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Damages for James F. Brown.....	1,000.00
Costs	84.32
	<hr/>
	\$3,584.32

SUMMONS.

The defendant was duly summoned. 10

COMPLAINT.

Plaintiffs, Ethelreda Brown, by her father and next friend, James F. Brown, and James F. Brown, in his own right, of Laurel Springs, Camden County, New Jersey, say that:

1. Defendant is a corporation. At the time here-
in mentioned defendant operated a trolley railroad
in the Cities of Camden and Gloucester, Camden
County, New Jersey, and was a common carrier of
passengers. 20

2. On December 13, 1919, plaintiff, Ethelreda
Brown, who is a minor aged eighteen years, became
and was a passenger on one of defendant's cars
to be transported from Yorkship Village to Warren
Street, Gloucester, New Jersey. 30

3. Thereupon it became defendant's duty to safely
and securely carry said plaintiff to her said destina-
tion and there to stop its said car at a place where
she could safely and securely alight.

4. When said car reached Warren Avenue aforesaid, it was stopped by defendant's servants and agents in charge and control thereof, and the door thereof opened to permit passengers to alight; as said plaintiff, Ethelreda Brown, then followed other passengers, and lawfully and carefully attempted to descend from the step of said car to the street, she stepped into a hole or opening between rails of defendant's tracks at or near their junction and
10 was thrown to the street, whereby her ankle was sprained, strained and contused, and she suffered other nervous and physical injuries.

5. Said accident was occasioned entirely by reason of the carelessness and negligence of defendant's servants and agents operating and in control of said car, in that they stopped said car, opened the door thereof, and invited passengers to alight, at an unsafe place, and where a hole or opening existed,
20 formed by the switch and defendant's rails there laid in the street, and in that defendant's said servants and agents then and there failed to exercise care to halt said car at a place where passengers might safely alight, and in that they failed and neglected to warn said plaintiff of said dangerous hole or opening when she was alighting.

6. Said plaintiff, Ethelreda Brown, had previously
30 suffered an injury and said accident aggravated the same, and by reason thereof and the direct injuries then sustained, she has suffered great physical and mental pain, has been caused to undergo operations and treatments, has been incapacitated from following her usual employment and will be permanently lamed and crippled.

7. Plaintiff, Ethelreda Brown, is the daughter of the plaintiff, James F. Brown, and he, by reason of her said injuries, has been and will be caused to expend moneys in attempting to cure her and has lost and will lose her services and earnings.

Plaintiff, Ethelreda Brown, by her father and next friend, James F. Brown, demands \$15,000 damages.

Plaintiff, James F. Brown, demands \$5,000 damages.

10

ANSWER.

(Filed April 27, 1920.)

The defendant, a corporation of New Jersey having its principal office at the City of Newark in the said State of New Jersey, says that:

1. It admits the first paragraph of the complaint;
2. It denies the remaining paragraphs of the complaint.

20

FIRST DEFENSE.

1. It avers that the negligence of plaintiff Ethelreda Brown contributed to the happening of the said alleged accident.

30

REPLY.

Plaintiffs deny every allegation in the answer of the defendant.

VERDICT.

Therefore the sheriff is commanded that he cause to come before the Judge of our Common Pleas Court at Camden, in the County of Camden, on the tenth day of March, 1922, twelve, etc., by whom, etc., who neither, etc., to recognize, etc., because as well, etc., the same day is given to the parties, etc., and the jurors of the jury whereof mention is made also
10 come who to speak the truth of the matter within contained being chosen, tried and sworn, upon their oaths say that they find for the plaintiff, Ethelreda Brown, by her next friend, James F. Brown, damages in the sum of five thousand dollars, and James F. Brown, in his own right, damages in the sum of fifteen hundred dollars, and the Court doth order judgment final in favor of the plaintiffs and against the defendant for the sum of sixty-five hundred dollars besides costs of the suit to be taxed.

20

JUDGMENT.

Therefore be it considered that the said plaintiffs do recover against the said defendant their damages by the jurors aforesaid in form aforesaid assessed and also the sum of eighty-four dollars and thirty-
30 two cents for their costs and charges by the Court before the Judge now here adjudged of increase to the said plaintiffs and with their assent which said damages, costs and charges in the whole amount to the sum of six thousand five hundred eighty-four dollars and thirty-two cents.

And the said defendant in mercy, etc.

Rule to Show Cause Reserving Exceptions 7

Judgment entered and signed this tenth day of March, 1922.

JOHN B. KATES,
Common Pleas Judge.

Certificate of clerk of Camden County is annexed to the certified copy of judgment record.

RULE TO SHOW CAUSE RESERVING
EXCEPTIONS.

10

CAMDEN COUNTY COURT OF COMMON
PLEAS.

ETHELREDA BROWN, by her father
and next friend, James F.
BROWN, and JAMES F. BROWN,
in his own right,

Plaintiffs,

v.

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant.

Action at Law.

20

Application having been made within six days af-
ter the rendering of the verdicts in this case:

30

It is on this 15th day of March, 1922, ORDERED that the plaintiffs show cause before this Court on Friday, the 24th day of March, 1922, at the Court House, in the City of Camden, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard,

why the verdicts heretofore rendered in the above-entitled cause should not be set aside and a new trial granted the defendant.

And it is further ordered that pending the hearing of this rule execution be stayed and that all exception taken in this cause be reserved.

JOHN B. KATES,
*Judge Camden County
Court of Common Pleas.*

10

On motion of

LEFFERTS S. HOFFMAN,
Attorney of Defendant.

Dated March , 1922.

RULE REDUCING JUDGMENT.

CAMDEN COUNTY COURT OF COMMON
PLEAS.

20

ETHELREDA BROWN, by her father
and next friend, James F.
Brown, and JAMES F. BROWN,
in his own right,

Plaintiffs,

v.

30 PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant.

Action at Law.
On Defendant's
Rule to Show
Cause.

The rule heretofore granted in the above-entitled cause directing the plaintiffs to show cause why

the verdicts heretofore rendered in the said cause should not be set aside, having been duly argued by the respective counsel for the defendant and plaintiffs, and the Court having considered of the arguments:

It Is, on this 31st day of March, 1922, ORDERED that the said rule to show cause be made absolute, and that the verdicts heretofore rendered in the said cause, and any judgments entered thereon, be set aside and for nothing holden, unless the respective plaintiffs shall, within ten days from the date of this rule, cause to be entered in the minutes of this court rules consenting to a reduction of their respective verdicts in the said cause and the judgments entered thereon as follows, to wit: 10

That of the plaintiff Ethelreda Brown to be reduced to the sum of Twenty-five Hundred Dollars (\$2,500.00), and that of the plaintiff James F. Brown to be reduced to the sum of One Thousand Dollars (\$1,000); and if one of the said plaintiffs shall accept such reduction and the other shall not so accept the same then it is ORDERED that the rule shall be made absolute as aforesaid as to the plaintiff who fails to accept such reduction and *shall be discharged as to the plaintiff who accepts such reduction.* 20

On motion of

LEFFERTS S. HOFFMAN,
Attorney of Defendant.

Let the above rule be entered in the minutes. 30

JOHN B. KATES,
Judge.

10 *Judgment Reduced—Agreement to Accept
Reduction*

JUDGMENT REDUCED.

This judgment reduced by order of Court as follows:

Ethelreda Brown to \$2500.00.

James F. Brown to \$1000.00.

10

WM. D. BROWN,
Clerk.

Certificate of clerk of Camden County is annexed to the certified copy of judgment record.

AGREEMENT TO ACCEPT REDUCTION.

20 CAMDEN COUNTY COURT OF COMMON
PLEAS.

ETHELREDA BROWN, by her father
and next friend, James F.
Brown, and JAMES F. BROWN,
in his own right,

Plaintiffs,

Action at Law.

v.

30 PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant.

IT APPEARING that the plaintiffs in the above-entitled cause recovered a verdict against the defen-

dant, the Public Service Railway Company, in the sum of \$5,000 for plaintiff, Ethelreda Brown, and \$1,500 for plaintiff, James F. Brown, on or about the 10th day of March, A. D. 1922;

And a rule to show cause having been allowed upon the grounds that the verdicts were against the clear weight of the evidence and excessive, and it further appearing that the Honorable John B Kates, before whom the case was tried and verdicts rendered, allowed the above rule and on March 30th, 1922, after argument by respective counsel, refused to disturb the verdict on the first ground, but held that the verdicts should be reduced to \$2,500.00 and \$1,000 for the plaintiffs, Ethelreda Brown and James B. Brown, respectively, and ordered that unless the plaintiffs agree to accept such reduced verdicts within ten days from the date thereof, then that the rule to show cause hereinbefore mentioned and allowed by the Court be made absolute. 10

Therefore, I, James F. Brown, in my own right and as father and next friend of Ethelreda Brown, plaintiffs herein, do hereby consent and agree to accept the reduction of the verdict of \$5,000 in favor of Ethelreda Brown by myself as her next friend to \$2,500 and the verdict of \$1,500 in favor of myself to \$1,000. 20

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 5th day of April, A. D. 1922.

JAMES F. BROWN, 30
In His Own Right.

JAMES F. BROWN,
Next Friend of Ethelreda Brown.

Signed, sealed and delivered
in the presence of
TERESA BROWN.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

BE IT REMEMBERED that on this 5th day of April, A. D. 1922, before me, a notary public of N. J., personally appeared James F. Brown, who, I am satisfied, is the person named in and who executed the annexed consent or agreement and I having first
10 made known to him the contents thereof he did then and there acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. All of which is hereby certified.

CARL KISSELMAN,
Notary Public of N. J.

Certificate of clerk of Camden County is annexed to the certified copy of rule to show cause, rule re-
20 ducing judgment and acceptance of reduction.

TESTIMONY.

CAMDEN COUNTY COURT OF COMMON PLEAS.

ETHELREDA BROWN, by her next friend, &c, <i>et al.</i> ,	}	Action at Law.	10
v.			
PUBLIC SERVICE RAILWAY COM- PANY,			

March 9, 1922.

APPEARANCES: 20
 For the plaintiff, ALBERT S. WOODRUFF, ESQ.
 For the defendant, L. S. HOFFMAN, ESQ., H. H. FRY-
 LING, ESQ.

Before KATES, J., and a jury.

The Court: I understand one of the jurors is 30
 ill; will counsel consent to try the case with eleven
 jurors?

Mr. Woodruff: I will consent.

Mr. Fryling: I will consent.

The Court: All right, it will be noted on the record that counsel consent to the trying of the case with eleven jurors.

(Mr. Woodruff opens the case to the jury for the plaintiff.)

(Mr. Fryling opens the case to the jury for the defendant.)

10

ETHELREDA BROWN, SWORN.

By Mr. Woodruff:

Q. Ethelreda, you are one of the persons bringing this case in court, aren't you?

A. Yes.

20 Q. How old are you?

A. Twenty years old.

The Court: Speak up.

Q. And who do you live with?

A. Mother and father.

Q. Whereabouts do you live?

A. Laurel Springs, New Jersey.

Q. How long have you lived now at Laurel Springs?

30 A. Nine months.

Q. And before that where did you live?

A. Yorkship Village.

Q. And whereabouts in Yorkship?

A. 1084 South Common.

Q. You lived there with your family?

A. Yes.

Q. Now, Ethelreda, some time some years back you suffered another accident, didn't you?

A. Yes, sir.

Q. How long before this last accident?

A. Seven years ago.

Q. How long ago, I didn't understand you?

A. Seven years.

Q. Seven years from now?

A. Yes.

Q. And where were you hurt in the first accident, 10
what part of your body?

A. My hips.

Q. Is that all the part of your body that was hurt
in the first accident?

A. Fractured pelvis.

Q. And where had that happened; I don't mean
the street, but what city?

A. West Philadelphia.

Q. You lived there at the time?

A. Yes.

20

Q. And what kind of an accident was it?

A. An automobile accident.

Q. An automobile pass over you?

A. Yes.

Q. Now, you had a fractured pelvis as a result
of that accident; how long did that affect you, how
long did you have trouble with it?

A. Four years.

Q. How long?

A. Four years.

30

Q. Had you moved over to Camden during that
time?

A. Yes.

Q. What was your condition during that period
when you moved over to Camden?

A. It wasn't very good.

Q. Was that one of the reasons you moved over to Camden?

A. Yes.

Q. And how did you improve after you came to Camden?

A. Improved wonderfully.

Q. Where did you live then when you first came over?

A. Laurel Springs.

10 Q. And did you have a doctor look at you some times?

A. Yes.

Q. What doctor?

A. Dr. Strohm.

Q. Then you moved from Laurel Springs into Yorkship Village, did you?

A. Yes.

20 Q. How long before this last accident, December two years ago, had it been you hadn't any doctor or any attention for this previous injury; how long a time had you been not bothering with doctors?

A. Two years.

Q. And during that time you had no doctor attending you for the hurts you had before?

A. No.

Q. Did you gain weight?

A. Yes.

Q. Now, what did you do after you gained weight, do any kind of work?

30 A. Yes.

Q. Where did you go to work?

A. Welsbach.

Q. Had you been able to go to school after your first accident?

A. Yes.

Q. How long were you kept away from school?

A. Two years.

Q. Then you had gone to school; and was this the first work you had ever done?

A. Yes.

Q. And you got this position at the Welsbach; what kind of a job was it?

A. Folder.

Q. What?

A. Folded mantels.

Q. And how long had you worked there up until the time the last accident happened?

A. One month.

Q. Doing the same kind of work?

A. Yes.

Q. How much did you make a week?

A. I started with \$10.00.

Q. Started with ten; how much were you making just before you were hurt?

A. They were going to put me on piece work next week.

20

Q. What?

A. They were going to put me on piece work next week.

Q. But you were still getting \$10.00?

A. Yes.

Q. Would you have made more at piece work?

A. Yes.

(Objected to.)

30

Q. How did you get back and forth from your home in Yorkship to the Welsbach factory?

A. I took the trolley car.

Q. What trolley?

A. The Yorkship trolley.

Q. That went from Yorkship Village to where?

A. Warren and Broadway.

Q. In what city?

A. Gloucester.

Q. And where would you get out of the car in the morning when you went over?

A. Broadway and Warren.

Q. Gloucester?

A. Yes, sir.

Q. Was that the nearest stop to the Welsbach
10 factory?

A. Yes, sir.

Q. Now, what time in the morning was it when the accident happened to you?

A. About seven o'clock.

Q. What?

A. Seven o'clock.

Q. You were on your way to work, were you?

A. Yes.

Q. Where had you gotten the car that morning, do
20 you remember?

A. I was about in the middle of the car.

Q. Where had you gotten on, do you remember?

A. I used to get on at three avenues.

Q. Get on somewhere in Yorkship Village?

A. Yes, sir.

Q. And you were about the middle of the car when you came to Gloucester, were you?

A. Yes, sir.

Q. Where did the car usually stop when it came
30 up to Broadway and Warren Street?

A. It usually stopped nearer the village.

Q. On this morning the accident happened, where did it stop; did it stop the same place it usually did?

A. It stopped nearer Gloucester.

Q. Did it stop the same place it usually did?

A. It stopped at the switch.

Q. Was that the place where it usually stopped other mornings?

A. No.

Q. It was nearer Gloucester, you say, than where it usually stopped?

A. Yes.

Q. Now, when the car stopped, were there very many people in it?

A. Yes, a good many people.

Q. Was that the time that the men went to work 10 at the New York shipyard, too?

A. Yes.

Q. When it stopped which end of the car did you attempt to get out of?

A. I got out the front end.

Q. Why did you do that?

A. Because the motorman had the doors open.

Q. Were other people getting out there?

A. Yes.

Q. Were people getting out the back, too? 20

A. People getting out the back.

Q. And you went out the front way, did you?

A. Yes.

Q. Were there other people going out that way besides you?

A. Yes.

Q. How many other people?

A. Well, I don't remember.

Q. I don't mean the exact number, but give us an idea of whether there were a number of people, or 30 whether there was just yourself?

A. About six or seven.

Q. When you came up to the door were there people getting out ahead of you?

A. People in front and back of me.

Q. Where was the motorman, do you know?

A. He was in the front of the car.

Q. On the platform?

A. On the platform.

Q. Now, what happened to you when you went out of the door and got down into the street?

A. I stepped from the trolley and I put my foot down and my heel caught on the rail and threw me into a hole with a terrible wrench; I looked down and everything got black, I grabbed hold of the

10 trolley and I fainted.

Q. Do you know what they did to you then?

A. No, I didn't.

Q. What is the next thing you knew?

A. I had a drink of water.

Q. Where were you then?

A. Whalen's store.

Q. Is that there on the corner?

A. Yes.

Q. Do you know how you had gotten in there?

20 A. No, I don't.

Q. Now, you say you tried to catch yourself; what did you take hold of?

A. The rail of the trolley.

Q. What do you mean?

A. The handle of the trolley.

Q. How had you stepped down, do you recollect?

A. Just like anybody else would step down.

Q. And where was this rail that caught your foot, and where was the hole?

30 A. It was in the track.

Q. How?

A. In the track.

Q. I mean where with respect to the step?

A. Right underneath the step.

Q. Did you have any chance to step over it?

A. No.

- Q. Why not?
A. There was people in front of me.
Q. What pain did you have?
A. I suffered terrible agony.
Q. Where was it?
A. In my ankle.
Q. Did you go to a hospital?
A. No.
Q. Where were you taken?
A. Taken home. 10
Q. You wanted to go home, did you?
A. Yes.
Q. How did they get you home?
A. They put me in a machine and took me home.

The Court: What was the answer?

(Answer repeated by stenographer.)

