you remember? A He was standing in a small office there, as I recall, in front of some shacks there in Grand street.

Q What did you find there? A He claimed injury to the right side of his chest near the axillary line over the lower ribs. I found no objective evidence of injuries.

40 Q Does that mean ecchymosis or bruises? A There was nothing that I could see, either ecchymosis, swelling or any pathological condition

Dr. Nicholas F. Feury, cross.

whatsoever. He also claimed injury to his right hand and right wrist. There were no objective evidences of injuries right there. His hand was covered with iodine very thick. I advised him to take it off or he would have an iodine burn on it. That is all that he claimed and all I found.

10

By the Court.

Q You found nothing except the iodine on the wrist? A No.

By Mr. Acton.

Q You found no injury and no bandages? A No injury and no bandages, no dressing.

Mr. Acton: That is all. Cross examine. 20

Cross examination by Mr. Singer.

Q Did you examine his chest, doctor? A His chest, yes.

Q Did he expose it to you? A Yes.

Q Did you examine the portions of his body where he claimed he had been suffering? A Yes, he claimed on the right side of his chest, the axillary line, which is this line over here around and down by the arm and along the ribs. I went over it and found no objective symptoms of any injury.

30

Q Was there any discoloration of any kind? A None whatever.

Q Were there any observable marks? A None.

Q Or abrasions of any kind? A No.

Q Were there any cuts of any kind? A None whatever.

40

Dr. Nicholas F. Feury, cross.

Q Is it possible, doctor, that anyone could suffer pain without any discoloration being had or observable on the exterior? A It is possible, yes, sir.

Mr. Singer: That is all.

10 *By Mr. Acton.*

Q But that would not be possible from trauma, would it, doctor? A Hardly, because you would have a pressure for trauma before it would give you a pain from the inside, and you could see it from the outside.

By the Court.

20 Q In other words, there would have to be a blow struck from the outside? A Pain from the outside, showing from the outside.

Q And then there would have to be bruises of the skin or blue marks or something? A That would be probable; yes, sir.

By Mr. Singer.

30 Q Did he complain of pain at the time you saw him? Did he tell you that his condition was such that he could not continue his work? A No, sir; I don't recall that, because he was working at the time.

Q What was he doing up there, doctor? A I don't know just what he was doing. I presume he was working. His sleeves were rolled up, the same as any workman.

Q But you did not see him engaged in any particular kind of work? A No.

40 Q You merely assumed he was working from his general appearance? A Yes; I saw him doing no work.

Dr. Nicholas F. Feury, cross.

By the Court.

Q Was he bandaged up in any way, doctor?

A Not at all.

By Mr. Singer.

Q Was there any swelling of any kind? A 10
None.

Q Was your examination a very minute and careful one? A It was my usual—

Q Or was it very superficial? A No, it is my usual examination, which is always very careful.

Q And you do maintain, however, that it is likely or possible, disregarding the fact of any possible discoloration about his chest, that the man could feel much pain there as a practical proposition— 20

Mr. Acton: Now, I object to that unless counsel confines the question to such pains as would be caused by trauma or an accident. He might have had a pain there from indigestion, yes. And it would not show. Of course it would not.

Mr. Singer: I will withdraw that question. 30

By Mr. Singer.

Q Is it possible that a man or anyone can suffer pain without any observable marks from the exterior? A Possible or probable?

Q Possible and probable? A All things are possible. It is highly improbable that he would have suffered from pain as a result of trauma without showing evidence of the trauma on the outside, at the point of trauma. 40

Dr. Richard W. A. English, direct.

Mr. Singer: That is all.

Mr. Acton: That is all. Now, may I call Dr. English, please?

The Court: Yes.

10

DR. RICHARD W. A. ENGLISH, 2389 Hudson Boulevard, Jersey City, N. J., called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Acton.

Q Dr. English, are you a veterinary licensed to practice in the State of New Jersey? A I am; yes, sir.

20

Mr. Acton: Are the qualifications of the doctor admitted?

Mr. Singer: Yes.

By Mr. Acton.

Q Did you have occasion to examine a gray gelding of Louis Burke at 365 Grand street, Jersey City, New Jersey? A I did.

30

Q Do you remember when you saw him? A About noontime on May 25th—May 29th, I should say, last.

40

Q Can you tell us what you found then? A I found a flea-bitten gray horse, about sixteen hands high and about sixteen years old. It was blind in the left eye. The eye was deformed from the injury that made him blind. It had a large scar, an old scar, on the left leg just below the elbow, a little bit straight in the ankles or, as we say, the knuckle, in the ankles, and he had a

Dr. Richard W. A. English, direct.

small cut on the left elbow and on the right hip he had a little bruise. A piece of bone, a small piece of the ilium, was chipped out, and that fell down and pulled the muscles of the spine. He moved up and down the yard and he walked apparently all right. I then had him trotted up and down the yard awhile and he swung on both of his legs all right, and then I let him go free and chased him up and down the yard, and he then showed a little limp in his right hind leg. 10

Q You say he was blind? A In the left eye, yes.

Q In the left eye? A The eye was disfigured.

Q Could you tell whether that was a recent injury or not? A No, that was an old injury.

Q You say he was straight in the front ankles and buckled in the back? A Oh, yes. 20

Q And he had a little scar on the left hip? A Yes.

Q And on his right hip you say there was just a little piece of ilium bone broken off? A Yes.

Q What is that portion of the ilium bone? Is that that bony protuberance on the hip of a horse? A Yes, it is.

Q Does that break of the ilium bone incapacitate the horse from working, permanently? A No, sir. 30

Q Do you run into cases of that kind? A Frequently.

Mr. Acton: Very frequently. I think that the other doctor testified that it was not infrequent.

Mr. Singer: That it was common, yes; I remember him saying it. 40

Dr. Richard W. A. English, direct.

By Mr. Acton.

Q Do horses recover from it? A Yes, they make a recovery, or what we call a recovery, that makes him a little different in the conformation. In other words, if you stand directly behind a horse and look at him from the tail, you will
10 see quite a difference in the hips. Usually the one that is fractured is a little bit lower than the one that was not.

Q That is a cosmetic defect rather than a functional defect? A Well, speaking of beauty parlors, yes.

Q How long a period after that would the horse be able to resume work? A Well, four or five weeks, in an accident of that kind.

Q Would it take a blow of considerable force
20 to cause that fracture, that chipping off of the piece of bone? A Yes. Such as being run into, or being struck or something dropping on it hard.

Q That was the right hip, however? A Yes.

Q Now, in your opinion, what was that horse worth before it had the injuries which apparently were received at the time you examined it? A From ninety dollars to one hundred dollars.

Q And at the time you examined him, how
30 long would it take that horse to get over that injury that you saw? A I should say from five to six weeks at the most, possibly four to six weeks.

Q What work could he do afterwards? A The same work, of hauling a barrel truck. I should think that he would be able to do that work as well as he did before the accident.

40

Mr. Acton: That is all.

Dr. Richard W. A. English, cross.

Cross examination by Mr. Singer.

Q Your examination took place on the 25th day of May? A No, sir, the 29th.

Q Oh, the 29th; that was the only time you had seen the horse? A Yes.

Q The horse did limp, did it? A When it trotted. 10

Q When it trotted. That was due to the defect in the hip? A No doubt.

Q Yes. In your opinion, you would estimate the value of a horse of that nature at a hundred dollars, you say, doctor? A Yes, from ninety to a hundred.

Q From your past experience of horses of similar nature, you say that? A From ninety to a hundred dollars. 20

Q When this bone is broken, when the ilium bone is broken in the manner described here, it is your opinion that a fracture of that kind could heal within a period of about six weeks after the accident? A Yes.

Q And yet the horse would be in as good condition as he was prior to the accident? Is that your opinion? A So far as his work, for the kind of work he did. So far as that kind of work is concerned, yes. 30

Q Cooperage work? A Yes.

Q It is rather tedious and heavy work, in your—in your opinion? A No, slow work. They do not as a rule go off a walk.

Q Would you say a horse of this kind would be capable of doing hard work? A Yes, sir.

Q Did you hear Dr. Smith testify this morning? A No.