- Q. And they took you home? 20
A. Yes.
Q. Did you have pain when you got home?
A. I had terrible agony.
Q. What doctor did you have first?
A. I had Dr. Bowker.
Q. He was the doctor in the village?
A. Yes.
Q. Now after a few days, what other doctor was called in.
A. Dr. Strohm. 30
Q. Tell us when you got home, when Dr. Bowker examined you and this other doctor took care of you, what was the matter with you, what took place?
A. I don't know what you mean.
Q. What did you feel about your ankle, what did you feel was wrong?

A. It was wrenched terrible, and it felt as though something was broken in my foot.

Q. Did it swell?

A. Yes.

Q. What did the doctors do for it?

A. Dr. Bowker put some medicine on it.

Q. Was it bandaged?

A. Yes, it was bandaged.

Q. How long was it before you were able to get
10 around and walk on it?

A. Three months.

Q. Before you were able to get out at all?

A. Three months.

Q. And when you were able to get out after three
months did you have to use anything to help you?

A. Crutches for three months.

Q. Three months after that?

A. Three months after that.

Q. Three months you didn't get out?

20 A. I didn't get out for three months, and three
months I had to use crutches.

Q. And then were you able to lay aside the
crutches and get along without them?

A. No, I had to use a cane.

Q. Do you still have any trouble with the ankle?

A. I suffer terribly with it.

Q. When do you suffer with it?

A. It wakes me up in the morning, and it is ach-
ing now.

30 Q. Can you walk any long distance on it?

A. No, it is very weak.

Q. What is the feeling you have when you go to
use it going up and down steps?

A. Very weak, can't hardly do that.

Q. It gives away with you?

A. Once or twice.

- Q. What?
A. Once or twice.
Q. What do you use now that you have given up the cane, anything?
A. I wear a rubber stocking and two anklets.
Q. Have those on now?
A. Yes.
Q. Do you wear them continuously?
A. Yes.
Q. How long have you been wearing those? 10
A. About a year, longer than that.
Q. About a year you have had the rubber stockings and anklets?
A. Yes.
Q. Had you used the cane until you got those?
A. Yes.
Q. And you substituted these for the cane?
A. Yes.
Q. Do you still feel that weakness with those on?
A. I do. 20
Q. Can you walk without limping?
A. No.
Q. How about your work, have you been able to do any work?
A. No.
Q. Haven't done any work at all?
A. I can't go on the trolley, my foot is too weak.
Q. How soon did you go back to school after this last accident?
A. Last September. 30
Q. September, 1921?
A. Yes.
Q. That is the first you were able to go back to school, was it?
A. Yes; I took a commercial course.
Q. Where did you take that?

A. In Laurel Springs.

Q. But you haven't taken any position yet, any kind of work at all?

A. No.

Cross-examination.

By Mr. Fryling:

10 Q. Where was the hole that your foot went in?

A. Was near the trolley.

Q. I understood you to say it was in the rail?

A. Near the rail.

Q. Did I understand you to say before when counsel asked you where the hole was you said the hole was in the rail?

A. I said near the rail.

Q. You said before when counsel asked you where the hole was it was in the rail; now, isn't that correct, was that where the hole was?

20 A. It has been so long—I couldn't see the hole.

Q. When counsel asked you before where the hole was you said it was in the rail; now, was that correct, or was it not?

A. No.

Q. It was not correct, is that right; do you mean to say now that wasn't correct? Is that right?

A. I don't know.

Q. This accident that you had sometime before,

30 when was that?

A. It is seven years now, it was five years ago.

Q. Do you remember what year it was in?

A. No; it was five years ago.

The Court: Five or seven years ago.

The Witness: Seven now, but five then.

Q. Seven years now; do you remember what time in the year you had that accident? Was it in the winter?

A. New Year's Eve.

Q. Is that New Year's of 1916?

A. I don't know.

Q. Or 1915; don't you remember?

A. 1915.

Q. New Year's Eve of 1915, and this accident you had at Warren Street and Broadway was on December 13th, 1919, was it not?

A. Yes.

Q. At the time you got off the car it was daylight, wasn't it?

A. It was dawn, it was getting daylight; it was dawn.

Q. It was a little after seven o'clock in the morning, wasn't it?

A. Yes.

Q. How often had you come out from the shipyard village, every day?

A. Yes.

Q. For the four weeks you had been working?

A. Yes.

Q. That was the first time you worked since your accident, wasn't it?

A. Yes.

Q. You had some difficulty in getting work, didn't you?

A. No, I didn't.

30

Q. What is that?

A. No.

Q. Well, you were lame, weren't you?

A. I wasn't lame.

Q. You weren't lame at all before this accident?

A. No.

Q. During the time that you were working?

A. No.

Q. Sure of that?

A. Yes.

Q. The car when it came to the corner of Warren Street and Broadway stopped at the corner, didn't it?

A. It stopped near the switch, or near a curve.

Q. What is that?

10 A. It stopped near a switch or a curve.

Q. Or what?

A. A curve.

Q. A switch or curve?

A. Yes.

Q. What do you mean by a curve?

A. Like this.

Q. You mean the curve where the rail goes around the corner, you mean by that the curved rail, is that what you mean?

20 A. A curved rail.

Q. The car always stopped there at the corner of Warren Street and Broadway, didn't it?

A. Not always; it stopped further near the village.

Q. How much further?

A. It was near Broadway, I can't tell you the exact feet.

Q. You do know where the car stopped on the day of this accident, don't you?

30 A. Yes; it stopped at the switch.

Q. Stopped at the switch; and the switch is where the tracks are—one goes to the right into Broadway and the other track goes straight ahead?

A. I don't remember, it has been so long; it has been over two years.

Q. Well, now, when the car stopped will you just tell us again what you did?

A. I put my foot down, there were people in front of me and people in back of me, I put my foot down, my heel caught on the rail, threw me into the hole with a terrible wrench.

Q. The hole in the rail?

A. Opposite the rail.

Q. A hole in the pavement, was it a hole in the pavement?

A. I don't remember, I couldn't see.

Q. You didn't see the hole at all? 10

A. No.

Q. Did you see any holes around there?

A. I didn't see the hole.

Q. Didn't see any holes?

A. There were people in front of me, I couldn't see.

Q. You don't know whether there was a hole there or not?

A. People said that a girl got her foot caught in the switch. 20

Q. We are not asking what people told you, we are simply asking you to tell us what you know yourself, not what people told you; you don't know about whether the hole was there?

A. No.

Q. You didn't see any hole?

A. No.

Q. And all you know you stepped on the rail and you turned your foot, then you didn't know what happened after that? 30

A. My heel caught on the rail and threw my foot into the hole with a terrible wrench.

Q. I understand you to say you didn't know whether there was a hole there or not. Do you recognize this picture as the corner where this thing occurred? Perhaps I can help you—do you recog-

nize this as Warren Street where the car comes from the bridge; this is Warren Street, and this is Broadway, here is the bridge and here is Warren Street, and here is Broadway; do you recognize that now as a picture of that corner?

A. Yes; I do.

Mr. Fryling: I ask that that be marked for identification.

10

(Said photograph is marked for identification, D1.)

Q. I show you another view of the same corner; do you recognize that as the corner?

A. Yes; that is the corner.

Mr. Fryling: I ask that that be marked for identification.)

20

(Said photograph is marked for identification, D2.)

Q. Now, you went by that corner twice a day for the four weeks you were working, did you?

A. Yes.

Q. And do you recognize that picture as showing the conditions as they were there then, referring to Exhibit D1 for identification?

30

A. That is the bridge over there, isn't it?

Q. The bridge is that there; do you recognize the bridge?

A. That rail comes around there.

Q. This is Warren Street, this is Broadway; is that a correct picture as the conditions were then at the time of this accident?

A. I don't know.

Q. Well, you saw it every day, didn't you; twice a day?

A. I don't know; there was a hole there.

Q. No, but do you see any hole in the picture now?

A. No.

Q. And you didn't know there was a hole there then, did you?

A. No.

Q. Isn't that a correct picture of what the conditions were there, before and around the time that this accident occurred?

A. I don't remember.

Q. You don't remember that?

A. No.

Q. Can't you tell us on that picture where the car stopped, where the front of the car was when it stopped?

A. I can on the other picture.

Q. Referring to Exhibit D2 for identification. 20
Now, just show us where the car stopped, where the front of the car was when it stopped; it came around this way, this is the house on the right coming up Warren Street here, and there is the switch, and here is the straight track running here, and here are the tracks running into Broadway; recognize that now?

A. Yes.

Q. Now, just show where the front of the car was when it stopped?

A. About there. 30

Q. Just a moment now. Right in front of the store. Will you put a mark on that photograph where you say the front of the car was; never mind your counsel, it is all right for you to do this; just pay attention to the question. Just put a mark on the picture where you say the front of the car was.

Let me help you; did the car stay on the straight tracks, or did the car take the curve into Broadway?

A. I don't remember.

Q. Well, do you know where the front of the car was with respect to the switch? That is the curb there, isn't it? Did you have to cross over a track when you got off?

A. Cross over a track?

10 Mr. Woodruff: Speak out, Ethelreda, I can't hear you.

Q. To get to the sidewalk, did you have to cross over a track when you got off this car?

A. I don't think so.

Q. Well, you say you did step on a rail; now, can you show us that rail that you stepped on? All right, if you think you can't do that, I won't insist on it. Do you know whether the car as it came to the corner kept on a straight track or took part of the curve around into Broadway?

20

A. I don't remember that.

Q. Don't remember that?

A. No.

Q. But you do know when you stepped down off the front platform of the car your foot stepped on a rail, is that correct?

A. Yes.

Q. Now, was the street paved there?

30

A. I don't know.

Q. What is that?

A. I don't know.

Q. You don't know that; you were there every day, weren't you?

A. A street paved is cobblestones.

Q. There are lots of different kinds of street paving. Was it paved as shown in that picture, D2?

A. I don't remember; it has been a long while.

Q. Now, the hole that your foot went in, was that the hole in the center of the curved rail, on the curve, is that the hole that you refer to, in the center of the curved rail, on the curve?

A. I don't know.

Q. Just a little louder, please?

A. I don't remember.

Q. Then you don't remember how this accident happened, do you? 10

A. I know I put my foot down and something caught, something caught it.

Q. You know you stepped on the rail, you know that much, don't you? Do you know you stepped on the rail?

A. I can't remember; really I can't remember.

Q. Talk a little louder?

A. I can't remember.

Q. You don't remember now whether you stepped on the rail or not, is that correct? Now, do you remember whether or not you stepped on the rail? 20

A. No; I know I put my foot down and something caught it; put my foot down and my heel caught on something, caught on something and threw me into the hole.

Q. But you don't know what it was your foot caught on?

A. No.

Q. Which pelvis was fractured in the previous accident you had? 30

A. Right.

Q. Which ankle did you wrench at the time of this accident?

A. The right.

Q. What?

A. The right.

Q. Both right; the pelvis was on the right side

and your wrenched ankle was on the right side, is that correct?

A. Yes.

By Mr. Woodruff:

Q. Ethelreda, what did you do with the money you earned while you were working the four weeks?

A. Gave it to my mother.

10 Q. Just for use in the family?

A. Yes.

Q. Ethelreda, you say you couldn't see the hole on account of the people ahead of you?

A. Yes.

Mr. Fryling: I object to that; the witness didn't know there was a hole there.

20 The Court: She said she couldn't see because of the folks ahead of her. I don't think she referred to a hole; she said she couldn't see because the people were ahead of her.

Q. When your heel caught, as you describe it, you said you didn't see where your foot caught, but how far did you feel it go?

A. It went way down, gave me a terrible wrench.

By Mr. Fryling:

30

Q. Well, let's see; you say, "way down;" will you show us by your hands about how far down you are referring to?

A. No; I can't.

Q. But you just indicated a minute ago when your lawyer asked you; now, I want you to show us how far you mean; indicate by your hands.

A. It gave me a terrible wrench.

The Court: We are talking about how far when you stepped down did your foot go before you suffered the wrench.

The Witness: About five or six inches.

Q. Five or six inches; you mean five or six inches 10
from the step down to the ground, the step of the
trolley car?

A. From the step of the trolley car; no.

Q. You mean five or six inches below the surface
of the pavement on the street?

A. Yes.

Q. Now, do you know whether there is any hole
five or six inches below the surface of the pavement
on the street?

A. Not that big.

20

Q. You didn't see any there at that time, at the
time of the accident, did you?

A. No.

Q. What?

A. No.

DR. LLOYD E. STROHM, SWORN.

30

DR. JOSEPH ROBERTS, SWORN.

WILLIAM C. R. SIMONS, SWORN.

By Mr. Woodruff:

Q. Mr. Simons, how old are you?

A. Twenty-one.

Q. Where do you live?

A. Fairview, New Jersey.

10 Q. Do you still live in Fairview?

A. Yes, sir.

Q. Do you know Ethelreda Brown?

A. Yes, sir.

Q. Do you know who she is?

A. Yes, sir.

Q. Where did you work at the time Ethelreda had the accident?

A. New York Shipyard, north yard.

Q. How did you go back and forth?

20 A. On the trolley service.

Q. On the trolley car Ethelreda was on?

A. Yes.

Q. You had gotten on at Yorkship Village?

A. Yes, sir.

Q. And were going to get off where?

A. North yard, up the road.

Q. So this was the place you were to get off?

A. No, sir.

30 Q. What happened when the car came towards Broadway that morning when Ethelreda got off?

A. What way do you mean?

Q. Tell us what you saw.

A. The car was crowded, and they all got off all in a hurry —

Q. How were they getting off, which way?

A. Both the front door and back door.

Q. What part of the car were you sitting in?

A. Near the front of the car; near the motorman.

Q. And were there very many people getting off the front way?

A. Quite a number; yes, sir.

Q. Where had he stopped his car that morning?

A. Alongside of the pole, even with the pole on the curve.

Q. Was that the regular place to stop?

A. No, sir.

10

Q. How much away from the regular place was it?

A. Well, it was about five foot usually stopped even with the step, Warren Street, there was a car coming the other way.

Q. Did you see Ethelreda when she left the car?

A. No, sir.

Q. How many people were getting off the front way?

A. Oh, about seven or eight.

20

Q. What was the first you knew that anybody had been hurt?

A. I saw the crowd trying to take the girl out of the track, or whatever she was in, the track, or something.

Q. What did you do?

A. I was told to get another car to get to the shipyard.

Q. Did you get off this car?

A. Yes, sir.

30

Q. By the front way?

A. Yes, sir.

Q. Did you look to see what was there?

A. I saw the bricks.

Q. And what was the condition of the street there?

A. Irregular.

Q. How?

A. Rocky.

Q. Irregular and rocky?

A. Yes.

Q. Whereabouts was it irregular and rocky?

A. Right around the switch.

Q. How close was that to the front step where everybody had to get off?

10 A. Just straight down from where the car stopped, just stepped down from the step and you were in the hole.

Q. How much of a hole was there at that point?

A. Three or four inches deep.

Q. And how long was it, do you know?

A. I guess about twelve or thirteen inches long.

Q. Where did it run?

A. I can't recollect whether it was the inside of the switch, or outside of the switch.

20 Q. How close was it to the step itself where Ethelreda had gotten out, or anybody had gotten out, where you got out?

A. I don't recollect that; I just stepped right off the car.

Q. Now, do you know where they took Ethelreda?

A. In the cigar store right there at the corner.

Q. You got off that car and took another car, did you?

A. Yes, sir.

30 Q. And went on to the shipyard. Do you know how long that hole had existed there?

A. No; I don't.

Q. How long before that had you seen it?

A. I never took notice until that day I got off the car.

Q. Until somebody had been hurt?

A. Yes.

Cross-examination.

By Mr. Fryling:

Q. What kind of pavement was there?

A. Pavement on the street, or sidewalk?

Q. On the street?

A. There was no pavement laid across, no pavement at all.

10

The Court: I guess you mean paving.

Q. I mean the street pavement, out where the trolley is?

A. On Warren Street it was just those bricks.

Q. Bricks?

A. Yes, sir.

Q. How long had that pavement been laid in the street, do you know?

A. By the trolley service?

20

Q. No; it wasn't paved by the trolley service; I am talking about the street pavement, out in the street, around the corner of Warren Street and Broadway.

A. That was built when Fairview was going up, for the trolley service.

Q. What?

A. That was put up by the trolley service.

Q. Put there by the Government the year before?

A. I suppose it was; I wasn't living there at the time.

Q. How often did you get around that neighborhood?

A. Just going back and forth to the shipyard.

Q. For how long?

A. About a year and a half.

Q. Did you frequently get off the car there at that corner?

A. No, sir.

Q. Did you ever get off the car at that corner?

A. Yes; we had to sometimes.

Q. For a while the car line ended at the corner, didn't it, and they ran a separate line from the corner of Broadway and Warren Street to the village?

A. Yes.

10 Q. And that is what they were doing at the time of the accident, weren't they?

A. Not every car.

Q. Not every car, but some of them?

A. Yes.

Q. And all the time you were traveling down, when they ran the separate car, you used to get off at that corner, didn't you?

A. I only traveled in the trolley when I was going to work, never used the trolley otherwise.

20 Q. And you worked there for how long?

A. Worked in the shipyard altogether, you mean?

Q. Yes.

A. Three years.

Q. Up to the time of the accident?

A. In the warm weather I used to walk back and forth clear to Morgan Village.

Q. You say the car usually stopped where?

A. The step right by the store they used to stop there, but they had a collision, a car coming from the
30 village —

Q. At what place?

A. It stopped even with the pole.

Q. At that place where they say they usually stopped, the street out where the track was wasn't paved, that was a dirt street?

A. No; there were stones there.

Q. Stones there, too?

A. Yes.

Q. The same kind of pavement as it was where the car stopped on this occasion, is that correct?

A. Yes.

Q. I show you Exhibit D2 and ask you if you recognize that as the condition that existed there at the time of this accident, if that is a correct picture of the corner of the street?

A. Yes.

10

Q. That is the way things looked at that time, is it?

A. It looks as though something —

Q. I am asking you now whether you say that picture is a correct representation of the things as they were at the time of the accident so far as the tracks are concerned and as far as the street pavement was concerned?

A. Yes, sir.

Q. I also show you D1 for identification, and ask you if you recognize that as another view of the same situation, the same location?

20

A. Yes, sir.

Q. Now, will you point out on this picture, D2, where the front of the car was when it stopped at the time of this accident?

A. Stopped about just even with this here pole.

Q. Now, will you point it out so the jury can see it, where you say it stopped?

A. Right here. (Indicating.)

30

Q. Pointing out on the car track right by the switch.

A. Right near the frog where the car stopped, and the door opened and I saw the switches as I went out.

Q. Where did they usually stop?

A. Back here, even with this here step, back here.

Q. Back how far from the switch?

A. About five foot.

Q. About five foot back of the switch. Where was this hole that you speak of, see that on the picture? Look at both of them.

A. Right here.

Q. Where?

A. See that rail there with that little hole down
10 there? (Indicating.)

Q. You mean in the rail?

A. I can't see by the picture here, but I can see the rails like there.

Q. Do you mean the hole was in the rail itself?

A. I can't say it was in the rail, it shows here outside of the rail.

Q. But what you recall at the time of the accident, you say you saw the hole; the hole you speak of, was that in the rail?

20 A. In the rail itself.

Q. In the rail itself, or was it in the pavement?

A. In between the rail.

Q. In between the rail; between what rail?

A. There is a sidewalk, and then the rail coming up from the curb.

Q. What do you mean by in between the rail; was it between two rails?

A. No.

Q. Between what rails?

30 A. The curb line and the first rail.

Q. You mean it was between the curb and the rail?

A. Yes.

Q. And how far from the rail?

A. Right alongside of the rail the hole was.

Q. About how far from the rail would you say; you mean it extended from the rail out toward the curb?

A. No; it was right alongside of the rail itself.

Q. Alongside of the rail, and you say you can see it on the picture?

A. Yes; you can see the rail on the picture, quite a little hole there.

Q. Referring to the point where the switch is on Exhibit D1 for identification.

A. You can see it right there, quite a little hole there where the rail shows.

Q. Can you see it on Exhibit D2? 10

A. It is turned against you right here.

Q. Now, I want you to show right in front of the jury so they can see the place where you say the hole is on Exhibit D1. Stand here for a moment so the jury can see; point out where you say the hole is?

A. Right here. (Indicating.)

Q. Now, just back this way a little ways. You never saw a hole there at any other time?

A. Beg pardon. 20

Q. You never saw a hole there at any other time?

A. No, sir.

Q. And that is the only hole that you did see?

A. No; there was some more holes along the street, too.

Q. On the street there?

A. On the streets; yes.

Q. Where are they; do they show on the pictures, on either one of these pictures?

A. I can't see them. 30

Q. Don't see any other holes on the picture, do you?

A. No.

TERESA BROWN, SWORN.

By Mr. Woodruff:

Q. Mrs. Brown, you are Ethelreda's mother?

A. Yes.

Q. Will you tell us what condition you found her in when she was brought home, in regard to her ankle?

10 A. She was in a faint condition.

Q. What about her ankle?

A. The shoe was laced on, but it was rapidly swelling, and I got terribly frightened; she was brought in by a jitney driver and a Public Service conductor. I got a rocking chair for her, and I got another chair to put her foot on, and I sent for a doctor. I didn't know what to do, I was afraid to handle it myself, it was swelling so rapidly —

20 Mr. Woodruff: I can't hear you; you had better wait until the bell stops.

The Court: Go on.

The Witness: The foot was swelling so rapidly beneath the shoe and I became alarmed, and naturally, and the nearest doctor was the one I got, and after waiting some time Dr. Bowker came.

30 Q. Now, Mrs. Brown, that was the condition she was in when she was brought home?

A. Yes.

Q. How long was she laid up with that foot?

A. That was the 13th of December, it was Saturday morning, and she was in bed for several days, then she was laid up totally until about—oh, I

couldn't say how long it was, the 8th of March it was before she left the house, and then I put her in a jitney and brought her down to Overbrook, where we lived, I took her down on a jitney, she was on crutches.

Q. Why wasn't she able to get around?

A. She couldn't put the foot under her, it was in a terrible condition.

Q. How did you treat it?

A. Dr Bowker sent over to the drug store and 10
got a bottle of laudanum, and some other mixture, and I had to wet it every five or ten minutes; it was a fevered condition, and the heat was great. I would soak it and then in five minutes I had to soak it again.

Q. After Dr. Strohm attended her, did you continue to bathe the ankle?

A. Yes; Dr. Strohm strapped it, but she suffered terribly with it, and she had to have it up on a pillow. Sometimes she would sit up in a rocking 20
chair and have another chair with her foot on it, and sometimes she would have to get into bed. She was awake at night, she suffered terribly, and we couldn't get any sleep; I don't know when she got a whole night's sleep, she moaned and cried so.

Q. Before she met with the last accident what was her health?

A. Very good; I would say it was back to normal.

Q. You had a great deal of trouble on account of the accident?

30

A. Yes; we had.

Q. Over how many years had you had trouble with that?

A. Why, it was over five years, I think.

Q. From the first accident to the second?

A. From the first accident to the second was over five years, about five years.

Q. And then you permitted her to go to work?

A. Yes; her condition was so good I permitted her to go to work.

Q. Before she actually went to work, she was permitted to work around?

A. She ran around, she went back and forth to church, she went everywhere; she went into town with us, went down to Atlantic City, she attended school—I mean in Philadelphia she attended school
 10 —she went everywhere with us, she even jumped down the steps in the yard, and they were good and broad, jumped down the steps, and she remarked how fine she was feeling, played around, and was enjoying life generally.

Q. Had there been any trouble in the first accident with this right ankle at all?

A. Nothing whatever.

Q. Where was the injury?

A. Pelvis, or upper hip bone.

20 Q. Is that the only place she had an injury of any seriousness?

A. Yes.

Q. Mrs. Brown, what bills were paid by you and your husband for Ethelreda's last accident?

A. I guess somewhere —

Mr. Fryling: Never mind.

Q. How much was paid to Dr. Bowker?

30 A. \$10.00 to Dr. Bowker.

Q. What was the first bill from Dr. Strohm?

A. Well, I think it was something —

Mr. Fryling: If you don't know —

Q. The bill?

A. I paid visits in between.

The Court: What was Dr. Strohm's bill?

The Witness: All right; his bill was \$80.00.

Q. Altogether?

A. Altogether.

Q. And was that rendered in separate statements?

A. Yes, sir.

Q. You don't remember what the first one was in exact amount, and what the other ones were afterwards? 10

A. No; I don't think I do.

Q. What was the cost of the crutches and the appliances which you have had, the stockings, and things of that kind?

A. It is hard to remember those, it is so long ago; it is awfully hard to remember all those things. I paid \$2.00 —

Mr. Fryling: One minute.

20

Q. Was Ethelreda able to go back to work after the second accident?

A. No; she wasn't.

Q. How is she now?

A. She is in a terribly nervous condition; she can't bear the least noise in the house. Really, the house isn't like a home at all any more, her nerves are so dreadful.

Q. What about the walking?

30

A. Very poor, and with great pain, great pain.

Mr. Fryling: The witness should only give us what she knows. I asked that be stricken out.

The Court: The plaintiff, the young lady herself testified to that.

Q. Does she sleep well?

A. No; Mr. Woodruff, she doesn't at all. She has wakened up at night time —

Mr. Fryling: There isn't any question; I object to that.

Q. How do you know she doesn't sleep well?

A. She woke me up at night, and I went to see
10 what was the matter, and she was sound asleep and her foot was quivering under the bedclothes.

Q. Did she have any nervous condition while she was working?

A. Not when she went to work.

Cross-examination.

By Mr. Fryling:

20 Q. She had a very severe accident on New Year's Eve, 1915?

A. '14, I believe.

Q. Wasn't it the night of December 31, 1914?

A. 1914.

Q. That would make it New Year's Eve, 1915?

A. It was New Year's Eve; yes, sir; that is right.

Q. When did she start to go to school after that first accident?

A. Well, I can't remember just exactly when she
30 started, that is a long while ago.

Q. That was in Philadelphia?

A. Yes, sir.

Q. When did you move to New Jersey?

A. 1917, the fall.

Q. Did she go to school in New Jersey?

A. No; she didn't go to school.

Q. Did she go to work at any place before she started to work for the Welsbach Compnay four weeks before this accident?

A. No; but she helped me around the house, though.

MARY A. MURTHA, SWORN.

10

By Mr. Woodruff:

Q. Mrs. Murtha, where do you live?

A. West Philadelphia.

Q. Speak a little louder?

A. West Philadelphia.

Q. And did you know Ethelreda Brown when she lived in Philadelphia?

A. Yes, sir.

Q. And have you kept in touch with them since up to the present time? 20

A. I have.

Q. I understand she had quite a serious accident some years ago?

A. She did.

Q. Do you remember when they moved over to New Jersey?

A. Well, not the date, definitely.

Q. I mean the time when it happened?

A. Yes.

Q. How had she come along in her physical health up to the time they moved to New Jersey? 30

A. How she came along from what the doctor told her.

Q. What you saw of her?

A. After the doctor gave her her discharge?

Q. I want to get an idea of how she appeared to the ordinary public at the time she moved to New Jersey.

A. Well, rather—I don't know what you mean, really.

Q. Had she gained her total strength?

A. No; she looked like a person gaining it, just starting it.

Q. Had she improved in health?

10 A. All the time.

Q. After she came to New Jersey did you visit her home?

A. Once or twice.

Q. I don't hear you?

A. Two or three times.

Q. Where?

A. At Laurel Springs when they first came, because they wanted to see the improvement. The doctor said —

20

Mr. Fryling: Just what you saw yourself.

Q. You saw her at Laurel Springs; did you see her at Yorkship Village?

A. Yes.

Q. Did she improve?

A. Yes; an entirely different person.

Q. Did you see her before she went to work at the Welsbach?

30 A. I said she should go to work; I told her mother to put her to work.

Q. What was her condition of health at the time she went to work?

A. Thoroughly all right girl; I asked her how she did it.

Q. Did she appear to have any trouble in walking?

A. No, sir; ask her.

Q. Have you seen her after the last accident?

A. Yes, sir.

Q. Where?

A. Laurel Springs.

Q. At her home?

A. Exactly.

Q. Has she had trouble since the last accident, physical trouble, trouble with her ankle?

A. Why, yes.

10

Q. What did you observe?

A. Great suffering.

Mr. Fryling: Now, you didn't see the suffering.

The Court: I think that has been covered by the testimony of the plaintiffs.

Cross-examination.

20

By Mr. Fryling:

Q. What is your address, please?

A. 3501 Hamilton Street, Philadelphia, northwest corner.

Q. Are you related to Miss Brown?

A. No, sir.

Q. Have you lived with her at any time?

A. Neighbors.

30

ELIZABETH A. SHOVELIN, SWORN.

By Mr. Woodruff:

Q. Where do you live, Mrs. Shovelin?

A. Woodbury, New Jersey.

Q. Are you related in any way to the Browns?

A. Nothing at all.

10 Q. You are under subpoena?

A. Sir?

Q. You are subpoenaed to be here?

A. Yes, sir.

Q. Did you know Ethelreda before she met with this last accident?

A. I knew them for several months.

Q. What opportunity did you have to observe her?

A. Just as a neighbor.

Q. Where did you live?

20 A. 1066 South Common Street.

Q. Yorkship Village?

A. Yes, sir.

Q. Neighbor to the Browns?

A. Yes, sir.

Q. Now, prior to this last accident did she appear to have any difficulty at all that was observable—and trouble of any kind?

A. Not as far as I could see.

30 Q. You remember the time—I don't mean the day—but you remember the time of this last accident when she was brought home, after that?

A. She was after the accident.

Q. What?

A. She was brought home after the accident.

Q. After the accident were you in and out of the house when she was there?

A. On two occasions I called to see how she was getting along.

Q. What did you observe yourself then?

A. She had her foot bound up lying on a pillow on a chair.

Q. That was shortly after the accident, was it?

A. Yes.

Q. Later did you see her when she got on crutches?

A. Yes.

Q. Saw her use them?

10

A. Yes.

Q. Do you remember later when she began to use the cane?

A. No; they moved to Laurel Springs.

Q. She still used the crutches when they were in Yorkship Village?

A. Using crutches up to the time they left.

No cross-examination.

20

JULIA GILFILLEN, SWORN.

By Mr. Woodruff:

Q. Where do you live?

A. 1081 Niagara Road, Fairview, Yorkship.

Q. Did you live in Yorkship when the Browns lived there?

30

A. Yes.

Q. Around the time that Ethelreda met with her last accident?

A. Yes.

Q. Did you have a chance to observe her before she met with her last accident?

A. Yes; often seen her.

Q. How often?

A. Every day.

Q. How close did you live to them?

A. Back of them.

Q. What did you see her doing?

A. Jumping in the back yard, went to the moving pictures with her, seen her about with her sisters every day.

Q. Played around with the other girls and sisters?

10 A. Yes.

Q. All right at that time, to all appearances?

A. Yes, sir.

Q. What did you see after that, when she first got out of the house; how was she able to get around?

A. Well, she was very weak, and she had crutches when I was called in I went in to see her every day after the accident.

Q. That is, for some months she was in the house?

A. Yes.

20 Q. How long do you remember her using crutches?

A. A couple of months, anyway.

Q. Then they moved away?

A. Yes.

No cross-examination.

PLAINTIFF RESTS.

30

Mr. Fryling: I move for a non-suit, if the Court please, on the ground that the plaintiff has not established any negligence against the defendant, on the principle laid down in *Johnson v. Public Service Railway*, and *Fielders v. North Jersey Street Railway Company*. There is no proof of anything

in this case for which the plaintiff should be held liable.

The Court: (After argument.) I will allow the case to go to the jury on the testimony of the young man that there was a hole alongside of the track where the passengers were alighting.

(Exception noted for the defendant.)

10

(At this point a recess was taken until 1.30 o'clock P. M.)

(Trial of the cause resumed at 1.30 o'clock P. M., pursuant to adjournment, in the presence of counsel for the respective parties.)

THE CASE FOR THE DEFENDANT.

20

JOHN M. KELLY, SWORN.

By Mr. Fryling:

Q. Mr. Kelly, what is your business?

A. Contractor.

Q. And where is your place of business?

A. Office, 507 Federal Street, Camden.

Q. How long have you been in that business?

30

A. Fifteen years.

Q. And in your contract business have you laid paving, street paving, and street railways?

A. Yes, sir.

Q. Did you lay the street paving, make a street paving and lay the rails in the vicinity of Warren

Street at the intersection of Broadway, at Gloucester?

A. Yes, sir.

Q. When did you do that work?

A. November of 1918, and it ran through until sometime in January of 1919.

Q. Was it completed then in January, 1919?

A. Yes, sir; completed in January, 1919.

10 Q. And the rails that you laid there, were they standard rails used in street railway construction?

A. Yes, sir, standard; and some special work we laid there, curves and switches.

Q. The special work you speak of, is that what you refer to as switches and curves?

A. Yes, sir.

Q. Was that standard?

A. Yes, sir.

20 Q. I show you Exhibits D1 and D2 for identification and ask you if those photographs show a proper representation of the situation as it was when you completed the laying of the rails and the paving of the street?

A. Yes, sir.

Mr. Fryling: I offer these photographs in evidence.

The Court: Any objection, Mr. Woodruff?

30 Mr. Woodruff: I want him to prove as to when they were taken; if he wants to prove that—

Mr. Fryling: I think the witnesses for the plaintiff have already proved the photographs as correct representations, at the true situation.

The Court: No testimony along that line.

Mr. Fryling: I asked the witnesses particularly, both the plaintiff and the other witness for the plaintiff, and both said the pictures represent the situation as it was at the time of the accident.

The Court: Only one witness named Simons, I think it was, he testified as to a depression there was there in the paving, that is all he testified to. He didn't go so far as to say these photographs indicated the condition. 10

Mr. Fryling: The plaintiff herself also identified them.

The Court: That is not my recollection.

Mr. Fryling: I had them marked for identification.

The Court: You merely had them marked for 20 identification, you didn't offer them as exhibits.

Mr. Fryling: I couldn't. I offer them now.

The Court: No; I hardly think that you covered the ground as to whether these photographs were taken as the condition. It is all right to offer them as to the location of the poles, the street curbing, and matters of that kind, but as to whether there was any depression in the paving at the time of the alleged accident, we certainly ought to know 30 when the photographs were taken.

Mr. Fryling: Does your Honor rule against me?

The Court: Yes; if you want to go so far as to

say these photographs are a true representation of the street paving at the time of the accident.

Mr. Fryling: Your Honor will allow me an exception?

The Court: Yes.

(Exception noted for the defendant.)

10

Q. When the work was completed by you in January, 1919, was there any hole alongside of the track and between the track and the curb near the switch?

A. Not to my knowledge.

Q. And I refer you now particularly to the point alongside of the switch on Exhibit D2, and ask you if there was any hole in the street, any hole of any kind there at that time?

A. No, sir.

20

Q. It has been testified there was a hole three or four inches deep, twelve by thirteen inches long alongside of the rail near the switch between the curb and the rail; when you finished your work January, 1919, was there any such hole there?

A. No, sir.

Cross-examination.