Q Were you present in court when Dr. Smith was here? A No. I would like to say in ex- 40

Dr. Richard W. A. English, cross.

planation, if I may, judge, that a fracture of this kind is not possibly the popular idea of it. The bone is not broken right through or across. There is this protuberance on the external side of the bone and some of the muscles on the top of the hip are attached to that protuberance.
 10 With its attachments, it is as large, possibly, as my fist. When it happens that little protuberance is broken off, the muscles which are attached thereto are strong enough to pull it down a little. That makes a slight difference in the contour of the hip. Until that bone or piece of bone which was pulled down formed a new adhesion in the pelvis, there would be some lameness. After it had been healed over and had become calcified and ossified, the muscles there
 20 would act in a normal or a nearly normal capacity.

Q Now, I just want to ask you one question more: Is it possible that if you had examined that horse within a week subsequent to May 29th there is a likelihood that you would have changed your opinion as to the usefulness of that horse?

A No, I should say not; no, sir.

Q Not a likelihood? A No, sir.

Q Dr. Smith testified that in his opinion the horse was worth \$7.50. A Yes, sir.
 30

Q There is quite a discrepancy between your valuation and his, is there not? A Yes, sir.

Mr. Acton: I object to that as calling for a conclusion.

By the Court.

Q Can you describe this bone a little more particularly? A They speak of that as the external angle of the ilium. The pelvis itself is
 40

Dr. Richard W. A. English, cross.

made up of three bones: One the ilium, the ischium and the pubis. The pubis is a little short bone underneath, comes under the body. The ischium runs out this way and the ilium comes from the back bone on this side to make an external angle on the hip, this ridge right here, on this part of this bone, right here. This may have become struck and chipped off and pulled down the muscles. That thing being true and the top or that part of the bone being chipped off, would not stop the horse from walking and it could walk to the stable and could walk afterwards. He did walk on the 29th, and he trotted, although he limped a little on the 29th. 10

Q Dr. Smith testified that it was worth \$7.50?

A Well, I have not seen him since the 29th, but so far as this accident was concerned he should not have depreciated in value to any extent, considering the fact that he was used for coo- perage business. The horse had quite some defects. In view of the fact that his eye had been blinded and in view of the fact that his knuckles—the ankles, or what they call the knuckles sometimes, had been sprained and he was not a sound horse. I base my valuation upon these deviations from the normal. 20

The Court: That is all. 30

By Mr. Acton.

Q Just one question. You said he was seventeen years old? A Yes.

Q Are you sure of that? A Yes, sir.

Q You think seventeen? A Yes, sir.

By the Court.

Q What is the average life of a horse of that kind? A They very often, without accident, 40

Dr. Richard W. A. English, cross.

they live from twenty-five, twenty-six, to twenty-seven years and work. I have known some to work up until the age of thirty.

By Mr. Singer.

Q How do you determine the age of a horse?
 10 Do you determine it by an examination of the teeth? A Yes, sir.

Q Is that the method of the veterinarian? A Yes, sir.

Q For the determination of the age of a horse? A Yes, sir.

Q By examination of the teeth? A Yes, sir.

Q Did you examine this horse's teeth that day? A Yes, sir, I did. A horse that would be ten or twelve years old, as I understand was testified to here today, would show teeth that
 20 came together at almost the same angle as a horse of eight years old, but they would be a little longer. They are not worn down as fast as what they grow. As the horse becomes older, the teeth instead of coming in this shape like they do when they have a full set of second teeth, at the age of four and a half years, they begin to elongate out this way, and as the age proceeds up to twenty-five or thirty or so they
 30 still become rather more acute in the angle rather than in this shape. Then there are marks on the side teeth; in other words, as you perhaps know, a horse has six upper and six lower teeth, called nipper teeth. These are very often used to determine age. When the horse is twelve years old, for instance, there is a brown mark shows on the upper corner of these teeth, and that gradually comes down. At fifteen it comes down about the middle and at eighteen about three-quarters and
 40 at twenty-one to the bottom of that tooth. And

James Cerone, direct.

the tooth along that brown mark and the angle in which it comes in and the length of it is the way I would determine the age of the horse. That is a way of ascertaining and estimating the age of a horse and that is the way that is accepted by the authorities on age and on veterinary science.

10

Mr. Acton: No further questions.

Mr. Singer: No further questions.

JAMES CERONE, 15 Summit avenue, Jersey City, New Jersey, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

20

Direct examination by Mr. Singer.

Q What is your full name? A James Cerone.

Q Where do you live? A 15 Summit avenue, Jersey City, New Jersey.

Q What is your business? A Butcher.

Q You have been subpoenaed to testify in this case, have you? A Yes, sir.

Q You remember the day of the accident to the plaintiff in this case? A Yes.

30

Q Will you tell your story in respect to what happened? A Well, on the day of the accident, the day the accident happened, I was sitting in my car about fifteen foot past Summit avenue on Grand street, near the curb, and I was sitting in the car. About a minute after—about a few minutes after I was in the car, all at once I heard the noise of a wagon bumping into my car on the rear end, and I just looked out and I seen this

40

James Cerone, direct.

man here off the wagon, and at the same time the trolley car hit his wagon. I said, "What happened?" He said, "Well, it isn't my fault."

Mr. Acton: I object to his detailing the conversation.

10 *By Mr. Singer.*

Q All right, don't say what he said. What else did you see? A That is all I seen.

Q What side was the plaintiff's wagon on? Was it on the right side of the street? A On the right side.

Q On the right side? A Yes, sir.

Q What was the positions of his right wheel and left wheel with respect to the extreme right-hand side of the trolley track? A Well, there was one wheel half on to the sidewalk and one wheel across half way on the track.

Q What do you mean by one wheel? You mean the right wheels were— A Yes, the right wheels were towards the curb and the left wheel towards the—

Q What direction was the wagon facing? A Direction, west.

30 Q He was going westerly? A Westerly, yes.

Q Towards where? A Towards Bayonne.

Q Towards Bayonne? A Yes.

Q Had he been thrown off the wagon? A Well, I seen he was off the truck. I looked out—it was an open car, you know—I looked out and I seen he was off the wagon.

Q Was he in a standing position or was he on the ground? A Well, no. He said, "I am hurt." And I said, "What happened?" Then I went inside and I did not bother with it.

40

James Cerone, direct.

By the Court.

Q Where was he? A He was right near my car at the time.

By Mr. Singer.

Q When you speak of your car, you mean your automobile? A Automobile, yes. 10

Q What kind of an automobile do you own? A A Studebaker.

Q Is it an open car or a closed car? A Open car.

Q An open car, five passenger? A Five passengers, yes.

Q Was your car in a moving position or stationary? A No, stationary.

Q Standing still? A Standing still, yes. 20

Q This accident occurred on Grand street? A On Grand street.

Q Between what streets? A Between Summit and Communipaw avenues.

Q Between Summit and Communipaw? A It was more near Summit.

Q More near Summit? A Yes.

Q How near the corner? A I should imagine about twelve feet.

Q What hit this plaintiff's wagon? A Why, 30 it was a trolley car.

Q Did you see the trolley car? A The trolley car was behind his wagon at the time it was hit.

Q Was there any trolley car in front of him? A No, I did not see any trolley car in front of him.

Q Was this man's horse in a lying position? A Why, yes, he was. He was past me, you know. 40

James Cerone, cross.

Q Was the horse thrown off his feet? A Why, yes. Sure he was. He was thrown past my car.

Q Was the horse hurt? A Why, sure he was.

10 Q Did you see any blood coming from the horse? A Why, there was only a few scratches on him. There was quite a few scratches on him, but I didn't see any blood, no.

Q Did you see anything else? A Why then I went right in the store, because there was nobody working there for me except the wife and the wife can't take care of all the business.

Mr. Singer: That is all.

20 *Cross examination by Mr. Acton.*

Q This happened at a quarter-after two, didn't it? A I imagine so. It was in the afternoon.

Q About that time? A Yes.

Q You were then in front of your store? Is that right? A No, I was there in the car.

30 Q Isn't that in front of your store? A No, I was across the way from my store.

Q How long had you been sitting there? A Oh, about a few minutes, about four or five minutes.

Q I see. And what is the number of your store? A 715 Grand.

Q 715 Grand street? A Yes, sir.

40 Q Was your automobile over in front of the drug store? A Yes, right in front of the drug store, just about a few feet away from the drug store.