By Mr. Woodruff:

30

Q. How big are these Belgian blocks, Mr. Kelly?

A. They are about nine to thirteen inches long, and about 4½ inches wide.

Q. The same size as the hole testified to, four or five inches deep and ten to thirteen inches —

A. Nine inches long.

Q. Did you lay the tracks there?

A. Yes, sir.

Q. What kind of ground is it, made ground?

A. Why, I couldn't say, Mr. Woodruff.

Q. Isn't that all built up ground from the railroad track over to Broadway?

A. No; on the contrary I think it is a hill that was cut down.

Q. At Warren Street?

A. At Warren Street.

10

Q. How much of a cut did you make?

A. I didn't make it, but before I ever did any work there there was a hill ten or twelve feet.

Q. At Warren Street?

A. At about Broadway and Warren.

Q. How close to that did they have to begin to fill when they built those houses?

A. I couldn't say.

Q. They filled over toward the railroad, didn't they?

20

A. They broke earth up in a northerly direction.

Q. What kind of soil was it?

A. Sand.

Q. These Belgian blocks you put down, what kind of a foundation did you use?

A. Concrete.

Q. How much?

A. Six inches.

Q. Six inches of concrete and your Belgian block on top?

30

A. And the Belgian blocks.

Q. You started the work in November, 1918, was that the construction work or paving work you started?

A. The construction work, the rail work, and we followed up immediately with the paving.

Q. When did you do the paving alongside the frog there and the curve where that leads out?

A. Sometime between the middle of November—I couldn't tell the exact date—within the period between the middle of November and early January.

Q. Which end of the road did you start the construction, the Broadway end or the Yorkship Village end?

A. I think we started on the Broadway end to the
10 best of my knowledge.

Q. From the time that work was done up until December, 1919, at least a year, you didn't have any occasion to go back and inspect your work, did you?

A. No, sir.

Q. You do have to go back sometimes and repair Belgian block places alongside of the track and switches?

A. I don't have to go back.

Q. Didn't you do the work?

20 A. No; after we finish the original job and it is accepted we are never required to go back.

Q. Somebody else does whatever repairing is necessary?

A. Yes, sir.

CHARLES STIFF, SWORN.

30 By Mr. Fryling:

Q. Mr. Stiff, what is your business?

A. Chief draftsman for the Lorraine Steel Company, Johnstown, Pennsylvania.

Q. And your chief place of business is with the Lorraine Steel Company?

A. Yes, sir.

Q. What business does the Lorraine Steel Company do?

A. Roll girder rails for street railways, switches, frogs, crossings, and special track work.

Q. You are an engineer, are you?

A. Yes, sir.

Q. How long have you been in the business?

A. I have been 29 years with this company at that business.

10

Q. In connection with your business do you manufacture and make switches, frogs and curved rails for street railway construction?

A. We do.

Q. And do you know whether your company made the rails, switches and frogs that were laid at the corner of Warren Street at the intersection of Broadway, Gloucester?

A. We did.

Q. Were the rails, switches, frogs and curved rails 20 that you made for that location of standard construction?

Mr. Woodruff: There is no contest on that point, your Honor; we haven't made any allegation as to any defective track there or defective workmanship, we allege a condition existed which the motorman might have seen and didn't.

The Court: It is admitted that the rails that were placed there were of standard construction; that will save time. 30

Q. Mr. Stiff, did you examine the tracks and the paving and the street at that location this morning?

A. I did.

Q. I show you Exhibits D1 and D2 for identification, and ask you if these photographs show a correct representation of the condition that existed there this morning when you saw it, both as to the rails and the paving, and as to the condition of them.

Mr. Woodruff: That is this morning?

Mr. Fryling: Yes, this morning.

10

A. Those photograph the condition of the track and pavement as they are today.

Q. And what condition did you find the construction work there as to both the rails and the street paving?

A. I found there was a beautiful job of installation and completion of the pavement; generally far better than is usually found in track layouts. The pavement was brought up flush with the surface of the
20 rail, an A-1 job, not only laying the track, all tight joints, but also the pavement was in perfect condition.

Q. Was the paving sunken in any place?

A. Absolutely not.

Q. Could you determine from your examination whether there had been any repair work in the paving or tracks from the time of its original construction?

A. I think it would have been evident if any had;
30 apparently the job was completed as usual, as the track was installed paved around.

Q. So that it is your opinion no repairs have been made?

A. That is my opinion.

Q. Were there any holes in the paving at any place around the curve or switches?

A. None whatever; I examined the entire layout from the corners. It was in perfect condition.

Q. Referring to Exhibit D2* for identification, and showing you the point next to the switch, between the switch and the curb on the left of the picture, and ask you if you found any hole alongside of the track at that point, or at any point along there?

A. No hole there; I think that is a shadow.

Q. I show you Exhibit D1 and ask you if there— 10
by looking at that, and from your examination this morning, whether there was any hole at that point, or any point in the paving?

A. I didn't see any holes in the paving at all whatever.

Q. At that point?

A. Yes, sir.

Cross-examination.

20

By Mr. Woodruff:

Q. You didn't see it December two years ago?

A. No.

DR. DANIEL STROCK, SWORN.

30

SAMUEL SHAW, SWORN.

By Mr. Fryling:

Q. Where do you live, Mr. Shaw?

A. Camden.

Q. What is your business?

A. Motorman.

Q. Were you the motorman of this trolley car operating from Yorkship Village to Broadway on December 13, 1919?

A. Yes, sir.

Q. What was your trip at the time of this accident; where did you start?

A. Mt. Ephraim and Collings road is the starting
10 point.

Q. Where is that, down in the Shipyard Village?

A. At the extreme end.

Q. What was your destination?

A. New York Shipyard.

Q. Did you go to the New York Shipyard on that
trip?

A. No, sir.

Q. Why?

A. Why, the accident delayed us so the men all got
20 off our car and got another Broadway car and went
on that way so they wouldn't be late for work.

Q. The street as you come around from the bridge
that you travel on going to Broadway, that is War-
ren Street, is it?

A. Yes.

Q. And what is the general direction that you
travel on that street?

A. I believe that is east and west.

Q. Then you were traveling west, were you?

A. Yes, sir.
30

Q. So that Broadway travels in a north and south
direction, does it?

A. Yes, sir.

Q. Did you stop when you got in the vicinity of
Broadway?

A. Yes, sir.

Q. Where did you stop?

A. Near the crossing, the usual stopping place.

Q. By the way, before I forget it; how long had you been a motorman?

A. In Camden?

Q. Anywhere?

A. Fifteen years in May I have worked in Camden.

Q. And how many years have you been a motorman altogether?

10

A. Seventeen.

Q. Well, now, do you know where the switch is on Warren Street where you switch in to go north on Broadway?

A. Yes, sir.

Q. Where did you stop your car with respect to that switch?

A. Now, I judge the front trucks of the car were about over the switch.

Q. Then did your car take part of the curve, or 20 did it stop on the straight rail?

A. The car hadn't started to swing; the body of the car hadn't started to turn.

Q. What about the front wheels?

A. The wheels were about in the switch; I don't judge they had started to turn there.

Q. Well, what happened when you stopped your car in the position in which you say?

A. Well, the people started to get out—quite a few on that trip worked in the Welsbach, and quite 30 a few had gotten off when I heard somebody holler.

Q. What end of the car did they get off?

A. The front end, that is the end I was on.

Q. Do you know whether anybody was getting off the rear end, too?

A. I imagine they were; of course, I couldn't see

back. We generally did let them off both ends that trip.

Q. Just tell us what you know?

A. Then I looked and I saw a young lady holding on to the grab-handle, and that quick somebody had hold of her, and they grabbed her so she wouldn't fall. I got off the car, too, and they helped her in the store on the corner.

Q. Did you go in the store?

10 A. I did.

Q. Did the young lady say anything in your presence?

A. She did.

Q. What was said?

A. She told me her ankle turned over, said it was her bad ankle.

Q. Did she tell you anything else?

A. I asked what was the matter with her ankle, and she said she had it hurt in a motor accident five
20 years before and it had never been right since.

Q. How long after that accident did you continue on that route?

A. I don't know just the date, until the cars started to run all the way through from the village to the ferry.

Q. About how long was that?

A. Now, I don't know just how long that was.

Q. Do you still run down Broadway?

A. Yes, sir.

30 Q. Down as far as Warren Street?

A. Yes, sir.

Q. How often since that time, since the time of the accident?

A. I go down?

Q. Yes.

A. I am up and down every day when I am working.

Q. Now, how long before the accident had you been riding over that road?

A. From the time the road was finished; one week after the road was finished they put the car on and I took the run.

Q. Do you recall when that was, when you started?

A. No, I don't.

Q. About how long before the accident?

A. I think it was sometime in March I believe 10 when they started to run the car over there.

Q. From the time that you started up to the present time do you know whether there have been any changes made in the tracks or in the paving in the street in the vicinity of the corner of Warren and Broadway?

A. I was off of Broadway for about six months, I was on another line.

Q. When was that?

A. Last summer. 20

Q. Up until last summer?

A. No change made whatever at that corner.

Q. And were there any changes made since the time you went back?

A. I been to work about three months, and there hasn't been any change since then; no, sir.

Q. With the exception of the six months you say you were not there, were there any repairs made in the paving or tracks at or anywhere near the corner of Warren and Broadway? 30

A. No, sir; none whatever.

Q. I show you Exhibits D1 and D2 for identification and ask you if these photographs show a correct representation of the tracks and street paving and all the surrounding situation as it existed on December 13, 1919, at the time of this accident?

A. Absolutely.

Q. Was there any hole in the paving?

A. None whatever.

Q. Was there any hole out in the paving alongside of the track at the switch, between the curb and the switch?

A. No hole at all; as you see it now is the way it was.

Q. Any hole there now?

10 A. No, sir.

Q. At any time since the paving was laid and the tracks were laid have you ever seen a hole there?

A. Never saw a hole anywheres near there; no, sir.

Cross-examination.

By Mr. Woodruff:

20 Q. Did you look for the holes?

A. Naturally, that is the first thing we do is look around.

Q. Why?

A. That was our orders, we were to take all precaution when an accident happened anywheres near the car or beyond the car.

Q. Isn't it orders to take precaution before an accident happens?

A. Yes.

30 Q. Not to stop over the holes?

A. It is impossible to stop when there is no holes there.

Q. That is your orders, not to stop over these kind of places?

A. Yes, sir.

Q. Who opened the front door?

A. I did.

Q. For the people to get out?

A. Yes, sir.

Q. Was it light enough for them to see getting in and out?

A. Yes, sir.

Q. Could you stand up on the platform and see the track ahead of you as you came along?

A. Yes, sir.

Q. Where you stopped your car this particular 10 time, your trucks may have started around the curve, is that right?

A. They may have started a little bit.

Q. But the body of the car was still straight?

A. The body of the car was about straight.

Q. That would swing your front step over the curved rail, wouldn't it?

A. The chances are the corner of the curved rail may have come at the corner of the step.

Q. Didn't it that morning? 20

A. I don't think so, I took particular notice of that that morning.

Q. That was the morning you had your accident?

A. We had been stopping there so long —

Q. You had your orders to take particular notice when there was an accident?

A. Yes, sir.

Q. Wasn't the curved rail right under that front step where you stopped that particular morning?

A. I suppose so; yes, sir. 30

Q. You know that, don't you?

A. Yes, I know it was.

Q. You could have told us that in the first place, couldn't you?

Mr. Fryling: I object to counsel arguing with the witness; he has answered it now.

Q. You mean all the Belgian blocks along that curved rail, around that frog, were smooth, is that so?

A. Yes, sir.

Q. Never a one of those blocks worked loose?

A. No, sir.

Q. Never a one pushed down?

A. Not while I worked there.

Q. No cracks?

10 A. No, sir.

Q. Do you know of any other place along the line where they stayed that way, without cracking, and without getting loose?

A. What do you mean, in the street?

Q. Any other Belgian block paving along the line?

A. Yes, lots of places.

Q. Was that the place you stopped every morning?

A. Yes, sir.

20 Q. Let them out the front door every morning?

A. Yes, sir.

Q. You always swung so the trucks began to get the curve and the front of your body would go straight?

A. Yes, so I could see Broadway.

Q. Why did you want to see Broadway?

A. See any other cars coming and when I could go around.

30 Q. Wasn't that the reason you went up so far that particular morning, to beat anybody who wanted to use the line; to get to the shipyard first?

A. No.

Q. You were in a hurry that morning?

A. Naturally, that was a heavy trip, we had to keep going.

Q. Hurrying the people off; you were ringing the bell that morning?

A. No, sir.

Q. Wasn't the conductor giving you the bell while these people were getting down the step?

A. No, sir.

Q. Just hurry themselves to get out?

A. Yes, sir.

Q. How many got off the front platform?

A. I didn't count them; I judge around six, seven or eight.

Q. Men and women, both? 10

A. Yes, sir.

Q. Crowded together?

A. They got off orderly, there was no crowding.

Q. I mean, they were close together when they were getting off the step; I don't mean they were jostling each other, but they were close together?

A. Yes.

Q. Did you see where Miss Brown was, what position?

A. I didn't see her until I heard her holler. 20

Q. You don't know whether she got off first or last?

A. She wasn't first.

Q. She wasn't last?

A. No.

Q. She must have been in the middle then?

A. Yes.

Q. Did you hear her when she cried out?

A. I did.

Q. Was she making some loud outcry there? 30

A. Yes, sir.

Q. How long did she continue that?

A. She continued it—she was moaning after we got into the store.

Q. She really screamed out loudly at first?

A. Yes, sir.

Q. You helped to take her into the store?

A. Yes, sir.

Q. You didn't go out on Broadway at all that trip?

A. No, sir.

Q. Back near the platform where the people were getting off was it paved?

A. Yes.

Q. So where you stopped it was paved?

10 A. Yes, sir.

Q. And you stopped so your front truck was right near the frog?

A. Yes, sir.

By Mr. Fryling:

Q. One question, Mr. Shaw, I forgot in my direct examination. Do you know how far out the step of the car projects, the step is in getting on and off
20 your car?

A. What do you mean, from the body of the car?

Q. Yes, from the line of the wheels, for instance?

A. They were over a foot; must be a foot and a half; two feet, anyhow.

Q. Now, would it be possible for anyone to step from the step of the car on to the switch?

A. No, sir.

Q. Would it be possible under the circumstances in that vicinity, no matter where you stopped your
30 car, for a person to step from the car on to the switch?

A. No, sir; couldn't step on to the switch.

Q. Why?

A. The switch would be under the car.

GEORGE JACKSON HAMMEL, SWORN.

By Mr. Fryling:

Q. Mr. Hammel, you were the conductor in charge of this car?

A. Yes, sir.

Q. How long have you been a conductor?

A. Three and a half years then. 10

Q. When did you start on that route, Yorkship route?

A. About the 15th of April, 1919.

Q. And how long did you continue on that route?

A. Why, until 1920; I think it was the 1st of May, 1920, they ran them all the way through.

Q. Now, on the trip at which this accident occurred, you came from where?

A. From Mt. Ephraim and Collings Road, Fairview. 20

Q. That used to be called ——

A. Yorkship Village.

Q. And at what point did you come?

A. Broadway and Warren.

Q. And at the stop at Broadway and Warren, what place did you stop at?

A. Why, the regular place where we had been in the habit of stopping, even with the building line.

Q. Were there many passengers got off and on there? 30

A. Yes, sir.

Q. About how many?

A. Well, there was about thirty or forty.

Q. Getting off which end of the car?

A. Both ends, sir.

Q. What did you first know of this accident?

A. What did I first know? A gentleman said, "You had better go up, someone is hurt." When I got off they had started going over to the store with Miss Brown.

Q. Did you go into the store?

A. Yes, sir.

Q. Did you talk to her?

A. I got her name.

Q. What did she say?

10 A. What did she say?

Q. Yes.

A. She said she had been in an automobile accident about five years before and her ankle had never been the same since; it was her bad ankle she had hurt.

Q. I show you Exhibits D1 and D2 for identification and ask you if those photographs show a correct representation of the tracks and paving in the vicinity of Warren and Broadway at the place of
20 the accident; as they were at the time of the accident?

A. Yes, sir.

Q. Were there any holes in the paving?

A. No, sir.

Q. During the time that you continued to go in that vicinity, and from the time you started to work in 1919, were there any changes made or repairs made in the paving or tracks?

A. No, sir.

30 Q. Have you any of the blocks in the paving depressed or have any holes been formed there any time, that you have seen?

A. Not that I know of, sir.

Q. Have you looked at the paving?

A. I was just in there yesterday afternoon.

Q. You found the condition there yesterday afternoon just the same as it was?

A. Yes, sir.

Q. At the time of the accident was there any hole in the paving?

A. No, sir.

Q. Particularly calling your attention at a point alongside of the switch between the switch and the curb as it appears on the left-hand side of the picture, was there any hole alongside of the track?

A. No, sir.

Q. At the time of the accident?

10

A. No. That was examined after the accident happened. Someone came out of the car and said Miss Brown had stepped in a hole; I examined it afterwards and there was no hole there, sir.

Q. How long afterwards?

A. The second trip afterwards.

Q. On the same day?

A. On the same day, sir.

Q. Would it be possible for a person to step off the car and step on to the switch?

20

A. No, sir; impossible.

Q. Why not?

A. Why not? It is underneath the car, sir.

Q. And is that irrespective of where the car may stop?

A. I couldn't tell you about going around the curve.

Q. If the car kept straight ahead without taking the switch, would the car be over the switch at all times?

30

A. Yes, sir.

Q. And if it took the switch and went around the curve would the car still stop up over the switch?

A. Some part of it would.

The Court: I suppose it depends entirely on the character of the curve.

Q. I mean the curve at Warren and Broadway?

A. They would have to swing around the front to get into that.

Q. You mean if the switch was ahead of where the car stopped?

A. Yes, sir.

Q. In order to get on to the switch they would have to walk in front of the car?

A. Yes, sir.

10

Cross-examination.

By Mr. Woodruff:

Q. There isn't any question, if the truck started around the curve there, the frog, and the body was still going straight, not having started to turn, your step would be over the curved rail?

A. Yes.

20

Q. Why did you wait until the second trip —

A. It was just this person came and told me.

Q. You didn't go back and look under the step while the car was still standing there?

A. No, sir.

Q. You were satisfied from Miss Brown having told you this was something that happened five years ago?

A. No, sir.

Q. Didn't bother to look at all?

30

A. No, sir.

Q. What made this man tell you that?

A. I don't know.

Q. Was she moaning and in pain?

A. No, sir.

Q. Had you heard her?

A. She had come to her senses inside the store.

- Q. You went in and asked her for her name?
A. She had told us before I got her name.
Q. Told it to you?
A. All in the store.
Q. Just right out of a clear sky started to explain this accident which happened five years ago?
A. Yes.
Q. And the same ankle had never been right?
A. And the same ankle had never been right.
Q. Did she say anything about the broken pelvis? 10
A. No, sir.
Q. Just said it was this ankle?
A. Yes, sir.
Q. Nobody asked her anything about it?
A. No, sir.
Q. Who heard that beside you and the motorman?
A. Two other witnesses there.
Q. How many names did you take beside hers?
A. I couldn't tell you.
Q. A great many of them? 20
A. The gentleman right there has them, sir.
Q. How long did you work on this particular line after the accident?
A. About thirteen months.
Q. They never did any repair work there at all?
A. No, sir.
Q. Do you claim they have never done any repair work there; today the conditions are the same?
A. Conditions are the same.
Q. Was this condition the same at the time of the 30 accident?
A. Yes, sir.
Q. Where you stopped it was somewheres, you say, about the property line?
A. Yes, sir.
Q. What other ridges or broken-down Belgian

blocks are down there beside this one shown in the picture?

A. I don't know, sir.

Mr. Fryling: I object to that; where is one shown in the picture?

Q. You say that shows a block broken down?

A. No, sir.

10

Mr. Fryling: I object to the question.

Q. What other places like this spot were there?

A. Not any other places.

Q. Just that one?

A. I didn't notice that one.

Q. You say this is exactly the way it was, didn't you?

A. Exactly the way it was.

20

Q. How could you say that if you didn't notice that spot?

A. I didn't notice that spot.

JACOB B. HAHN, SWORN.

By Mr. Fryling:

30 Q. Mr. Hahn, what is your business?

A. Sir?

Q. What is your business?

A. Chief of Police, South Yard, New York Ship.

Q. Were you a passenger on this trolley car, December 13, 1919?

A. Yes, sir.

Q. From Yorkship to Warren Street and Broadway?

A. Yes, sir.

Q. Did you get off the car in the vicinity of Warren Street and Broadway?

A. Yes, sir.

Q. Which end of the car did you get off?

A. At the back end.

Q. Did you see the accident?

A. Well, I seen the lady there with a foot in the 10 curve, and I went toward the front of the curve——

Q. What do you mean by that?

A. Standing hanging on the handle of the car with her foot like that.

Q. What do you mean by “the curve”?

A. The curved rail.

Q. Did the car stop where the cars usually stop?

A. Yes, sir; it might have been a little further ahead, I couldn't say positively.

Q. I show you Exhibit D2 for identification and 20 you point where you say her foot was on the curved rail.

A. I will have to get my glasses for that. Right here, the foot was about on there (indicating).

Q. Talk louder?

A. Her foot was on the right rail there near the curve.

Q. Will you just point out that to the jury?

A. About here (indicating).

Q. Now, again down here?

30

A. Right about there, above the frog.

Q. And about where the front wheels of the car —

A. The front wheels of the car were over the switch.

Q. The position in which the car was, would it be possible for a person to step off the car on to the switch?

A. No, sir.

Q. At the point where the plaintiff was standing was there any hole in the paving?

A. No, sir.

Q. Was there any hole in the paving about there?

A. Not that I took notice of; I looked pretty good, too, to see if there was a hole.

Q. Witnesses have testified there was a hole four or five inches deep and twelve or thirteen inches long
10 in the paving alongside of the switch; was there any such hole there?

A. No, sir.

Q. Do you know when this construction work was done?

A. I don't remember the date, but I remember when it was done, all the work.

Q. Well, can you recall about how long before the accident?

A. Which, the switch put in there?

20 Q. The switch, the curved rails and the paving?

A. I couldn't tell you that.

Q. Was it all completed some time before the accident?

A. All completed some time before the accident.

Q. And have you been in that vicinity since that time?

A. Yes, sir.

Q. Continuously?

A. Yes, sir.

30 Q. Do you know whether there has been any repairs to the tracks, the curves or switches and the paving from the time it was originally laid?

A. I haven't seen any.

Q. Would you have seen it?

A. I ride over there three or four times a day.

Q. What is the condition now of the paving, the railing, and so forth?

A. First-class condition.

Q. Did you go in the store with the plaintiff when she went into the store?

A. Yes, sir; I asked the lady if she wanted to go to the hospital, and she said no, and I had her sent home.

Q. Were you there when she said something about how she hurt her ankle?

A. No, sir; I sent the conductor across the street to get an automobile, and he came back and told me he got the automobile, and I went about my business. 10

Cross-examination.

By Mr. Woodruff:

Q. Were you in there, chief, when the conductor came in first?

A. No, he didn't come in right at the start, he was standing outside. 20

Q. He came in and you sent him out to get a jitney?

A. An automobile, since she didn't want to go to the hospital.

Q. How long was he in there before you sent him?

A. I wasn't in there very long; I asked her if she wanted to go to the hospital, and she said no, and I asked the conductor to go across the street; a man was standing there in an automobile. 30

Q. Did the conductor take your name in there?

A. I don't know, he didn't ask me.

Q. Did you hear him ask her for her name?

A. I wasn't in there then.

Q. But she didn't say anything about an old accident while you were in there?

A. No, sir.

Q. Who else was in there at the time?

A. Well, there were probably four or five different people, half a dozen, for all I know.

Q. People from the crowd crowded right in, I suppose?

A. Yes, sir.

Q. Chief, you got off the rear of the car?

A. Yes, sir.

10 Q. You didn't get off the front?

A. No, sir.

Q. A number of people got off the front?

A. Yes.

Q. What was the first you knew that anybody had been hurt?

A. When I stepped off the back of the car I heard somebody scream, and I looked and I seen this lady.

Q. Were there people at the step getting off?

A. Several of them.

20 Q. And you went over and helped her into the store?

A. Yes, sir.

Q. After you sent the conductor to get the jitney, and you went out, what did you do, go home then?

A. No, sir; went over to the yard at my work.

Q. You went on over to the shipyard?

A. Yes, sir.

Q. Did you see her taken away first?

30 A. No, sir; as soon as the man said he was coming to take her away I didn't bother any more, I went about my business.

Q. Who else helped you in with the girl?

A. Several, I don't know the names.

Q. People getting off the step she had gotten off?

A. I think one did; I don't know where the rest came from.

Q. The first thing you thought of was getting hold of her and helping her?

A. That is natural.

Q. Back where you had gotten off, was it paved?

A. Yes, sir.

Q. As far back as you were?

A. I think they are cobblestones back there.

Q. That isn't paved with Belgian blocks?

A. I don't think so.

10

HORACE RIKER, SWORN.

By Mr. Fryling:

Q. Where do you live, Mr. Riker?

A. Fairview.

Q. What is your business?

A. Timekeeper at present.

20

Q. Were you a passenger on this trolley car December 13, 1919, when the plaintiff was injured?

A. Yes, sir.

Q. Did you get off the car at Warren Street and Broadway?

A. Yes, sir.

Q. Which end of the car did you get off?

A. Front end.

Q. Did you get off before or after Miss Brown?

A. After.

30

Q. What did you see?

A. When I got off the car I seen a couple of gentlemen had hold of her arm leading her into the store.

Q. Did you look at the place where you were getting off the car?

A. What do you mean?

Q. The condition of the paving?

A. No, I got off the car and saw her lifted into the store, and I boarded another car and went to the shipyard.

Q. At the place where the car stopped, where you got off, was it a pretty good place to get off?

10 Mr. Woodruff: I object to the characterization of the place, whether it was a pretty good place or not. Mr. Fryling asked the witness if where the car stopped was a pretty good place; that is a question of argument, a question of decision by the jury.

Mr. Fryling: I think the witness can describe the condition of the place.

Mr. Woodruff: He already said he didn't notice the condition of the paving.

20 Mr. Fryling: Does your Honor overrule me?

The Court: Yes.

(Exception noted for the defendant.)

Q. Did you notice anything about the place as indicating any dangerous condition for the car to stop at to allow passengers to get off?

A. No, sir.

30 Cross-examination.

By Mr. Woodruff:

Q. After she had been taken into the store the place was clear there for you to get off and go on your way?

A. I got off the car and went right over to the other car.

Q. After these two men had led her away, there was nobody immediately in front of you; the steps were down?

A. Yes.

Q. No necessity for your hesitating?

A. I stepped straight down, you know.

Q. Stepped down into the street?

A. Stepped right down.

10

Q. Nobody in your way?

A. The few people watching; people getting off in back of me, maybe they were waiting for a car going south.

Q. I mean immediately in front of you?

A. I don't know where they went, whether they stayed around there or not; some of them ran for cars, the same as I did.

By Mr. Fryling:

20

Q. Could you see where you stepped to when you were stepping down?

A. Oh, yes.

Q. The place where you had to step to to get down on the street from the car, what was the condition there?

A. It seemed to be all right.

Q. Did you see any holes around?

A. No, sir.

30

By Mr. Woodruff:

Q. When you stepped out, did you step over the curve, the curved track?

A. Stepped right on the street.

Q. Did you step over the curved rail there?

A. Yes.

Q. On over that?

A. Yes; I didn't see any rail; I just stepped on the pavement itself.

JOHN V. THOMAS, SWORN.

10

By Mr. Fryling:

Q. Where do you live, Mr. Thomas?

A. Fairview.

Q. What is your business?

A. At that time I was an electrician at the yard.

Q. What is your business now?

A. In the sign business.

20 Q. You are not connected with the Public Service Corporation, or Electric Company, or Railway Company?

A. No, sir.

Q. Were you a passenger on this car on December 13, 1919, when the plaintiff was injured?

A. Yes, sir.

Q. What end of the car did you get off?

A. The front end.

Q. Had you been accustomed to traveling by that route?

30 A. Night and morning.

Q. How did the car stop with respect to the usual place of stopping?

A. Well, I didn't notice anything unusual about it.

Q. What was the condition of the paving and the rails at the place where the front of the car stopped where the passengers alighted in the front?

A. About the usual condition; I didn't notice any unusual condition of the street then.

Q. What did you see of the accident?

A. I didn't see the accident; I was the last person out of the car. I guess I heard her holler, and saw them leading her in, through the window of the car. I didn't go in.

Q. Did you go in the store?

A. No, sir.

Q. Did you look at the paving there? 10

A. No, I didn't know the nature of the accident and I didn't look around; I was in a hurry to get to work.

Q. Was the place where the front of the car was, where you alighted, a safe place to get off?

Mr. Woodruff: I object; he can describe the location, but he can't give his opinion.

The Court: I think counsel should be confined to 20
the questioning of the witness as to the character
of the surroundings, and leave the rest to the jury.

(Exception noted for the defendant.)

Q. How long after the time of this accident did you
continue going over that route?

A. I still continue to go over there.

Q. And have continuously from the time of this
accident? 30

A. Off and on; yes, sir.

Q. Do you know whether there have been any
changes or repairs made to the tracks, curves, switches
or paving in the vicinity of that corner?

A. To my knowledge I have never seen any.

Cross-examination.

By Mr. Woodruff:

Q. A block or two might have been taken out and put back many times without your knowing it?

A. I was in the hospital seventeen weeks.

10 Q. Mr. Thomas, what were you doing, catching another car going up Broadway?

A. This car was supposed to be making the trip, but owing to the accident we all had to get on another car.

Q. Transfer?

A. No, sir.

Q. Just got on and they took you up?

A. Yes, sir.

Q. Was that car waiting?

A. It happened to come along.

20 Q. And as you stepped out the door you didn't hesitate, you went right over to that car?

A. Yes, sir.

Q. What did you step on?

A. I couldn't tell you; I stepped some place, I don't know whether it was on the rail or on the ground.

30 RICHARD ADDIS, SWORN.

By Mr. Fryling:

Q. Where do you live, Mr. Addis?

A. Yorkship Village at present.

Q. December 13, 1919, where did you live?

A. 418 North Broadway.

Q. Where is that with respect to Warren Street?

A. Three doors below.

Q. Did you live there at the time the paving was laid and the tracks were laid there at the corner of Warren and Broadway?

A. Yes, sir.

Q. How long did you continue to live there?

A. 418 Broadway; I imagine five years.

Q. At the end of that five years—let me see, this was in 1919 the accident happened, December 13, 10 1919, when did you go away from there?

A. I been away from there not quite two years.

Q. Been away two years?

A. Not quite two years.

Q. And then you went to Yorkship Village?

A. No, sir; to Wellwood, and then to Yorkship Village.

Q. At the time the paving was laid have you continuously been in the neighborhood of that corner?

A. Up until this last eleven months. 20

Q. During that time have there been any changes made of repairs to the curves, rails, switches or paving at the corner?

A. Not that I have seen; no, sir.

Q. At the time of the accident, where were you?

A. I was going to work, I was coming off the porch, and I heard this young lady call, or holler, and naturally I turned off the sidewalk to go on the other side of it.

Q. Where was she? 30

A. The fellows were carrying her into the store.

Q. Did you go into the store?

A. I didn't have room to get in.

Q. Did you see the condition of the paving there?

A. That always looked pretty good to me.

Q. No holes in the paving?

A. No, sir.

Q. Near the track or anywhere about the vicinity where the front of the car was?

A. No, sir.

Cross-examination.

By Mr. Woodruff:

10 Q. Did you know how she had been hurt?

A. No, sir.

Q. There was nothing to call your attention to the paving at all?

A. Only I traveled there maybe twenty or thirty times a day.

Q. At this particular time of the accident there wasn't anything to call your attention to the paving?

A. No, sir.

20 Q. During the day I suppose you work, about that time?

A. In the evening when I come home.

Q. During the other times you are away somewhere at work?

A. Yes, working at the shipyard.

Q. You didn't stand on that corner to see if anyone was changing a block, filling in, or anything?

A. No, sir.

30

JESSE A. HILL, sworn.

By Mr. Fryling:

Q. Where do you live, Mr. Hill?

A. Yorkshipp Village.

Q. And how long have you lived there?

A. I moved there in July, just after the village had been completed, when they first opened it up, I forget now when it was.

Q. Were you a passenger on this car when the plaintiff was injured?

A. I was.

Q. You resided at the village at that time, did you?

A. Yes, sir.

10

Q. Do you know when this paving was laid there in the vicinity of the corner of Warren and Broadway?

A. No, sir; I do not.

Q. Well, since the time of the accident have you continuously traveled over that route?

A. I have.

Q. During that time have any changes been made in the tracks, curves, switches or paving in that vicinity?

20

A. Not to my knowledge.

Q. What end of the car did you get off?

A. The rear end.

Q. What did you see of the accident?

A. I seen the people get off before her, then I seen her step down from the step, she didn't take her hand off from the handle at all, she just seemed to drop part way, but not all the way. She cried out about her foot, and then Mr. Hahn, he had gotten off right after me—I was stuck in the door, in the way of passengers getting off, so I stood out of the way—Mr. Hahn got off, and then several of them took hold of her and marched her into the store.

30

Q. When you saw her stepping from the car, where did she step to?

A. She seemed to step right down on to the street.

Q. Were there any holes in the street where she stepped down from the car?

A. Not to my knowledge, I didn't notice any.

Q. Could you have seen them if there were any holes there?

A. I probably would have.

Q. Did you go in the store?

10 A. I went up to side, and then I turned back—
see, there was a number in the store, and I went
back and told the conductor there was a girl hurt,
he should go and see about it; it was me who called
his attention to it.

Q. Have you seen at any time any holes in the paving?

A. Never took any notice of any.

Q. What was the general condition of the paving
at the point where the front of the car was?

A. Well, it is like all Belgian blocks.

20 Q. Laid?

A. Some depression between the blocks filled with
concrete, I didn't notice anything exceptional about
it.

Q. These photographs, Exhibits D1 and D2, are a
correct representation of what the conditions were
there at that time?

A. In general, I should say yes.

Cross-examination.

30

By Mr. Woodruff:

Q. Did I understand you were going to take the
same car up to the shipyard?

A. That car on that trip usually did go to the
shipyard.

Q. You just stepped off the platform to allow the people to get off and you were going to get back? Did you stay back of the people getting off?

A. On the contrary, I stood ahead; the conductor had asked me to tell him when they were all off.

Q. Do I understand you to say you stepped outside; did you step with your back toward the front of the car?

A. No, I was facing the front of the car, and I watched the young lady getting off. 10

Q. Did you step off the back end of the car so you could watch?

A. I had gotten off the step facing the front end of the car, my left hand on the grab, for instance, here is the doorway, and I got out in this manner, facing the forward end of the car.

Q. When was it you state you were in the way and stepped out, I understood you were in the way of the people and you stood out of the way?

A. I was in front of the door; I was the last one to get in the car, and people couldn't get past me without me getting out of the way, so I got out of the car. 20

HARRY S. CHANDLER, SWORN.