James Cerone, cross.

Q It was just there in front of the drug store that this accident happened, wasn't it? A Yes, about a few feet away from there.

Q What were you doing? Were you taking an afternoon nap? A No, I just came from the market, on business. I was standing there. As soon as I stopped, I closed the car, and got in my—I had some bills there. I had some papers to attend to and just at this time this happened of this scrunching, and the car hit the wagon. 10

Q The first thing you knew about it was when there was a smash in the back of your car? A Why, yes, sure.

Q Was there any damage to your car? A Why, yes, there was, but I did not bother much with it.

Q You looked right out? A I did.

Q And you saw this man's wagon? A Yes. 20

Q And two Public Service cars? A Why, yes, it was a double car.

Q It was two open cars, wasn't it? A It was an open car, yes.

Q There were two of them, weren't there? A Yes, two of them, one after another, attached together.

Q When you looked out this man was on the front? A Yes, he was off the seat. 30

Q And then he started to talk to you? A Yes. He says, "What has happened?"

Q Well, he started to talk to you, didn't he? A I am now talking to him.

Q And he said what was the matter, didn't he? A No, "Just what happened?"

Q You said that? A Yes.

Q And he said something back? A Why, he said something, yes—

Q Just a minute. He said something back to you, didn't he? A He did, yes. 40

Interrogatories.

Q Did you see a motorman and a conductor there? A Yes, they were there.

Mr. Acton: That is all.

Mr. Singer: That is all.

That is the plaintiff's case.

10

THE PLAINTIFF RESTS.

Mr. Acton: I would like first to read into the evidence some answers to interrogatories put to the plaintiff on the first day of July.

Mr. Singer: There may be some slight discrepancies in some of the answers. I will admit those interrogatories.

Mr. Acton: "Question No. 5: Were you confined to your bed by reason of the injuries complained of, and if so for how long?
20 A About three days.

"Question No. 6: Were you confined to your house by reason of the injury complained of, if so, for how long? A About three days."

The Court: That is what he testified to.

Mr. Singer: He testified to that; there is no question about it.

30

Mr. Acton: He also testified that he phoned for Dr. Smith on the twenty-ninth and he was down there when it happened. There is a difference of two days there. He says three days in bed and three days confined to the house.

The Court: He says himself that three days of that he was confined to his bed. I asked him and he said all that he was sick was three days and he was not right for two
40 days.

Interrogatories.

Mr. Acton: He did not say that he told me he was confined to the house for three days.

The Court: He could not work for two weeks.

Mr. Acton: I asked him after that how long he was confined to his house and he said three more days. Your Honor will remember that I went over the days of the week with him. 10

Mr. Singer: Dr. English examined the horse about the twenty-seventh, or Dr. Smith did. It is undisputed that this doctor did examine the horse. There is no doubt about it.

Mr. Acton: The ninth question: "For what number of days, if any, were you prevented from earning money as a result of this accident and on what date did you return to your work after this accident? A About two weeks; went back to work about June 9, 1925." 20

Mr. Singer: That is exactly what he testified to.

The Court: How many witnesses have you, Mr. Acton? 30

Mr. Acton: I have four more witnesses, if the Court please.

The Court: I will stay until a quarter-after four or twenty minutes after four, and we will see if there may be a possibility of finishing the case. If not, I do not like to keep the officers of the court here. It is a very warm day and they are working every day here. 40

Martin Carroll, direct.

Mr. Acton: I am willing to have it carried over.

Mr. Singer: I might suggest, your Honor, that I will be very limited in my cross examination and that I will not sum up.

10

MARTIN CARROLL, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Acton.

Q You are a motorman from the Public Service Railway Company, are you not? A Yes, sir.

20

Q Talk up loud, so we can hear you. You were a motorman on May 25th here in charge of the open trolley car that was towing another open trolley car? A Yes, sir.

Q On Grand street near Summit avenue? A Yes, sir.

Q Now, as you passed Grand street will you just tell the Court what happened? A As we passed Grand street—as we passed Summit avenue, the other side of Summit avenue—it happened—as I passed Summit avenue, I got a signal to stop, and I stopped within about five or six feet. I was going up against the grade and there was a car behind me stopped kind of quick. I got the signal to stop and I stopped. I looked behind and as I looked behind, I seen him. I asked him what —

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40

Mr. Singer: I object to what he asked.

Martin Carroll, direct.

A My conductor I asked him—oh, he says, my car—the tail-end of the car—

Q Well, who did you ask? A My conductor.

Q Oh, I see. Well, I consent that that be stricken out. You went back to the conductor and had some conversation? A Yes.

Q Did you see this accident at all? A No. 10

Q Did you see the truckload of barrels? A Yes, I saw it, and I passed it about three foot out of the way.

Mr. Singer: I object to what happened to him on this car.

Mr. Acton: On what ground?

Mr. Singer: On the ground that it is incompetent, irrelevant and immaterial.

Mr. Acton: This is the motorman of the head car of the two. 20

Mr. Singer: He just testified that this plaintiff's wagon had been in front of his car prior to this accident.

Mr. Acton: Surely. He pulled out and let him go past. That is the way I understand it. Doesn't your Honor understand that?

The Court: That is what he said. He pulled out to let him go by. The cooperage man pulled out and let him past. 30

Q Was he the one who pulled out to let you pass at that time? A I passed him before. I passed him in the front of my car.

Q You passed him with the front of your car? A I mean the front car passed him. I got the bell to stop and I went back immediately and my conductor told me— 40

Martin Carroll, direct.

Mr. Singer: I object.

By Mr. Acton.

Q You can not tell us what the conductor told you. After this accident, however, you got this bell to stop and you went back, did you? A I
10 did.

Q Where was the wagon? A The wagon was in the other—and he was facing out a little bit, the wheel near the rail.

Q And was it by the second car or the first one? A By the second car.

Q The one that you were towing? A Yes, sir.

Q Your car had gotten past him all right; is that it? A Yes, about half the distance of the
20 other car—I mean of my car.

Mr. Acton: Cross examine.

Mr. Singer: No questions.

By the Court.

Q You don't know how he was hit, do you?

A No, sir, I do not know.

Q You do not know anything about that? A
30 No.

The Court: That is all.

Bernard Mellon, direct.

BERNARD MELLON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Acton.

Q Mr. Mellon, you are employed as a conductor on the Public Service Railway? A Yes, sir. 10

Q Were you the conductor in charge of these two cars on May 25, 1925, at Grand street and Summit avenue, the cars which had this accident with this truckload of barrels? A I was.

Q Where were you standing? A I was standing on the rear of the first car, on the running board.

Q Where were you taking these cars? A Taking them to the Plank Road shops in Newark. 20

Q That is, the destination of the second car was the Plank Road shops? A Both cars had to be tied and left at Newark, both cars.

By the Court.

Q You were standing where, did you say?
A On the rear of the first car on the running board. 30

The Court: Proceed.

By Mr. Acton.

Q Tell us in your own words what you saw of this accident. A Well, when I was standing there going to Grand street I saw a truckload of barrels in front of our cars and I heard the motorman sound his gong. This truck pulled over to the right to give the trolley cars the right 40

Bernard Mellon, cross.

of way. He pulled in back of an automobile that was parked a little ways past Summit avenue, thus stopping his progress up Grand street, and naturally the motorman kept going after he gave him the right of way. As the rear of the first car where I was standing got level with where
 10 the driver of this truck was setting, just alongside the man, he pulled over. He pulled right over and I called right out to him, "Hold it, Jack," at the same time holding up my hand. He disregarded the warning so I pulled the bell to stop, and just as that happened the hub of his wheel came in contact with the corner of the running board of the second car, pushing him slightly over against the curb, against the automobile.

Q What was on that truck? A Barrels.

20 Q How were they piled? A They were piled out past the end of the wagon.

Q You say they were out past the sides of the wagon? A Yes, sir.

Q Was the driver of that wagon knocked off his seat? A No, sir.

Q Was the horse knocked down? A No, sir.

30 Mr. Acton: Cross examine.

Cross examination by Mr. Singer.

Q Did you hear the veterinary doctors testify in this case? A I did, sir.

Q Did you hear Dr. English testify to the effect that there was a chip knocked off the right hip of the horse, or words to that effect?

40 Mr. Acton: Just a minute. I object to this line of questioning, unless the purpose

Bernard Mellon, cross.

of it is disclosed. He is asking whether he heard the doctor testify to certain facts.

Mr. Singer: I will withdraw that last question.

Q Did you trouble yourself to the extent of looking at the horse to see whether it had any cuts or whether there was anything the matter with it? A No, I did not pay so very much attention at the time. No, sir, I did not examine the horse; I took it for granted. 10

Q The fact is, Mr. Conductor, that you do not know whether the horse fell or not; isn't that the truth? A Well, to all appearance the horse seemed all right.

Q Well, according to all appearances, to your imagination, you took for granted that the horse was all right? A Yes, sir. 20

Q And the same thing applies to this man; you can't positively state now on this witness chair— A I can positively swear—

Q Whether he was knocked off the seat or not? A I can positively swear that that man climbed down from his seat, sir.

Q You don't know whether he had any marks on his face? A He did not, sir.

Q You don't know whether he had or not, do you? A It was I who gave him this card. I do, sir. He seemed in a belligerent mood, sir, so I gave him this card. 30

Q The fact remains, however, that this wagon was in front of the trolley car on which you were conductor? A No, sir, his wagon was in front of the rear car and I was on the front car.

Q His wagon was in front of the rear car? A Yes, sir, the left part of his wagon, where he had pulled over. 40

Bernard Mellon, cross.

Q In other words there were two cars together? A Yes, sir.

Q Were they tied together? A They had a tool-bar and a chain.

Q A metal appliance? A They had a tool-bar and a chain.

10 Q This man was driving his wagon on the right side of the road; there is no doubt about that, is there? We are agreed on that, aren't we? A He was stopped at the time when the car started to pass him.

Q He was driving his wagon in a westerly direction, wasn't he? A Just as we came up to him, yes.

Q He was going in the same direction? You were going in the same direction as he was; is that right? A Yes, sir.

Q And he was going in the same direction? A Yes, sir.

Q And when the front of the rear car hit this man's wagon he was on the right side of the street, wasn't he? A Yes, sir.

Mr. Singer: That is all.

30 *By the Court.*

Q Did he keep sounding his bell all the time? A When he sounded his bell, sir, the truck passed over.

Q Yes. A And then he kept going. It was unnecessary then to sound his gong.

Q After he had sounded his bell, the man switched over to the side of the street with his truck abreast of you and then it was not necessary to sound it? A Yes, your Honor, he had gone over.

40

Bernard Mellon, cross.

Q Because he had switched over? A Switched over.

Q But he did not sound his bell while both cars were passing, did he? A The motorman was passing it, sir.

Q His first car was past? A Yes.

The Court: That is all. 10

Mr. Singer: No further questioning.

Mr. Acton: That is all.

Counsel will admit, for the sake of the record, that the tow-bar is eight feet long.

Mr. Singer: Yes. That is the connecting bar between the front and rear car.

The Court: That is the connecting bar. How much difference would that make the front of the car behind in rear of the car ahead of it? 20

Mr. Acton: I suppose it would make it about seven feet, six or seven feet.

The Court: In other words, almost enough room for somebody to go through it.

Mr. Acton: I asked him how long the tow-bar was. He told me seven or eight feet. Maybe I had better call him back on the stand and see how much distance there is between the cars? 30

The Court: No.

Earl Danforth, direct.

EARL DANFORTH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Acton.

10 Q Mr. Danforth, where did you work on May 25, 1925? A Pennsylvania Railroad.

Q In what capacity? A Why, I was motor inspector at the time.

Q Did you notice a collision between a barrel truck and one of our Public Service trolley cars that day? A I did.

Q Where were you? A Going in the opposite direction.

20 Q Going in the opposite direction on what streets? A I was down on Grand street near the corner of Summit avenue.

Q Will you tell us just what you saw? A Yes. I was coming in an opposite direction of the accident, watching the car—

Q Speak up loud so all can hear you. A I seen the two cars. One was towing the other up Grand street and I seen the wagon loaded with the barrels in the rear.

30 Mr. Singer: We can save time, your Honor, by my asking counsel on the other side: Are you going to have him testify to practically a similar story to that testified to by the previous witness? If so, I will admit it.

The Court: No, you had better not do that, Mr. Singer. We have a stenographer here and they may want to take it up.

Mr. Singer: Very well.

40 The Court: I think you had better try your case as far as we can go.

Earl Danforth, cross.

By Mr. Acton.

Q Go ahead with your story. A And I seen a wagon load of barrels coming up the same direction. The motorman on the front car was towing the car in the rear. He sounded his bell, and then the wagon pulled over on the side to wait until the first car got by, which he did. And after it did he turned out, but there was the rear car in the rear and he turned out and it run against the front head of his wheel—a team of two horses—naturally it was in back of an automobile—and naturally it kind of jarred his—practically in between the two horses, and slightly damaged the fender of his car. 10

Q Was the horse knocked to the ground? A No, sir, neither one of them.

Q Was the driver knocked off the seat? A He sat on his seat about three minutes and he got down off his seat to see what was the matter, tried to take the names of witnesses of the accident. It did not appear to me he was hurt. 20

Q Was blood streaming from the horse that was hurt? A No, I examined them thoroughly. I examined the horses before I did him. There was no scars on neither one of them.

Mr. Acton: That is all. 30

Cross examination by Mr. Singer.

Q Did you see the trolley car hit this man's wagon? A I certainly did.

Q The position of plaintiff's wagon was that it was in front of the trolley car, was it not? A Why, no, he was on the side of the trolley car.

Q He was on the right side? A On the right side. The rear trolley car was— 40

Earl Danforth, cross.

Q Was he driving in the same direction? A Same direction as the trolley car.

Q This trolley car came around— A Yes.

Q And he hit him in the rear. Well, you have already answered that, haven't you? A Just a minute. He did not hit this wagon in the rear; 10 he hit him on the side.

Q Well, he hit him anyway? A Yes, he hit him.

Q Surely he hit him? A Yes.

Q Where are you working? A Pennsylvania Railroad, Waldo avenue roundhouse.

Q Pennsylvania Railroad Company? A Yes, sir.

Q Have you been subpoenaed to testify in this case? A I certainly have.

20 Q You do not make a practice of testifying in Public Service Railway cases, do you? A No. This is the first occasion I have had to testify.

Q I beg your pardon? A This is the first occasion I have ever had to testify.

Q How long have you lived in Jersey City? A I have been here two years.

Q Are you a married man? A No, sir, single.

30 Q Where did you come from to here? A Chicago.

Q Chicago? A Yes, sir.

Q Have you been down to the office of the Public Service Railway? A I have.

Q Did you sign an affidavit in their office? A I did not sign any affidavit.

Q Did you sign a statement? A I signed a statement in that office.

40 Q You did not examine the horse and wagon to observe whether there were any marks on

Earl Danforth, cross.

them? A I certainly did. I examined the two of them thoroughly.

Q Were there two horses? A Two horses, yes, sir.

Q On this wagon? A Yes, sir.

Q You are positive of that, are you? A Yes, sir, I am positive. There is two horses. 10

Q Now don't you know that you are deliberately lying when you say that this man had two horses attached to that wagon? A I am not lying. I know that positively myself. I noticed it when I first came up there, I saw he had two horses.

Q Do you remember the day when this accident occurred? A I do.

Mr. Singer: Now, please, please! Don't point to the conductor there. 20

Mr. Acton: If you have any objections to make, make them to the Court.

Q What color of horse was there? What was the color of those horses? A Dark bay.

Q Dark bay? A Yes, sir.

Q What color is that? A Why, it is dark brown, as far as I know.

Q A dark brown horse. Are you positive? Are you positive it was a dark brown horse? A I am, absolutely. 30

Q Did you hear Dr. English testify in this case? A I did.

Q Did you hear him say that it was a gray horse? A I did.

Q Well, is Dr. English wrong or are you right?

Mr. Acton: I object to that. That is very objectionable, because there is no proof that 40

Earl Danforth, cross.

the horse that either one of these veterinarians examined was involved in this accident, not the least bit of proof. That is one of the funny things about this case.

10 Mr. Singer: It sounds strange and mystifying to me. It has sounded very strange to me since this man was on the stand.