By Mr. Fryling:

Q. Mr. Chandler, where do you live? 30

A. 632 Willard.

Q. Were you in the vicinity of Warren and Broadway, December 13, 1919, at the time of this accident?

A. Yes, sir.

Q. Where were you?

A. I got off a Gloucester car at Broadway and Warren with the intention of taking the Yorkship Village car and go into the village.

Q. And where did you stand?

A. Pardon me?

Q. Where were you standing?

A. When I got off the car the accident had already happened, when I got off the Broadway car. See, 10 when I walked over I saw this car in first, coming in from the village; that car that morning was going to run to the shipyard.

Q. Did you see where the front of the car was where the young lady stepped from?

A. I saw where the car stopped yes; sir.

Q. What was the condition of the paving?

A. The condition of the paving as far as I knew was good.

Q. Were there any holes in the paving?

20 A. Not that I know of; no, sir.

Cross-examination.

By Mr. Woodruff:

Q. You didn't have your attention called to the paving?

A. No, sir.

Q. Didn't look to see what it was that hurt the 30 girl?

A. No, sir.

Q. Just walked to get on the car and go on your business?

A. Yes, sir.

EDGAR Y. EVANS, SWORN.

By Mr. Fryling:

Q. Mr. Evans, where do you live?

A. 1574 Collings Road.

Q. Were you a passenger on this trolley car on December 13, 1919, when this accident occurred?

A. Yes.

10

Q. Where were you coming from?

A. I was coming from 1574 Collings Road.

Q. Did you get off the car at Warren Street and Broadway?

A. Broadway and Warren, yes.

Q. What end of the car did you get off?

A. Front.

Q. What did you see of the accident?

A. Well, the girl was right ahead of me, she stepped off, she had hold of the rod that you catch hold of to get off the car, she hollered, and another man got off the back of the car—that was in front—he got hold of her and I helped him with her in the store.

20

Q. Did you see where she stepped when she stepped off?

A. It looked like she stepped on the track.

Q. What part of the track?

A. The curve there.

Q. On the curved track that curves around Broadway?

30

A. Yes.

Q. Now, the place she stepped, were there any holes in the paving?

A. I didn't see any.

Q. If there had been any holes there would you have seen them?

A. Well, yes.

Q. Was this the usual place for the car to stop?

A. Always stopped there.

Q. Did you go in the store?

A. Yes.

Q. Did you hear Miss Brown say anything when you were in the store?

A. She said she had a weak ankle, she had hurt it before.

10

Cross-examination.

By Mr. Woodruff:

Q. Did she say that leg was bad or that hip was bad?

A. I didn't hear her say anything like that.

Q. You mean she said that this particular ankle was weak?

20 A. She said her ankle was weak, yes.

Q. Did she say how it became that way?

A. I didn't hear her.

Q. You were in there?

A. I was in there, but not all the time; I wasn't there when the car came to take her home.

Q. Now, Mr. Evans, when you were back on the platform you were in back of her?

A. Yes.

Q. And other people back of you?

30 A. Yes.

Q. All hurrying to get off?

A. I didn't take notice of anybody hurrying. I was on the step and she was on the ground; I was on the top step.

Q. You were all close back of her?

A. Yes.

- Q. Other people close in front of her?
A. I didn't see anybody close in front of her.
Q. She wasn't the first one to get off, was she?
A. No, sir.
Q. How many people got off ahead of her?
A. Must have been four or five.
Q. When she hollered you were still up on the step?
A. I was on top.
Q. You couldn't see where she was going? 10
A. It looked as though she was under the step.
Q. Her foot being under the step and you up on the platform, you couldn't see where it was, and what was happening under there?
A. No.
Q. Your first thought was to help to get her into the store?
A. Yes.
Q. And that is what you did, helped the other man get her into the store? 20
A. Yes.
Q. That is the reason you say there were no holes in the pavement, because that wasn't the thing you were looking for?
A. I didn't see any.
Q. This particular morning you were intent on getting her into the store?
A. Yes.
Q. You weren't stopping to examine any pavement or anything of that kind? 30
A. I didn't examine any.

WILMER MORRISON, SWORN.

By Mr. Fryling:

Q. Mr. Morrison, what is your business?

A. I am an insurance agent.

Q. And where do you live now?

A. I live in Philadelphia.

10 Q. Where did you live on December 13, 1919?

A. I lived in Fairview.

Q. Were you on this trolley car the plaintiff was injured?

A. Yes, sir.

Q. Did you get off at Warren Street and Broadway?

A. Yes, sir.

Q. What end of the car did you get off of?

A. The rear end.

20 Q. What did you see of the accident?

A. I walked—got off the car and walked to the corner, and just then I heard her holler and some men there grabbed hold of her and helped carry her into the store.

Q. At the time you walked over and heard her holler, did Miss Brown have hold of anything?

A. The hand-rails.

Q. Where were her feet?

A. On the ground.

30 Q. How were they with respect to the rail?

A. I didn't see no rail at all where the feet were.

Q. Were there any holes in the pavement where her feet were?

A. No, sir.

Q. Were there any holes in the pavement anywhere in that vicinity near the front of the car?

A. No, sir.

Q. Did you go in the store?

A. Yes, sir.

Q. Did you hear Miss Brown make any statement in the store?

A. When the conductor asked her for her name she said, "There is no use giving you my name, it is only my sore ankle," that is all I heard her say.

Q. Anything else?

A. Only about the sore ankle, that is all. 110

Cross-examination.

By Mr. Woodruff:

Q. You were there while the conductor was taking names?

A. Sir?

Q. You were there while the conductor was taking names? 20

A. Yes, sir.

Q. And all she said was it was no use taking her name, it was only her ankle?

A. She said it was her old ankle.

Q. Did she say that?

A. That is what I understood.

Q. She was asking to be taken home?

A. I left right after that there, I didn't hear anything after that.

Q. You didn't hear her say it was her ankle about 30 five years ago?

A. I didn't hear that; I heard her say it was her sore ankle.

J. WALTER WRIGHT, SWORN.

By Mr. Fryling:

Q. Mr. Wright, what is your business?

A. Superintendent, Maintenance of Way.

Q. Public Service Railway Company?

A. Yes, sir.

10 Q. And for how many years have you been connected with the Public Service?

A. Fourteen years the 1st of May.

Q. And in what division are you?

A. In what division?

Q. Yes.

A. Southern division at present.

Q. And how long have you been in the southern division?

A. Since October 1, 1917.

20 Q. Have you charge of the tracks in our southern division in your capacity as superintendent?

A. I do.

Q. Were you familiar with the construction and the laying of the tracks, switches, curves, and in the laying of the paving at Warren Street and Broadway, at the place where this accident happened?

A. I was.

30 Q. I show you Exhibits D1 and D2 and ask you if those photographs show a correct representation of the conditions there at the time of the accident, December 13, 1919?

A. Yes, sir; they do.

Q. And how does that condition compare with the condition today?

A. Just the same today.

Q. Have there been any repairs or alterations or

any changes made either in the tracks, switches, curves or paving in the vicinity of that corner?

A. None whatever.

Q. On December 13, 1919, were there any holes in the paving?

A. No, sir.

Q. And are there any holes there now?

A. No, sir.

Q. I think you said there were no changes made?

A. I did.

10

Q. You have been in the vicinity there frequently?

A. Very frequently.

Q. And if any changes or repairs were made in the paving alongside of the tracks or any changes in the tracks would you in your official capacity know it?

A. I would; I would give the orders to have it done.

Cross-examination.

20

By Mr. Woodruff:

Q. Who does the repairing that becomes necessary on switches and tracks?

A. My trackmen.

Q. That is not done by Mr. Kelly, the contractor?

A. Mr. Kelly does the construction work, but not the repair work.

Q. You send the trackmen out to do that?

30

A. Yes, sir.

Q. You take a certain section and work along on it?

A. When it is necessary.

Q. Send them out on particular jobs?

A. Sometimes out on a section of track.

Q. Do you know when this was paved?

A. Why, it was paved —

Q. Originally?

A. It was paved before we put in the special work; we repaved it in 1918, paved it better than it was.

Q. With blocks?

A. Yes, sir.

Q. Was that by a contract with the City of Gloucester?

A. No, sir.

Q. Was that by an ordinance of the City of Gloucester?

A. I can't say whether it was an ordinance of the City of Gloucester.

Q. Can't you tell me why it was you put that in?

A. We put in the special work.

Q. There wasn't anything to obligate you?

A. I don't know, I am not familiar with the ordinance.

By Mr. Fryling:

Q. Wasn't that all done in connection with the Government putting the village down there?

A. That was one of the Government projects; yes, sir.

30

J. N. WATERS, SWORN.

By Mr. Fryling:

Q. Mr. Waters, are you an engineer employed by the Public Service Railway Company?

A. Yes, sir.

Q. Are you familiar with the location at the corner of Warren Street and Broadway, Gloucester?

A. I am.

Q. Where this accident happened?

A. Yes, sir.

Q. I show you Exhibits D1 and D2 for identification, and ask you when you last saw that location?

A. I last saw this location yesterday.

Q. And was the condition then as represented by those photographs? 10

A. It was, yes, sir.

Q. Any holes in the pavement?

A. There is not.

Q. Were you there at the time of the accident, December 13, 1919?

A. Not at this location, I was in this division, yes.

Q. I mean that.

A. Yes, sir.

Q. Do you know whether any changes have been made in the paying or construction of the tracks, curves, or switches since it was originally laid in 1918? 20

A. There have been no changes.

Q. Can a person step on to the switch from the step of the car; from the front step of the car can a person in any way step on to the switch?

A. Stepping from the step?

Q. Yes.

A. He cannot. 30

Q. Why?

A. Because the step overhangs from eighteen to twenty inches, varying with the type of car, and it would be impossible to step on it.

Q. Is there a groove in the curved rail used at this corner?

A. Yes, sir.

Q. And that is the usual rail used on all curves?

A. Standard guard rail.

Q. How wide is that groove?

A. 1 9-16 inches.

Q. And what is the depth of the groove?

A. It is $1\frac{3}{8}$ inches below the head of the rail.

Q. Were there any holes alongside of the switch
and alongside of the curved rail, in the pavement
10 anywhere?

A. There was not; it is one of the best pieces of
work we have on the property.

Cross-examination.

By Mr. Woodruff:

Q. And the Public Service didn't do that, did
they?

20 A. Mr. Kelly did it.

Q. Mr. Waters, you don't have anything to do
with this kind of work after the construction is
done?

A. That is under Mr. Wright.

Q. Will you tell me again how wide the opening
is in the curved rail?

A. 1 9-16 inches.

Q. And how deep is it?

A. $1\frac{3}{8}$ inches.

30 Q. Running down on an angle like, a triangle?

A. Kind of scooped out.

Q. That is all the opening there would be in the
curved rail itself?

A. That is all, yes.

RICHARD R. MILLER, SWORN.

By Mr. Fryling:

Q. Mr. Miller, what is your business?

A. Photographer.

Q. And how long have you been in that business?

A. Twelve years.

Q. Did you make a photograph of the conditions with respect to the rails and paving at the corner of Warren Street and Broadway, Gloucester? 10

A. I did.

Q. When did you make the photographs?

A. Yesterday afternoon.

Q. I show you Exhibits D1 and D2 and ask you if those are the photographs you took yesterday afternoon?

A. Yes, sir.

Q. Do these photographs show the exact conditions with respect to rails, switches, curves and paving as they exist there? 20

A. They do.

Q. Are there any holes in the paving?

A. No, sir.

Q. I show you on Exhibit D2 for identification, opposite the sewer hole, which I presume it is, on the extreme left of the picture, a mark in the paving, and ask you what that is?

A. That is a shadow caused by the cement poured between the concrete blocks; it is a dark space there at the edge of the cement. 30

Q. Were there any depressions or openings between blocks or holes of any kind in the paving?

A. Not that I saw, no, sir.

Q. In the entire section taken up by your picture?

A. No, sir.

Mr. Fryling: I offer these photographs in evidence.

Mr. Woodruff: No objection.

(Said photographs previously marked D1 and D2 for identification are now marked Exhibits D1 and D2.)

10 No cross-examination.

Mr. Fryling: I am ready to rest, but I have this suggestion, if the Court please. The whole question in this case is about the condition of the street, according to the plaintiff's case, and of these rails. I don't know of any better way for the jury to determine the facts in the case than to see the situation themselves, and I respectfully ask for the jury to have the privilege of viewing the place where the accident occurred. So far as getting the jury there, I am perfectly willing to provide for the conveyances to and from the place of the accident. It would take only a short time to go there, and I don't know of any better evidence than to have the jury see the place themselves.

Mr. Woodruff: I haven't any objection to taking the jury for a joy ride on the Public Service if it could be helpful, but this accident happened two years ago. Conditions may have materially changed in two years in respect to the location where this accident happened, and I don't think it could be helpful at the present time. I haven't any doubt but that the pictures show conditions as they existed yesterday, but that isn't the real question the jury wants to know about; they want to know what

was there in December two years ago. If I thought it could be helpful I wouldn't object, but I think it is a mere waste of time.

The Court: I rather feel that the question is the condition of this paving at the time of the alleged accident. I believe the photographs here before us as exhibits are a true representation of just what the condition is, and the jury would not know any more after they went down there than after making a careful scrutiny and examination of these pictures. 10

Mr. Fryling: Counsel has suggested there is something that appears in this photograph that appears to be a raised block. The photographer says that is a shadow by reason of cement between the blocks, and all these things, if the jury saw for themselves, they could understand the situation. 20

The Court: I don't think that is material, even if it is a raised block. My opinion is there is enough testimony without viewing the property; there was enough testimony on the part of the plaintiff and the part of the defendant as to the condition of the road or paving at the time of the accident, which would be the only safe line of testimony to go by. What the condition is there today wouldn't be at all conclusive, and I think the best interests of both the plaintiff and the defendant would be best served 30 by confining our thoughts and deliberations to the evidence that has been submitted on both sides as to the condition of the paving at that time. I think we are safe in leaving to the discretion of the jury that question. If we went down there it wouldn't have any binding effect on what the condition was

two years ago last December, and I would much rather allow the case to go to the jury from the testimony that has been adduced on both sides as to that condition. I think it would be the only safe way.

DEFENDANT RESTS.

10

PLAINTIFFS' REBUTTAL.

ETHELREDA BROWN, recalled.

By Mr. Woodruff:

20 Q. Ethelreda, when you were taken into this store, was there any discussion of this old accident of yours whatever; any talk about the old accident you had?

A. I don't remember.

Q. What was your condition, what was it you said, if anything?

A. I don't remember, I was in terrible agony.

Q. You remember saying you wanted to be taken home?

A. Afterwards.

Q. I mean there in the store?

30 A. Yes; I remember that.

Q. Do you remember anybody asking you or talking to you about your ankle there in the store?

A. I don't know.

Cross-examination.

By Mr. Fryling:

Q. What is the answer?

A. I don't know.

CARL T. WOODRUFF, SWORN.

10

By Mr. Woodruff:

Q. Mr. Woodruff, you are no relative of mine, although the names happen to be the same?

A. Yes, sir.

Q. I say, you are no relation to me?

A. None whatsoever.

Q. Where were you at the time of the accident?

A. I walked out from the village, I walked out that morning, I wasn't on the car. 20

Q. Do you usually take the same car out?

A. Well, it may be two or three times a week I walk out.

Q. Go over this same section?

A. Yes.

Q. Did you know an accident had happened?

A. I was told so.

Q. By people around there?

A. I came out there, and people were loading on the Gloucester car coming up from Gloucester, and I got on the car at the other corner. 30

Q. And with whom did you talk about that?

A. I heard them talking in the car.

Q. With whom did you speak?

A. The conductor.

Q. Of the car she had been on?

A. Yes, sir.

Q. Now, after that, did you look at the paving along there where she had been hurt?

A. Yes, sir.

Q. Did you pass back and forth there frequently?

A. Quite often.

Q. Around that time?

10 A. Yes, sir.

Q. What was the condition of the Belgian blocks along there where the curve came around?

Mr. Fryling: I object to that as not being rebuttal.

Mr. Woodruff: A statement has been introduced by the defendant that there was never a hole there and absolutely no change from that time until this. This is in rebuttal of that position they have taken, 20 attempted to establish here, that there has been no change whatsoever. That is the only point on which it is rebuttal, I assume, and that is the point I am offering it on.

The Court: (After further argument.) I will hear it, and determine it later.

(Exception noted for the defendant.)

30 Q. After the accident, did you observe the paving along there?

A. Yes, sir; I did.

Q. Now, before and after this accident, around the same time of the year, what was the condition of the Belgian blocks on the right-hand side from the frog on along the curving, the curved rail?

A. Bad.

Q. In what respect?

A. They had sunk down in different places two and three inches at that curve coming out from the village at different places; I couldn't say exactly what place, but several places around there. About a foot, a trifle over, is Belgian blocks, and the rest out to the pavement is brick, the Belgian blocks are the ones that had sunk down.

10

By the Court.

Q. They have been fixed?

A. Yes, sir, they are in good shape at present.

Q. Did you see them fixed?

A. No, sir, I don't remember when it was fixed.

Cross-examination.