By Mr. Singer.

Q Do you remember the day when this accident occurred? A Yes, sir.

Q What day was it? A It was the twenty-fifth or twenty-sixth.

Q You don't remember whether it was twenty-six or twenty-five, do you? A Either one of the two days.

20 Q Either one of the two days; what day of the week was it? A Well, I just can't recall what day.

Q You don't remember whether it was Sunday or Saturday or Monday or Tuesday? A It was a week day, it was not Sunday.

Q You do not remember the day? A No.

Q What time of the day was it? A It was about a quarter-after two when it happened.

30 Q What direction were you going? A I was coming west on the—in the opposite direction to the trolley car and the team of horses.

Q I am asking you from what direction you were coming when this accident occurred? A West.

Q Were you coming—

Mr. Acton: From the west, he says.

40 A From the west. I was coming from the west.

Earl Danforth, cross.

By Mr. Singer.

Q You were coming from the west? A Yes, sir.

Q And you were going where? A Going to work.

Q You were going to work? A Yes, sir.

Q Were you in a trolley car at the time? A No, I was afoot.

Q You were walking? A Yes, sir.

Q How far is this place where you are employed to where this accident occurred? A Why, it is eight blocks.

Q About the distance of eight blocks? A Eight blocks.

Q Where did you live at this time? A 69 Atlantic street.

Q How long have you lived at that address? A Two years.

Q At that same address? A Yes, sure.

Q Do you know the exact spot where this accident occurred? A I do.

Q Where? A Summit avenue and Grand.

Q Summit avenue and Grand street? A Yes.

Q You say that the plaintiff's wagon and horse were on the right side? A The plaintiff's wagon?

Q The plaintiff's wagon and horse were on Grand street? A They was.

Q Going towards the junction? A Yes, sir.

Q In the same direction in which the trolley car referred to in this case was going? A Yes, sir.

Mr. Singer: I have no further questions.

Mr. Acton: That is all.

The Court: Is this your last witness?

Elisha S. Taborn, direct.

Mr. Acton: Yes, I think so, unless they want to raise the question of how many horses there were.

10 ELISHA S. TABORN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Acton.

Q Mr. Taborn, are you employed as an investigator for the Public Service Railway Company in their claim department? A I am.

20 Q In the course of your business activities did you have occasion to visit one Louis Burke, at 356 Grand street, Jersey City, New Jersey? A I did.

Q Do you remember when you saw him first? A Some time in May, I think, about the 28th.

Q Do you remember? A I can't remember unless I see the record.

Q I show you some sheets of paper and ask you if you know what they are? A 28th is correct.

30 Q What are they? A This statement I took from him covering the particulars of the accident. It was about half-past twelve at noon, 365 Grand street.

Q That was on May 28th? A Yes, sir.

Q Do you remember how you found him at that time? A He was in a little office in front of his place of business.

Q That is on May 28th? A Yes, sir.

40 Q Did he attempt to show you any injuries while you were there? A Why, yes, he did. He said he was injured in one of his arms. He

Elisha S. Taborn, direct.

wanted to take his coat off. I told him I was not a doctor, but I did see something, which was painted with iodine.

Q And he made a regular claim statement to you, did he, concerning this accident? A Yes, sir.

Q Do you remember when you went to see him again? A I don't think I went— 10

Q Do you remember when you talked to him again? A Why, he called on the telephone one day and wanted to know about his claim.

Mr. Singer: I cannot see any materiality to this.

The Witness: It won't take long.

Mr. Acton: This man claimed he was in bed two weeks at sixty dollars a week. 20

The Court: I can say right now that I will never allow anything for the two weeks, if there is found to be a liability. There is no showing of two weeks.

By Mr. Acton.

Q When was the next time you heard from him? A The first of June.

Q Where was he then? A He was at his place of business. He called me on the phone. I suggested that he come to the office and take it up with some of my superiors. He said he did not know why he should come and that I should come down there. I told him, all right, that it would be satisfactory to me and I would come down there. 30

Q Did you go down there? A I certainly did.

Q When was that? A Thursday. 40

Elisha S. Taborn, cross.

Q Did you find him there? A Yes, I did.

Q Working? A Working.

Mr. Acton: That is all.

Cross examination by Mr. Singer.

10 Q When was that first visit, Mr. Taborn? A I couldn't say just exactly, a couple of days.

Q When you say he was working, he was in his working clothes and appeared to be as if he was working? A He was in the rear of his office at that time.

Q He was not doing anything in the way of working, was he? A He was loading barrels, or was wheeling them.

20 Q Well, if he was in his office, he was not doing work? A No, not when I took his statement down. I refer to the call, to the last call when he decided he would not come up to the office and I should come down. This is when I told him that my investigations showed me that we did not owe him, and he was in the rear loading barrels on a truck.

Q When was that? A The date I can't say, counsellor. Yes, on the 4th of June.

30 Q But prior to that you had not seen him actively engaged? A No, I did not see him actively engaged before that on the premises.

Mr. Singer: That is all.

Mr. Acton: That is all.

Mr. Singer: You rest?

Mr. Acton: Yes.

40 Mr. Singer: I will take two minutes in my summation, your Honor, if counsel on

Judgment.

the other side will consent to the same period.

Mr. Acton: I will consent to submit.

Mr. Singer: All right, I will submit the case the way it is in.

The Court: All right. There will be a judgment in this case in favor of the plaintiff and against the defendant by reason of the fact that it is borne out by the testimony that the defendant says the bell was sounded and by reason of all the other facts in the case. There will be a judgment as follows: For the horse, sixty-five dollars. 10

Dr. Smith's bill at twenty-five dollars.

For the loss of time for this man for five days at sixty dollars a week, which would be six working days. 20

Mr. Singer: Say fifty dollars; that is five-sixths of sixty dollars.

The Court: Fifty dollars. For the personal doctor, ten dollars, and for injuries to himself, one hundred dollars, making a total of two hundred and fifty dollars.

Mr. Acton: Will the Court spread on the record for me a finding as to whether or not he was hit by the first or the second car? 30

The Court: Why, I find that the testimony shows he was hit by the second car, as evidenced by the motorman's testimony that his first car had passed, and as indicated by the testimony of the conductor that he was on the rear of the first car and that his car had passed, and, as I said before, I find from all of the facts as I have indicated. There is no question of law connected with this case. 40

Certificates of Judge and Stenographer.

Mr. Acton: Well, I think there is. This question will give us a point. Your Honor will, of course, give us an exception?

The Court: Yes. You have a very, very low judgment.

10 Mr. Acton: Yes. I agree with your Honor. That is one of the difficulties.

I, Myron C. Ernst, Acting Judge of the First District Court of the City of Jersey City, do hereby certify that the foregoing transcript in the case of Louis Burke *vs.* Public Service Railway Company, as the state of the case for appeal in the above-stated cause.

Dated August 21, 1925.

20

MYRON C. ERNST,
Judge.

30 I, Edward W. Cooper, a stenographer duly appointed to report stenographically the evidence given before the First District Court of the City of Jersey City in the case of Louis Burke *vs.* Public Service Railway Company, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 11th day of August, 1925, before Honorable Myron C. Ernst, Acting Judge of the First District Court of the City of Jersey City, in the said matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 19th day of August, 1925.

EDWARD W. COOPER.

40

Specification of Objections.

the defendant, gave judgment in favor of
the plaintiff and against the defendant.

Dated September 3, 1925.

Yours truly,

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JOSEPH COULT,
Attorney of Defendant-Appellant.

(Endorsed) "Service acknowledged this 4th
day of September, 1925. J. J. Singer, Atty. of
Plaintiff-Appellee."

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Supreme Court Opinion.

SUPREME COURT OPINION.

Filed January 29, 1926.

NEW JERSEY SUPREME COURT.

No. 438, October Term, 1925.

10

LOUIS BURKE, <i>Plaintiff-Respondent,</i> <i>vs.</i> PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i>	}	<i>On Appeal.</i>
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Submitted October Term, 1925; decided January 28, 1926. 20

Before Justices Parker, Minturn and Black.

For the appellant, Joseph Coult, Esq.

For the respondent, Jacob J. Singer, Esq.

PER CURIAM:

The plaintiff had a judgment for two hundred and fifty (\$250.00) dollars in the First District Court of Jersey City for injuries to himself and his horse. The case was tried by the Court without a jury. 30

The testimony shows, that the plaintiff on May 25, 1925, was driving his horse and wagon loaded with barrels in a southerly direction on Grand street, Jersey City, near Summit avenue, when the defendant's trolley car came up back of the plaintiff with a trailer. The two cars were connected by a tow bar eight feet long. The gong was sounded by the first car, the plaintiff 40

Supreme Court Opinion.

turned his horse toward the west, which was to his right to get out of the trolley tracks, that he was continuing on and had not stopped. He had not completely gotten out of the tracks, when he was struck from the rear, the first car proceeded safely past the load of barrels. His wagon was struck by the second car or trailer. The Trial Judge gave judgment for the plaintiff for \$250 under the evidence. We think there was evidence from which the Court could render such a judgment.

The judgment of the First District Court of Jersey City is therefore affirmed with costs.

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Supreme Court Judgment.

SUPREME COURT JUDGMENT.

NEW JERSEY SUPREME COURT.

October Term, 1925.

<p><i>Between</i></p> <p>LOUIS BURKE, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i></p>	}	<p><i>On Appeal</i> 10</p> <p><i>from First</i></p> <p><i>District</i></p> <p><i>Court of</i></p> <p><i>Jersey City.</i></p> <p><i>Order on</i></p> <p><i>Affirmance of</i></p> <p><i>Judgment.</i></p>
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This cause having been submitted on brief at the October Term, 1925, of this Court by Joseph Coult of counsel for the appellant and Jacob J. Singer attorney for and I. Faerber Goldenhorn of counsel for the respondent, and the Court having considered the same, and finding no error in the record or proceedings in the First District Court of Jersey City. 20

It is thereupon, on this twenty-eighth day of January, in the year of our Lord one thousand nine hundred and twenty-six, ordered and adjudged that the judgment of the First District Court of Jersey City removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the First District Court of Jersey City to be proceeded with in accordance with this judgment and the practice of said court. 30

JACOB J. SINGER,
Attorney for Respondent.

Entered February 8, 1926,

On motion of

I. F. GOLDENHORN. 40

*Notice and Grounds of Appeal.***NOTICE AND GROUNDS OF APPEAL.**

Filed February 23, 1926.

NEW JERSEY SUPREME COURT.

10	LOUIS BURKE, <i>Plaintiff-Appellee,</i> <i>vs.</i> PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i>	}	<i>In Tort.</i> <i>On Appeal</i> <i>from the New</i> <i>Jersey</i> <i>Supreme</i> <i>Court.</i> <i>Notice and</i> <i>Grounds of</i> <i>Appeal.</i>
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20 To Jacob J. Singer, Esq., attorney of plaintiff-appellee.

SIR:

TAKE NOTICE that the defendant-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment of affirmance entered in the New Jersey Supreme Court in the above-entitled cause on the following grounds:

30 1. Because the New Jersey Supreme Court in affirming the judgment of the First District Court of the City of Jersey City in giving judgment of affirmance for the plaintiff-appellee, and against the defendant-appellant, when, because of one or more of the grounds of appeal, filed by the defendant-appellant in the said Supreme Court, such court should have reversed the judgment of the First District Court of the City of Jersey City, and have given judgment for the

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Notice and Grounds of Appeal.

defendant-appellant instead of for the plaintiff-appellee.

Dated February 18, 1926.

Yours truly,

JOSEPH COULT,
Attorney of Defendant-Appellant. 10

(Endorsed)

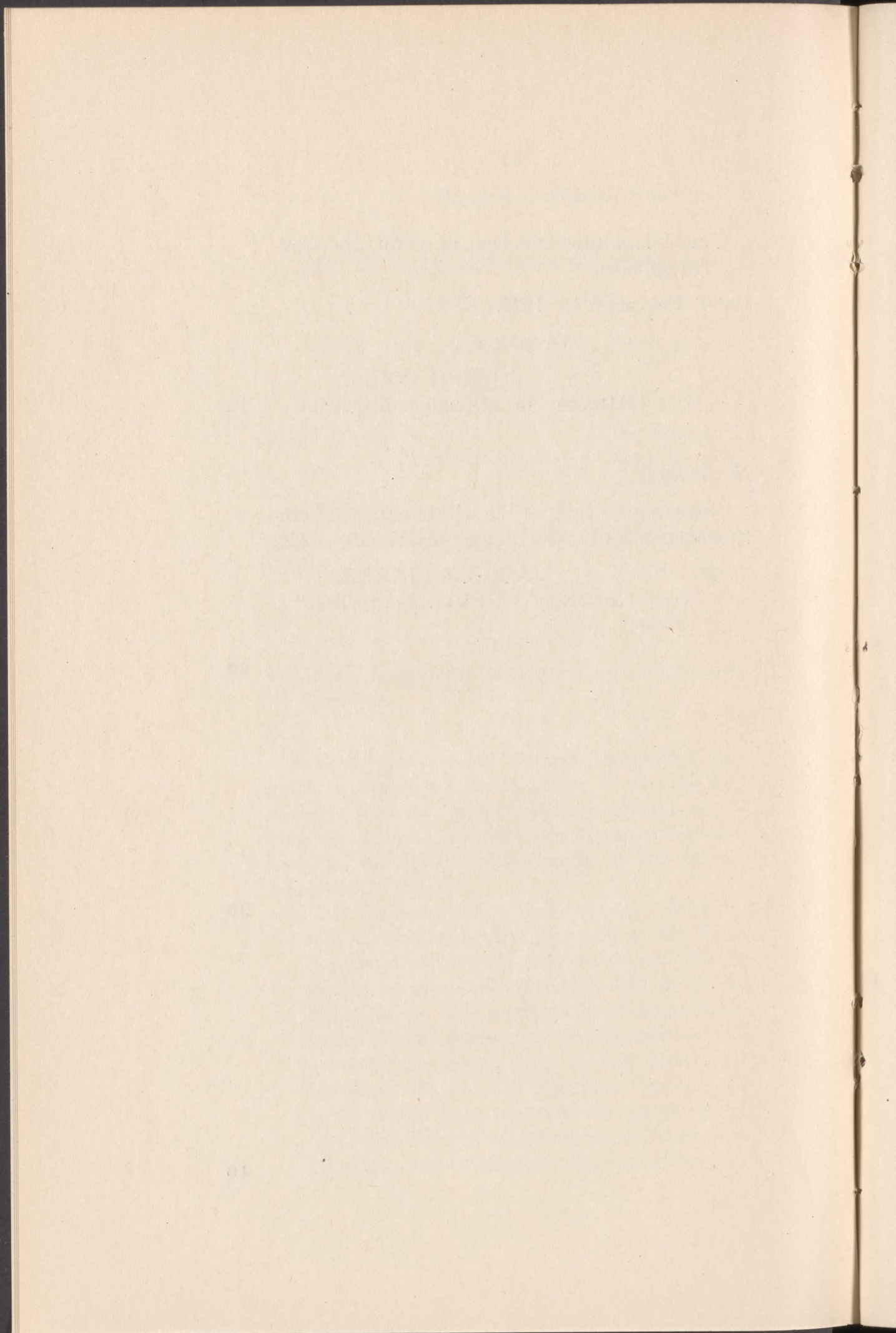
“Service of a copy of the within notice is hereby acknowledged this 19th day of February, 1926.