By Mr. Fryling:

20

Q. Where do you live?

A. Sir?

Q. Where do you live?

A. 512 Essex Street, Gloucester.

Q. What is your name?

A. Carl T. Woodruff.

Q. What is your business?

A. Grinder, tool grinder.

Q. Where are you employed?

A. Not at all at present.

30

Q. How long have you been out of employment?

A. Three and a half months.

Q. Where did you work before?

A. New York Ship.

Q. How long did you work there?

A. Four years.

Q. What did you do?

A. Tool grinder.

Q. How did you get into this case?

A. How did I get into this case?

Q. Yes.

A. Subpoenaed.

Q. When?

A. A week or so ago, last week, I think it was.

10 Q. When did you notice this condition of the pavement you speak of?

A. Before the accident I had made remarks.

Q. Never mind about the remarks, how long before the accident?

A. Well, I could positively say a couple of months anyhow.

Q. Will you tell us what month, what year?

A. 1900.

Q. 1900?

20 A. Yes, 1919.

Q. What was it, 1900 or 1919?

A. 1919.

Q. What part of 1919?

A. Around December, before December.

Q. Where were you living then?

A. At 3731 Tuckahoe Road, Fairview.

Q. And you worked then—

A. New York Ship.

Q. And you went by there?

30 A. Lots of times, got off the car there.

Q. And where do you say that depression was, that condition you speak of?

A. Around here, over here, right here from the switch around here, yes, sir (indicating).

Q. And you noticed that in December, 1919?

A. 1919, not particularly in December, but before December, too.

Q. How long before December?

A. Well, a couple of months.

Q. Did you notice when this paving was laid?

A. No, I do not.

Q. When did you go to work there?

A. Where, New York Ship?

Q. Yes.

A. Four years, the 13th of December last, four years ago.

Q. Then you were working there in January, 1919? 10

A. Yes.

Q. December, 1918?

A. No, sir; let's see, December, 1918?

By the Court:

Q. You came there three years ago last December?

A. Yes, sir.

Q. I thought you said four years ago?

A. Three years ago last December; so it is, four years ago last December. 20

By Mr. Fryling:

Q. So you went there in December, 1917?

A. Along there—now, wait a minute, it was four years I been working there up to last December.

The Court: Last December was 1921.

The Witness: Yes, sir.

30

Q. And from that time in December, 1917, did you travel over that road?

A. No, sir; I wasn't living there.

Q. When did you go to live there?

A. In 1919, in April or May.

Q. April or May, 1919?

A. Yes, sir.

Q. And from that time in April or May, 1919, you came from the York Ship Village to the shipyard every day?

A. Yes, sir.

Q. And you traveled over Warren Street?

A. Not always, I walked over Essex sometimes.

Q. You walked over Warren Street frequently
10 during that time?

A. Yes, sir.

Q. During that time do you recall seeing this paving being laid?

A. No, sir; not being laid.

Q. Do you recall seeing tracks being laid?

A. No, sir, not the tracks.

The Court: When were the tracks laid?

20 The Witness: They were down before I came there.

Q. Sure of that?

A. Yes, sir.

Q. And you never saw any repairs being made?

A. Not by the company.

Q. I didn't ask you that.

A. No, sir.

Q. Never saw any repairs made by any one, did
you?

30 A. Gloucester.

Q. What?

A. Gloucester people.

Q. Who?

A. With concrete—not concrete, but broken stones
on the sides of the track beyond the switch.

The Court: We are not interested in that.

Q. You never saw any repairs made where the Belgian blocks were laid, did you?

A. No, sir.

Q. And even though you had been going over it practically every day you hadn't seen any repairs being made where you saw this bad condition?

A. Not to my knowledge.

Q. I understood you to say that you say the condition today is different than it was at the time of this accident?

10

A. Yes, sir.

BOTH SIDES REST.

At this point an adjournment was had until March 10, 1922, at 9.30 o'clock A. M.

20

30

Camden, N. J., March 10, 1922.

Trial of the cause resumed on the above date, pursuant to adjournment, in the presence of counsel for the respective parties.

10 Mr. Fryling: I desire to make a motion for a direction of verdict in favor of the defendant on the ground that the plaintiff has not established the facts alleged in the complaint. In paragraph four of the complaint it is alleged that she stepped into a hole or opening between the rails of defendant's tracks at or near their junction, and again in paragraph five, the car was stopped where a hole or opening existed formed by the switch and the defendant's rails then laid in the street. There hasn't been proof to establish the allegations of the complaint, and I
20 move, first, for a motion for direction of verdict in favor of the defendant, and secondly, I move for direction of verdict in favor of the defendant on the ground that no negligence has been established against the defendant.

(Motion denied.)

(Exception noted for the defendant.)

30 In the course of his argument to the jury Mr. Woodruff said: "There are two ways of escaping responsibility when it is your fault; one is to beat it as the fellow did that broke her pelvis—"

Mr. Fryling: I object to that; I don't think that is a proper statement to make before this jury.

The Court: No, as a matter of fact it is not in the

case as to just what the outcome was of the original accident.

Further on in his remarks Mr. Woodruff said: "In one case that I brought asking for \$20,000, the jury brought in a verdict for a hundred dollars more than that."

Mr. Fryling: I object to counsel talking about other cases; the question before this jury is the evidence in this case. 10

The Court: The evidence in this case; I would confine my argument as far as the monetary loss is concerned in this case.

Mr. Woodruff: I was only using it as in illustration, if the Court please.

Mr. Fryling: Counsel knows that those remarks 20 are entirely improper before this jury.

CHARGE OF THE COURT.

KATES, J.:

Ladies and Gentlemen of the Jury: It is an admitted fact in this case that the plaintiff, Miss Brown, was a passenger on one of the cars of the defendant company on the day in question, and the Court charges you that, in view of that relation, the company owed to the passenger, Miss Brown, to exercise a high degree of care in her transportation, and also provide a safe place for her to alight; and that is the whole question in this case as I see it; with all the witnesses and with all the arguments that we have had, the only question in this case is whether the defendant company provided a reasonably safe place for her to alight from the trolley car on the morning in question. If the defendant company provided her with a reasonably safe place to alight, why, they have discharged their duty and have exercised a high degree of care, if such a place was provided, and the verdict then should be in favor of the defendant company, no cause of action. Because if she met with an accident, as undoubtedly she did, there can be no recovery against the company simply because she met with an accident; you have to go further in your deliberations and ascertain that there was some negligence on the part of the defendant company before there can be a recovery—that is very clear.

Dealing with the facts in the case, and considering this question as to whether the defendant company did provide a reasonably safe place for her to alight, it is a disputed question as to whether there

was a block, a Belgian block to which they referred today, that was depressed to such an extent that she stepped in this place, or the forepart of her foot went into this place that they allege was there, and as a result the accident complained of happened. Now, that is a disputed question in this case as to whether that condition did exist or not. There has been some little testimony that she may have stepped into the groove of the track; I think the jury have a perfect right to assume that it has been testified to in this case that there is an overhang of the car of anywhere from eighteen inches to twenty inches over the rail, and if that was the case, she could not have possibly stepped into the groove or into the frog or switch, because the switch would have been under the car. I think the question in this case for the jury to determine is as to whether, when she alighted from this car, there was a depressed Belgian block. Mr. Kelly, the contractor, said that the block was of a certain size, which seemed to corroborate another witness who testified as to the size of this depression. There were a number of witnesses who have been here for the defendant company who say there was no such depression, and that there never had been, so that that is the whole question in this case, as I see it, a question of fact as to whether there was this hole in the pavement, and if there was this hole in the paving, the question, for the jury is then whether the defendant company provided a reasonably safe place for this young lady, the passenger of the defendant company, to alight. I cannot determine it; that is the reason we call in a jury to determine from the testimony as to whether there was this depression in the pavement.

If there is a recovery, if you find that it was not a reasonably safe place for her to alight, the recov-

ery for the father would be the loss of services of the girl, and whatever expenses he has been to, whatever has been established in this case, and, secondly, to the girl, for whatever pain and suffering she has undergone.

Another phase of this case that I warn the jury concerning is the previous accident that this plaintiff has sustained. Some five years before this accident, she was struck by a motor car in Philadelphia and suffered a fracture of the hip, and while it is claimed by the plaintiff in the complaint that this original accident was aggravated, I have seen nothing in the case to indicate any aggravation of the original injury, because that original injury admittedly was to the hip, while the accident that they allege at this time and which the doctors testify to was an accident in connection with her foot, and there is no relationship between the two; I see nothing in the case that would indicate any aggravation of the original injury. She is not complaining today about a hip condition; she is complaining today about a foot condition, having, as she alleges, stepped in a hole and severed one of the ligaments or small particles indicated by Dr. Roberts. So that I would not confuse the original accident with this one, and it is for the jury to say as to whether she fully recovered from the original accident. You cannot possibly charge this defendant company with any physical condition that she has today, or physical impairment that was brought about by the motor accident of seven years ago. You are to confine your deliberations entirely as to what happened in connection with her alighting from the car on the day in question, as to whether the condition of her foot was brought about by any hole in the paving, and that it was an unsafe place for her to alight or a rea-

sonably unsafe place. I think that is the whole case as I see it.

The defendant has requested me to charge you as follows and I do so charge you: There is no evidence in this case of any duty upon the part of the defendant to keep the street repaired. I so charge you; there is nothing in the case to indicate that the defendant company was found to keep the street repaired. You may retire and deliberate upon your verdict. 10

DEFENDANT'S EXCEPTIONS.

Mr. Fryling: I have a motion to make in reference to this case. I desire to have it appear in the record that counsel for the plaintiff, in summing up, stated to the jury that the man who was responsible for the plaintiff's previous accident ran away to avoid responsibility, and again that— 20

The Court: Wait a minute; you objected to it and I sustained the objection.

Mr. Fryling: I ask that a mistrial be directed on the ground that this statement was made in the presence of the jury, and another ground, that there should be a mistrial because of the fact that counsel for the plaintiff in his summing up stated to the jury that jurors in another case had talked to him after their deliberation as to the amount of damages that had been claimed by the plaintiff, and what counsel said to the jury in respect to what his claim for damages was in other cases. By reason of those improper remarks made to the jury, I think there should be a mistrial. 30

The Court: Are you making a motion?

Mr. Fryling: I am making a motion to that effect.

The Court: Well, Mr. Woodruff did not hear your motion.

10 Mr. Fryling: I have made a motion that there should be a mistrial declared on the ground that counsel for the plaintiff made two statements, one with respect to the fact that the man responsible for the plaintiff's previous accident ran away to avoid responsibility, and what counsel said in his address to the jury about the jurors making statements to him in previous cases as to the amount of damages claimed, and by reason of what counsel said in the presence of the jury there ought to be a mistrial in this case.

20 The Court: And I want the record further completed, Mr. Reporter, that counsel for the defendant objected to those remarks and I sustained him in his objections, and this was done in front of the jury.

Mr. Fryling: Then your Honor denies my motion?

The Court: Yes.

Mr. Fryling: I pray an exception.

30 The Court: Yes.

Mr. Fryling: May I also ask an exception to that part of your Honor's charge wherein your Honor stated that the question to be decided by the jury is whether there was a depressed Belgian block along-

side of the rail or in the street, whatever your Honor said in that respect.

(Exception noted for defendant.)

Mr. Fryling: And again later on where your Honor spoke of the injuries to the foot, your Honor again said that the question was whether the accident was brought about by a hole in the pavement, to which I desire to take an exception. 10

The Court: That may be it; I don't remember it, but I don't think that is all of it.

Mr. Fryling: Well, what your Honor said on that subjected.

(Exception noted.)

20

30

GROUND OF APPEAL.

(Filed May 31, 1922.)

NEW JERSEY SUPREME COURT.

10

ETHELREDA BROWN, by her father
and next friend, James F.
BROWN, and JAMES F. BROWN,
in his own right,

Plaintiffs-Appellees,

v.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant-Appellant.

Action at Law.
On Appeal
from the
Camden County
Court of
Common Pleas.

20

To ALBERT S. WOODRUFF, Esq.,
Attorney of Plaintiffs-Appellees.

SIR:

TAKE NOTICE, that the following are the grounds
of appeal which the defendant-appellant will urge
why the judgments heretofore rendered in the above-
entitled cause should be reversed, set aside, and for
nothing holden:

30

1. The Court, despite the objection of the attor-
ney of the defendant-appellant, charged the jury as
follows:

“I think the question in this case for the jury to
determine is as to whether, when she alighted from
this car, there was a depressed Belgian block—so

that that is the whole question in this case, as I see it, a question of fact as to whether there was this hole in the pavement, and if there was this hole in the paving, the question for the jury is then whether the defendant company provided a reasonably safe place for this young lady, the passenger of the defendant company, to alight. I cannot determine it; that is the reason we call in a jury to determine from the testimony as to whether there was this depression in the pavement.”

10

2. The Court, despite the objection of the attorney of the defendant-appellant, charged the jury as follows:

“You are to confine your deliberations entirely as to what happened in connection with her alighting from the car on the day in question, as to whether the condition of her foot was brought about by any hole in the paving, and that it was an unsafe place for her to alight or a reasonably unsafe place. I think that is the whole case as I see it.”

20

Yours truly,

LEONARD J. TYNAN,
Attorney of Defendant-Appellant.

(Service acknowledged on original by attorney of plaintiffs-appellees.)

30

OPINION.

(Filed November 9, 1922.)

NEW JERSEY SUPREME COURT.

No. 21.

June Term, 1922.

10

ETHELREDA BROWN, by her father
and next friend, James F.
Brown, and JAMES F. BROWN,
in his own right,

Plaintiffs-Appellees,

v.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant-Appellant.

20

} On Appeal.

Before GUMMERE, Chief Justice, JUSTICES SWAYZE,
and TRENCHARD.

ALBERT S. WOODRUFF, for plaintiffs.

LEFFERTS S. HOFFMAN, HENRY H. FRYLING, LEONARD
J. TYNAN, for defendant.

30

PER CURIAM:

The plaintiff was a passenger. In alighting from a street car she was injured by reason of a depressed Belgian block in the pavement. The Court allowed a rule to show cause reserving all exceptions pending the hearing of the rule. On the hearing it was or-

dered that the rule be made absolute unless the plaintiff consent to a reduction of the verdict. The plaintiff did consent, but no further rule seems to have been entered and the defendant took an appeal under the exceptions reserved. It is now urged that these exceptions are not sufficient because the points were not expressly reserved in the rule. The reservation seems to be in the usual form and we see no reason to think that there is any indefiniteness about reserving *all* the exceptions. Nor is there any force in the suggestion that the reservation lasted only pending the hearing of the rule. If it were so, the rule is still pending as it was made absolute upon a condition that the plaintiff should consent to a reduction of the verdict and the plaintiff has consented. This deprives the defendant of the right to a new trial which would otherwise be involved in making the rule absolute but the assent of the plaintiff to the reduction does not amount to a discharge of the rule, and no such order has been made. Nor is there any greater force in the argument that the suit was brought in the Common Pleas. If the rule of the Supreme Court is improperly taken the plaintiff should move to dismiss the rule but there is no reason why, if the rule is properly taken to the Supreme Court, the defendant should not avail itself of all the exceptions which have been reserved. As to the meritorious features of the case only two exceptions are argued.

The action is brought as the complaint avers to recover damages for the carelessness and negligence of the defendant's servants and agents, operating and in control of a street car, in that they stopped the car, opened the door and invited passengers to alight at an unsafe place, where a hole or opening existed, formed by a switch and defendant's rails

laid in the street, and in that defendant's servants and agents failed to exercise care to hold the car at places where passengers may safely alight; and failed and neglected to warn the plaintiff of the dangerous hole or opening when she was alighting. Clearly the plaintiff counted as the complaint avers on negligence of the defendant.

10 The Judge charged "I think the question in this case for the jury to determine is as to whether when she alighted from this car there was a depressed Belgian block." "The whole question in this case as I see it is the question of fact, as to whether there was this hole in the pavement and if there was this hole in the pavement the question for the jury is then whether the defendant company provided a reasonably safe place for this young lady, the passenger of the defendant company, to alight." He also charged "you are to confine your deliberations
20 entirely to what happened to her on the day in question, as to whether the condition of her foot was brought about by any hole in the paving and that it was an unsafe place for her to alight or a reasonably unsafe place."

The expression "reasonably unsafe place" is probably a misprint but, laying that aside, the Judge failed to charge that the jury were to find whether there was negligence on the part of company. His charge permitted a judgment for the plaintiff in case the jury found the physical situation to be as he
30 stated, but this was not the legal question. The legal question was, granting the existence of the physical situation, did it show on the part of the defendant company or its employees negligence in permitting a depressed Belgian block or an imperfection in the paving at that point. The situation may be so recent that the company has had no chance to repair it. It

may be such as "to be beyond the company's control and in the control of the city." Various other situations may be thought of, where the physical situation might be just as it is in this case, and negligence be negative. At any rate the defendant has the right to have the question of negligence or no negligence, submitted to the jury and that the Judge failed to do. The case is governed by *Foley vs. Brunswick Tracttion Company*, 66 Law, 367; *Mason vs. Erie R. R. Company*, 75 Law, 521.

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We note an inadvertence in entering the judgment which is a single judgment for both plaintiffs in the full amount claimed by both without distinguishing between the amount awarded by the jury to Ethelreda Brown and the amount awarded to her father, James F. Brown. It is not important since the judgment must be reversed for the errors already stated.

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RULE OF REVERSAL AND REMITTITUR.

NEW JERSEY SUPREME COURT.

10	ETHELREDA BROWN, by her father and next friend, James F. BROWN, and JAMES F. BROWN, in his own right, <i>Plaintiffs-Appellees,</i>	} Action at Law. } On Appeal } from the } Camden County } Court of } Common Pleas. } Rule of } Reversal and } Remittitur.
v.		
	PUBLIC SERVICE RAILWAY COMPANY, <i>Defendant-Appellant.</i>	

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The Court having heard the arguments of counsel, and having inspected the judgment and proceedings removed by the appeal in this cause, and having duly considered the grounds of appeal,

It is, on this day of November, nineteen hundred and twenty-two, ordered that the said judgment or judgments be in all things reversed, set aside, and for nothing holden, and that the said cause be remitted to the Camden County Court of Common

30 Pleas to be proceeded in according to law.

Entered November 23, 1922.

On motion of

JOSEPH COULT, JR.,
Attorney of Defendant-Appellant.

In the Camden Common Pleas, judgment of reversal was duly entered.