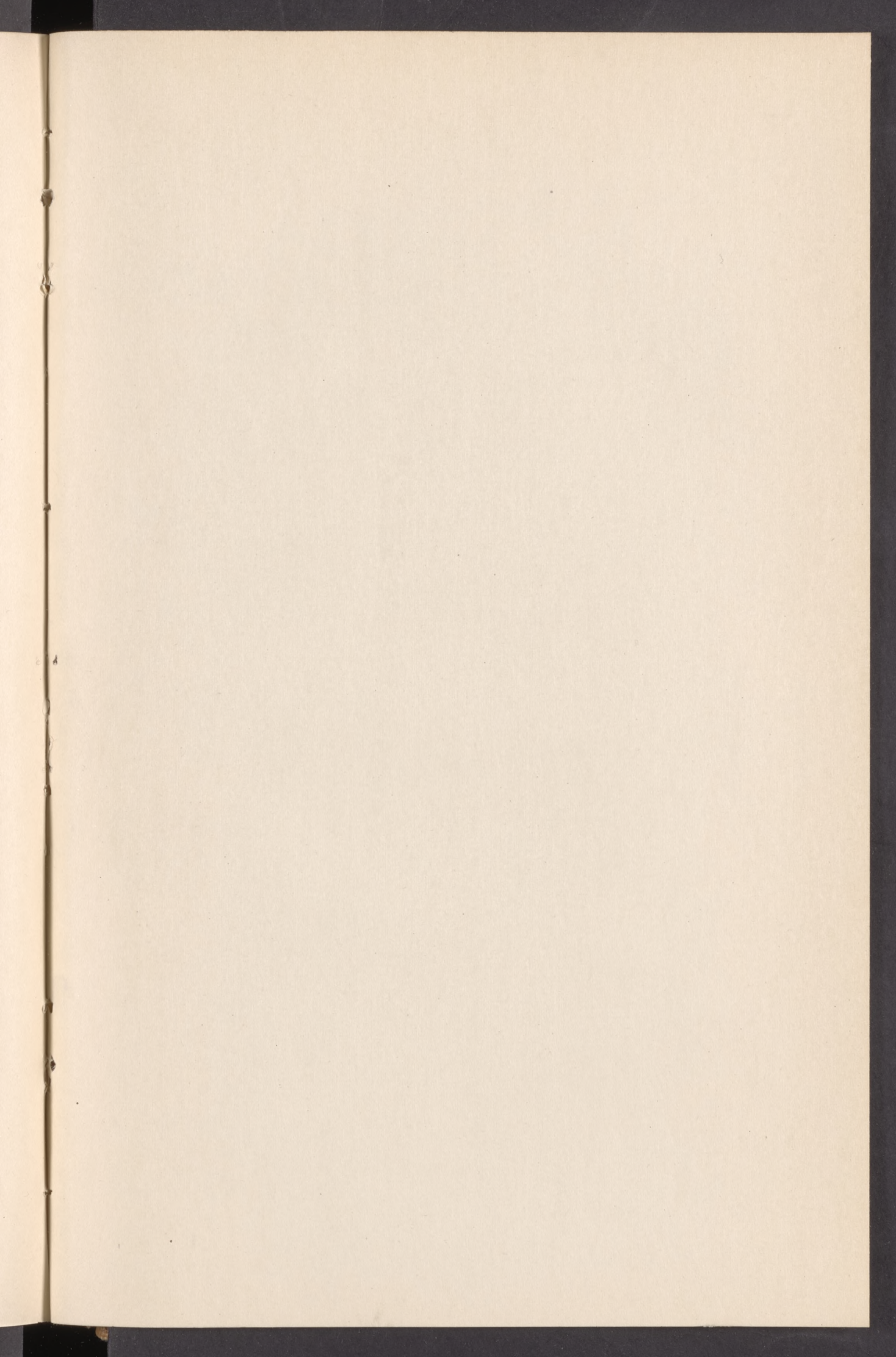
JACOB J. SINGER,
Attorney of Plaintiff-Appellee.”

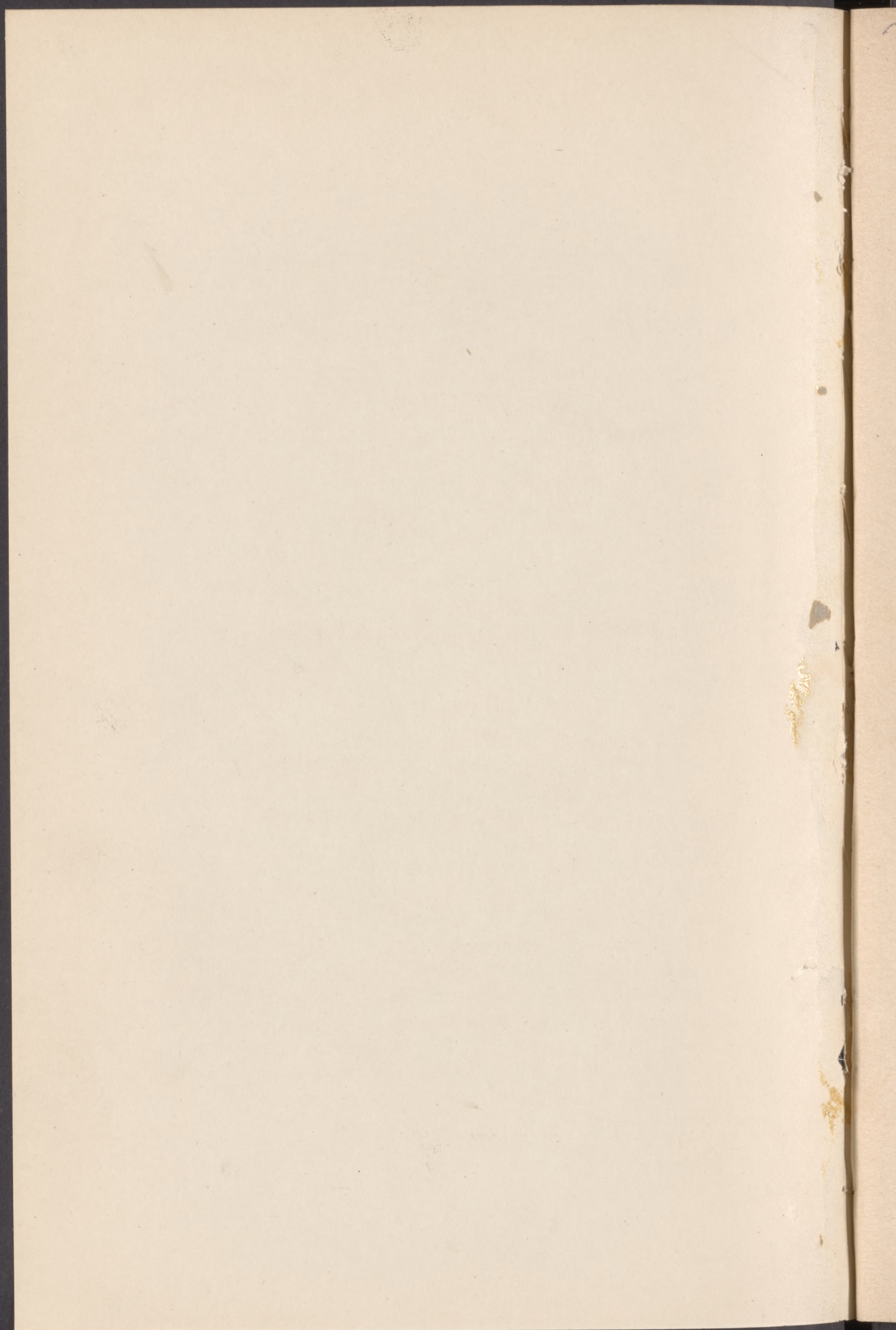
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New Jersey Court of Errors and Appeals

LOUIS BURKE, <i>Plaintiff-Appellee,</i> <i>vs.</i> PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i>	}	<i>In Tort.</i> <i>On Appeal</i> <i>from</i> <i>New Jersey</i> <i>Supreme</i> <i>Court.</i>
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BRIEF OF DEFENDANT-APPELLANT.

The District Court, sitting without a jury, found in favor of the plaintiff (p. 67, ll. 20 to 30) for two hundred and fifty dollars, and thereupon (p. 5) judgment was entered in favor of the plaintiff and against the defendant for two hundred and fifty dollars, besides costs. The basis of this appeal is that the facts actually found by the Court necessitate a judgment in favor of the defendant. The defendant (top of p. 68) took an exception to the action of the Court in giving a judgment for the plaintiff and against the defendant. Presumably, in view of the statute (Pamphlet Laws 1916, p. 109) said exception was really not necessary.

Plaintiff was driving a horse and wagon westerly on Grand street, Jersey City, in the same direction as the defendant was operating a trolley car with a trailer joined together with an eight-foot bar. Plaintiff drove his horse and wagon with his right wheels between the right-hand curb and the westbound trolley track, and his left wheels between the two rails of the westbound trolley track. This is disclosed in the opening made by his attorney (p. 10), and in the testimony of the plaintiff. His claim was based

upon the theory that these cars of the defendant, operated at an excessive speed, ran into the rear of the plaintiff's wagon causing damage. The trial court, however, from its findings determined that this was not so. The court found (p. 67, l. 31)—“I find that the testimony shows he was hit by the second car, as evidenced by the motorman's testimony that his first car had passed, and as indicated by the testimony of the conductor that he was on the rear of the first car and that his car had passed, and, as I said before, I find from all of the facts as I have indicated. There is no question of law connected with this case.”

The plaintiff's wagon was loaded with barrels (p. 24). The contention of the defendant is that these two trolley cars, one being a trailer, were connected together (p. 57, ll. 10 to 20) by a tow-bar eight feet long. The motorman, who operated both cars, was at the front of the first car. He sounded his gong. The plaintiff with his load of barrels pulled off the track to the right. The head trolley car proceeded safely past the load of barrels when the plaintiff turned back toward the track, and his truck was struck by the trailer.

The story of the conductor, Bernard Mellon, is as follows: (p. 53) That he stood on the rear of the first car on the running board. (p. 53, l. 35) “Q Tell us in your own words what you saw of this accident. A Well, when I was standing there going to Grand street I saw a truckload of barrels in front of our cars and I heard the motorman sound his gong. This truck pulled over to the right to give the trolley cars the right (p. 54) of way. He pulled in back of an automobile that was parked a little ways past Summit avenue, thus stopping his progress up

Grand street, and naturally the motorman kept going after he gave him the right of way. As the rear of the first car where I was standing got level with where the driver of this truck was sitting, just alongside the man, he pulled over. He pulled right over and I called right out to him, 'Hold it, Jack,' at the same time holding up my hand. He disregarded the warning so I pulled the bell to stop, and just as that happened the hub of his wheel came in contact with the corner of the running board of the second car, pushing him slightly over against the curb, against the automobile. Q What was on that truck? A Barrels. Q How were they piled? A They were piled out past the end of the wagon. Q You say they were out past the sides of the wagon? A Yes, sir."

The Supreme Court in affirming the judgment of the District Court in reviewing the facts said, —(p. 71) "The testimony shows, that the plaintiff on May 25, 1925, was driving his horse and wagon loaded with barrels in a southerly direction on Grand street, Jersey City, near Summit avenue, when the defendant's trolley car came up back of the plaintiff with a trailer. The two cars were connected by a tow-bar eight feet long. The gong was sounded by the first car, the plaintiff turned his horse toward the west, which was to his right to get out of the trolley tracks, that he was continuing on and had not stopped. He had not completely gotten out of the tracks, when he was struck from the rear, the first car proceeded safely past the load of barrels. His wagon was struck by the second car or trailer."

The defendant contends that such a finding is inconsistent with the facts. The first car unless it went through the air, could not have passed by if the plaintiff had not completely gotten out of the tracks.

The trial court found the facts to be that the accident happened in an entirely different way than that claimed by the plaintiff. Having found from the testimony of the motorman and of the conductor that the first car had passed the plaintiff, and that the plaintiff was hit by the second car is inconsistent with the finding of liability against the defendant. The conductor, Bernard Mellon, (p. 56, l. 31) testified,— “Q Did he keep sounding his bell all the time? A When he sounded his bell, sir, the truck passed over. Q Yes. A And then he kept going. It was unnecessary then to sound his gong. Q After he had sounded his bell, the man switched over to the side of the street with his truck abreast of you and then it was not necessary to sound it? A Yes, your Honor, he had gone over (p. 57) Q Because he had switched over? A Switched over. Q But he did not sound his bell while both cars were passing, did he? A The motorman was passing it, sir. Q His first car was past? A Yes.”

When the motorman at the head of the two cars was permitted to pass plaintiff's wagon, he, of course, had a right to assume that the plaintiff had pulled off of the track to permit him to pass by, and had a right also to assume that the plaintiff would not attempt to run into the side of his car, or between his two cars, which were so closely connected, until the passageway had been entirely cleared. The trial court found that it was “borne out by the testimony that the defendant says the bell was sounded”. (p. 67, l. 12) And having found these facts, and also the fact that the plaintiff was hit by the second car, and that the first car had passed, it necessarily follows that the plaintiff, after having entirely cleared the track to permit the first car to pass by, then pulled to the left so as to be hit by the

trailer. The plaintiff obviously did not look where he was proceeding or he would have seen the trailer. If the load of barrels upon his wagon made it impossible for him to look, that, of course, was an obstruction to vision of his own creation, and was no excuse for his failure to look.

This very element was a feature of the case of *Hackney v. West Jersey and Seashore Railway Company*, 78 N. J. Law 454, decided by this court. In that case the syllabus is:

“Plaintiff was driving alongside of a trolley track, a wagon load of brush about fourteen feet wide, ten feet long and six feet above the plaintiff’s head. His wagon was closely followed by another wagon similarly loaded. The brush was so placed as to prevent plaintiff, from the place he was seated, from seeing behind him or on either side of him. After stopping to listen for a signal he, without changing his position so that he could see behind him, turned his team to pass over a crossing across a trolley track, and his horses were struck by a car which was approaching closely behind his wagon. Held, that plaintiff was guilty of contributory negligence.”

In the above-cited case, this court held that there was evidence of the defendant’s negligence to go to the jury, and then said,—“The question then is whether the plaintiff himself was so clearly negligent, and whether his negligence so contributed to the accident that the Court properly directed a verdict against him upon that ground.”

The analogy of the Hackney case to the case at bar is evident from the following quotation from the Hackney case:— “It is to be observed as already stated, that he was not driving on a cross street, and directly across the railway

track, but was driving alongside of the railway track." * * * When he turned in on the track it is obvious that the car was close upon him,— * * * The query then is whether the driver of a vehicle who puts himself in such a situation can drive blindfolded across a trolley track, with no assurance that the track is clear for a safe distance save that he hears no signal."

In the case at bar the trial court found as a fact that there was a signal from the leading car. The plaintiff contends that a signal should have been given by the trailer, but it is respectfully submitted that the defendant had a perfect right to operate a car, with a trailer attached connected by an eight-foot iron bar, with one motorman, and this court answers the proposition of their being no signal in the Hackney case as follows:

"In the present case the plaintiff, by the adjustment of his load and of his seat, had so placed himself that he could not look, and so did not look; and he took no pains to change his position and relieve himself from his condition of blindness so that observation would be effectual before driving across the track. In doing this he was guilty of manifest negligence which contributed to the accident."

In the foregoing Hackney case the writ of error brought up judgment on a verdict for the defendant below which had been directed by the trial court. This court said,— "The judgment of the Supreme Court should be affirmed."

In the case of *Solatinow v. Jersey City, &c., Ry. Co.*, 70 N. J. Law 154, this court held:

"If a person drives upon a trolley track without exercising reasonable observation to ascertain whether there is danger from an approaching car, he is guilty of contributory negligence."

The above-cited case was an appeal from a District Court, the plaintiff having recovered judgment in the District Court. This court reversed the judgment, both for lack of proof of negligence of the defendant, and because of the negligence of the plaintiff. The facts, as set out in the opinion, are:—

“After the plaintiff had entered her wagon from the sidewalk, the wagon standing alongside the curb, she was desirous of turning around in the street to go north; she waited for a northbound car to pass and then started to turn her horse around in the ordinary way as to speed, and for this purpose going a little to the south as she turned, and then went directly (eastward) across the westerly track; when the horse’s feet had cleared the westerly track a car of the defendant going south on said westerly track ran against and struck the wagon on the left hind wheel, overturning the wagon and throwing the plaintiff to the ground; that the plaintiff did not, after entering her wagon, look in a northerly direction, and that she did not hear any gong sounded or noise of an approaching car.”

We submit that the opinion of the Supreme Court affirming the District Court should be reversed for the reason that in accordance with the findings of the trial judge there was no negligence on the part of the defendant, and for the further reason that in accordance with the findings of the trial judge there was negligence of the plaintiff which contributed to the happening of the accident.

Respectfully submitted,

JOSEPH COULT,
Attorney for and of Counsel
with Defendant-Appellant.

WILLIAM H. SPEER,
HENRY H. FRYLING,
Of Counsel.

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