(Leonard J. Tynan, Esq., was duly substituted as the attorney for the defendant-appellant in the above entitled cause.)

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

10

ETHELREDA BROWN, by her father and next friend, James F. BROWN, and JAMES F. BROWN, in his own right,

Plaintiffs-Appellants,

v.

PUBLIC SERVICE RAILWAY COMPANY, a corporation,

Defendant-Appellee.

On Appeal.
Notice of Appeal.

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To Public Service Railway Company, Henry H. Fryling, Leonard J. Tynan, Its Attorneys, or To Whom It May Concern:

Take notice that Ethelreda Brown, by her father and next friend James F. Brown, and James F. Brown in his own right, appeal to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in the above named cause in the Supreme Court of New Jersey reversing the

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entitled cause by the New Jersey Supreme Court should be reversed, set aside, and for nothing holden:

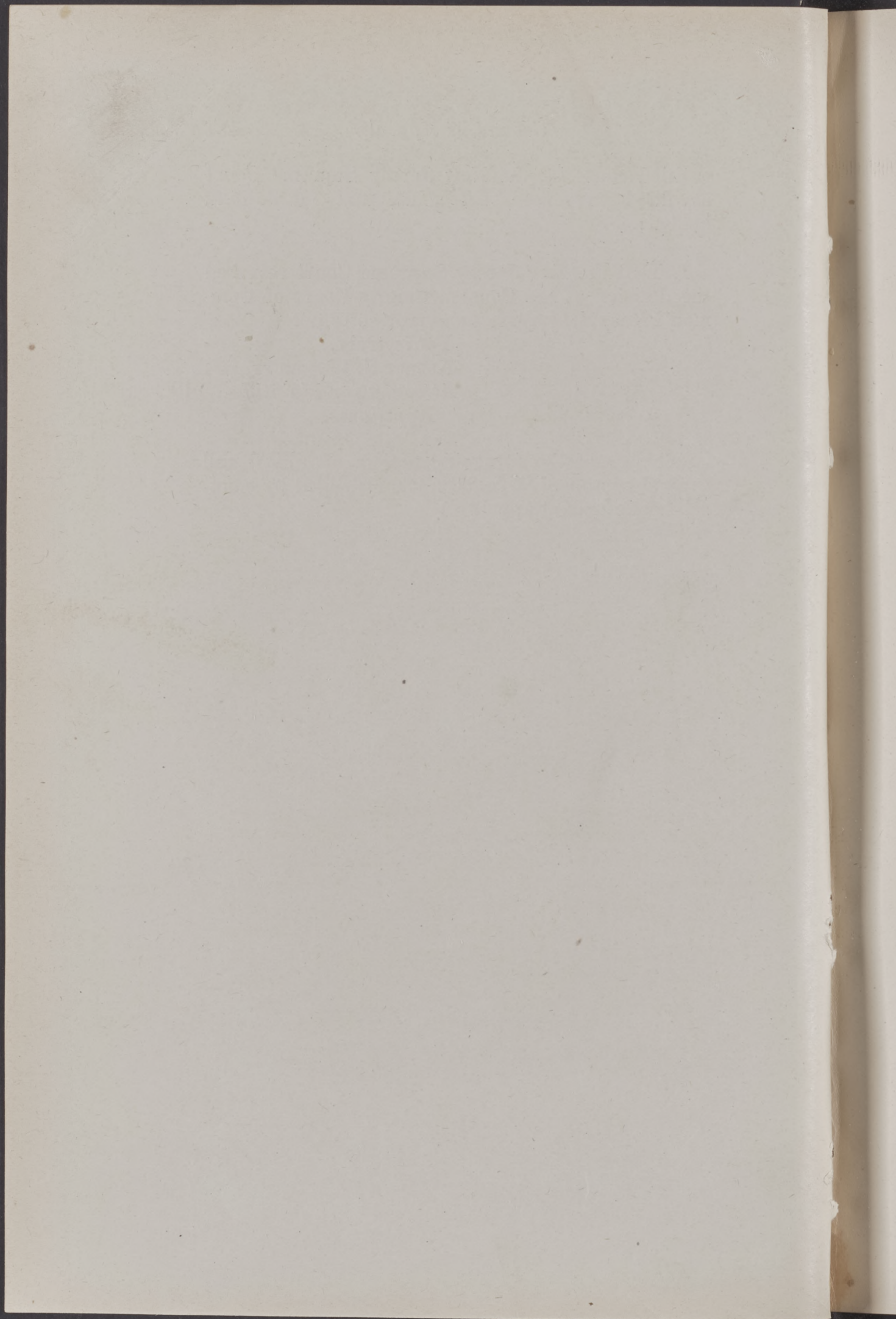
1. That the New Jersey Supreme Court reversed the decision of the Camden County Court of Common Pleas, although it was error so to do.

Yours truly,
ALBERT S. WOODRUFF,
Attorney for Plaintiffs- 10
Appellants.

(Service of the foregoing notices of appeal and ground of appeal were duly acknowledged by counsel for defendant-appellee.)

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

ETHELREDA BROWN, by her father and next friend,
JAMES F. BROWN and JAMES F. BROWN, in
his own right,
Plaintiffs-Appellants,

v.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant-Appellee.

ACTION AT LAW.

BRIEF OF PLAINTIFFS-APPELLANTS.

A.

THE FACTS.

The plaintiff Ethelreda Brown was a passenger on one of defendant's trolley cars westbound on Warren Street, Gloucester City, this state. At Broadway the car rounds a curve and thence proceeds northwardly on the main line on that street to Camden. This particular car was the morning car (7 A. M.) used by workmen in going from their homes to their places of employment in Gloucester and Camden. Regularly it stopped to discharge

passengers just east of Broadway and before it reached the frog and switch. On the morning in question the motorman testified he was in a hurry, he wanted to see up and down the main tracks on Broadway, and swung the front trucks into the curve just enough so that the body of the car still held straight forward which placed him in a position to watch for other cars which might get past his corner and ahead of him. This unusual stop brought the front step directly over the curved-grooved rail and the strip of belgian blocks beside it. He opened the front door for passengers to alight. Several men, hurrying, stepped some distance out into the street and rushed on. Miss Brown followed. She had not time to stop because others were behind her, she had no opportunity for critical observation because of those ahead and the obstruction to vision the step presented. She took hold of the guard handle and stepped straight down, her foot struck the edge of a hole, her ankle turned and was broken.

All this was admitted except the existence of the hole.

At the close of the case the proof made it self-evident that in forcing cars around this curve the paving had given way to the repeated shocks and jars and belgian blocks were there missing, depressed and irregular. Exactly at the point chosen by the motorman to bring the step of his car to a halt, an entire block was gone. The hole was thirteen inches long, four and a half inches wide and four inches or more deep. There was direct, positive and abundant proof of this opposed only by indirect inference and qualified testimony.

Thus three main questions had been raised: *first*, the existence of the hole, *second*, the conduct of the motorman in halting the car step at that exact point

and there discharging passengers unwarned of danger and his opportunity to have observed and guarded against that situation, *third*, plaintiff's injuries.

The extent of the injuries were disputable but their existence admitted. The motorman did not attempt to testify that he had looked to observe holes as he brought his car to a stop. Inferentially his testimony legitimately argued the contrary because of his admission that he was in a hurry and had made an unusual stop with the step over the curved rail and line of belgian blocks that he might look for other cars on Broadway. Frankly he admitted he could have seen a hole such as described in the proof, had he looked. And as if that were not enough he testified, "A. It is impossible to stop when there is no holes *there*. Q. That is your orders, not to stop over these kind of places? A. Yes, sir" (page 52, line 16). And there he opened the door. 66 31

In view of this unqualified admission of conduct conclusively negligent under the circumstances proven, one clearly-defined question for the jury (excepting the dependent question of damages) remained and one only—the existence of the hole.

Counsel for the defendant, at the conclusion of his case, recognizing this situation said to the Court:

"Mr. Fryling, I am ready to rest, but I have this suggestion, if the Court please. *The whole question in this case is about the condition of the street * * **" (page 80, line 1). 164 12

So, qualifiedly, the Court charged the jury. Verdicts were returned for the plaintiffs, \$5000 and \$1500.

Defendant had its choice of appeal or an application for a new trial addressed to the trial Court.

It chose the latter course. A general rule was allowed the entire case thus argued and pursuant to the Court's decision defendant served plaintiffs with notice to enter a remission of all except \$2500 and \$1500 of the verdicts and the rule would be discharged, otherwise made absolute. Plaintiffs formally remitted, sacrificing approximately half of their verdicts and on defendant's motion a rule was entered of record discharging the order to show cause (page 8).

But the rule to show cause had been discharged and with its discharge the claimed reservation was also brought to an end. The Supreme Court held the appeal permissible and granted a new trial on the theory that the trial Judge improperly charged the jury.

B.

THE TESTIMONY DEMONSTRATES THAT
ONLY THE QUESTION OF THE EXIS-
TENCE OR NON-EXISTENCE OF THE
HOLE REMAINED FOR THE JURY.

THE CAR DID NOT STOP AT ITS USUAL
STOPPING PLACE.

Testimony of Ethelreda Brown, plaintiff, page ~~16~~¹⁸,
line ~~36~~²⁷.

"Q. Where did the car usually stop when it came up to Broadway and Warren Street?

"A. It usually stopped nearer the village.

"Q. On this morning the accident happened, where did it stop; did it stop the same place it usually did?

"A. It stopped nearer Gloucester.

“Q. Did it stop the same place it usually did?

“A. It stopped at the switch.

“Q. Was that the place where it usually stopped other mornings?

“A. No.”

Testimony of William C. R. Simons, page ³⁵28, line
18:6

“Q. Where had he stopped his car that morning?

“A. Alongside of the pole, even with the pole on the curve.

“Q. Was that the regular place to stop?

“A. No, sir.

“Q. How much away from the regular place was it?

“A. Well, it was about five foot usually stopped even with the step, Warren Street, there was a car coming the other way.”

Testimony of Samuel Shaw, defendant's motor-
man, page ⁵²52, line 26:10

“Q. Where you stopped your car this particular time, your trucks may have started around the curve, is that right?

“A. They may have started a little bit.

“Q. But the body of the car was still straight?

“A. The body of the car was about straight.

“Q. That would swing your front stop over the curved rail, wouldn't it?

“A. The chances are the corner of the curved rail may have come at the corner of the step.

“Q. Didn't it that morning?

“A. I don't think so I took particular notice of that that morning.

“Q. That was the morning you had your accident?

“A. We had been stopping there so long—

“Q. You had your orders to take particular notice when there was an accident?

“A. Yes, sir.

“Q. Wasn't the curved rail right under that front step where you stopped that particular morning?

“A. I suppose so; yes, sir.

“Q. You know that, don't you?

“A. Yes, I know it was.”

And page ⁶⁸53, line ²²30:

“Q. You always swung so the trucks began to get the curve and the front of your body would go straight?

“A. Yes, so I could see Broadway.

“Q. Wasn't that the reason you went up so far that particular morning, to beat anybody who wanted to use the line; to get to the shipyard first?

“A. No.

“Q. You were in a hurry that morning?

“A. Naturally, that was a heavy trip, we had to keep going.”

And page ⁷⁰54, line ¹¹39:

“Q. And you stopped so your front truck was right near the frog?”

“A. Yes, sir.”

Testimony of George Hammell defendant's conductor, page ⁷⁴57, line ¹⁵39:

“Q. There isn't any question, if the truck started around the curve there, the frog, and the body was still going straight, not having started to turn, your step would be over the curved rail?

“A. Yes.”

EXISTENCE OF A HOLE AND ITS EXTENT.

Testimony of the witness, William C. R. Simons, a passenger on the car, *page 28³⁵, line 26:21*

“Q. What was the first you knew that anybody had been hurt?

“A. I saw the crowd trying to take the girl out of the track or whatever she was in, the track, or something.

“Q. What did you do?

“A. I was told to get another car to get to the shipyard.

“Q. Did you get off this car?

“A. Yes, sir.

“Q. By the front way?

“A. Yes, sir.

“Q. Did you look to see what was there?

“A. I saw the bricks.

“Q. And what was the condition of the street there?

“A. Irregular.

“Q. How?

“A. Rocky.

“Q. Irregular and rocky?

“A. Yes.

“Q. Whereabouts was it irregular and rocky?

“A. Right around the switch.

“Q. How close was that to the front step where everybody had to get off?

“A. Just straight down from where the car stopped, just stepped down from the step and you were in the hole.

“Q. How much of a hole was there at that point?

“A. Three or four inches deep.

“Q. And how long was it, do you know?

“A. I guess about twelve or thirteen inches long.”

And again *page* ⁴⁶~~32~~, *line* ³³~~27~~:

“Q. And how far from the rail?

“A. Right alongside of the rail the hole was.

“Q. About how far from the rail would you say; you mean it extended from the rail out toward the curb?

“A. No; it was right alongside of the rail itself.

“Q. Alongside of the rail, and you say you can see it on the picture?

“A. Yes; you can see the rail on the picture, quite a little hole there.”

Testimony of John M. Kelly, paving contractor, defendant's witness, *page* ~~44~~⁴⁵, *line* ~~28~~³¹:

“Q. How big are these belgian blocks, Mr. Kelly?

“A. They are about nine to thirteen inches long, and about 4½ inches wide.”

Testimony of Carl T. Woodruff, plaintiff's witness, *page* ~~38~~³⁶, *line* ~~27~~³⁰:

“Q. After the accident, did you observe the paving along there?

“A. Yes, sir; I did.

“Q. Now, before and after this accident, around the same time of the year, what was the condition of the belgian blocks on the right-hand side from the frog on along the curving, the curved rail?

“A. Bad.

“Q. In what respect?

“A. They had sunk down in different places two and three inches at that curve coming out

from the village at different places; I couldn't say exactly what place, but several places around there. About a foot, a trifle over, is belgian blocks, and the rest out to the pavement is brick, the belgian blocks are the ones that had sunk down."

DOOR OPENED BY MOTORMAN: PASSENGERS ALIGHTED.

Testimony of Samuel Shaw, defendant's motorman, page ~~52~~⁵⁴, line ~~20~~^{20:36}

"Q. Who opened the front door?

"A. I did.

"Q. For the people to get out?

"A. Yes, sir.."

Testimony of plaintiff Ethelreda Brown, page ~~16~~¹⁹, line ~~14~~¹³

"Q. When it stopped which end of the car did you attempt to get out of?

"A. I got out the front end.

"Q. Why did you do that?

"A. Because the motorman had the doors open.

"Q. Were other people getting out there?

"A. Yes."

And at line ~~30~~³³:

"Q. When you came up to the door were there people getting out ahead of you?

"A. People in front and back of me.

"Q. Where was the motorman, do you know?

"A. He was in the front of the car.

"Q. On the platform?

"A. On the platform.

“Q. Now, what happened to you when you went out of the door and got down into the street?

“A. I stepped from the trolley and I put my foot down and my heel caught on the rail and threw me into a hole with a terrible wrench; I looked down and everything got black, I grabbed hold of the trolley and I fainted.”

Testimony of Samuel Shaw, plaintiff's motorman,
page 54, line 8: 7

“Q. How many got off the front platform?

“A. I didn't count them; I judge around six, seven or eight.

“Q. Men and women, both?

“A. Yes, sir.

“Q. Crowded together?

“A. They got off orderly, there was no crowding.

“Q. I mean, they were close together when they were getting off the step; I don't mean they were jostling each other but they were close together?

“A. Yes.

“Q. Did you see where Miss Brown was, what position?

“A. I didn't see her until I heard her holler.

“Q. You don't know whether she got off first or last?

“A. She wasn't first.

“Q. She wasn't last?

“A. No.

“Q. She must have been in the middle then?

“A. Yes.”

DEFENDANT ADMITTED THAT MOTORMAN
COULD HAVE SEEN THE HOLE.

Testimony of Samuel Shaw, defendant's motorman: *page 66, line 27.*

"Q. Isn't it orders to take precaution before an accident happens?

"A. Yes.

"Q. Not to stop over the holes?

"A. It is impossible to stop when there is no holes there.

"Q. That is your orders, not to stop over these kind of places?

"A. Yes, sir.

"Q. Who opened the front door?

"A. I did.

"Q. For the people to get out?

"A. Yes, sir.

"Q. Was it light enough for them to see getting in and out?

"A. Yes, sir.

"Q. Could you stand up on the platform and see the track ahead of you as you came along?

"A. Yes, sir."

Defendant produced a number of witnesses to testify as to the condition of the paving at and around the point of the accident. Most of these witnesses testified as to its condition at other times months and years before and months and years since and knew nothing of conditions on the day of the accident. Defendant's motorman did not attempt to testify that he had looked for a hole before bringing his car to a stop, he did state, "It is impossible to stop when there is no holes *there*" (page 52, line 16). Defendant's conductor did not attempt

to observe conditions while his car was still standing where Miss Brown was hurt but waited until the next trip to look at the paving (page 58,⁷³ line 8).¹¹ Defendant called several passengers, those who had gotten off at the front of the car with Miss Brown were men who had stepped out in a hurry to leave the car, their haste and the length of their steps had taken them over the hole and none of these could testify that no hole existed.

C.

ARGUMENT.

1. DEFENDANT'S RIGHT TO APPEAL.

The general policy of the law exemplified in our decisions has been to limit litigation after a jury trial.

Finley v. Handley, 50 N. J. L. 503;

Haden v. Bamford Bros. Silk Mfg. Co., 73 N. J. L. p. 308, 63 Atl. Rep. 7;

Hansen v. DeVita, 76 N. J. L. 96, 68 Atl. Rep. 1062.

In conformity with this general policy of the law to limit litigation, the Supreme Court adopted Rule 129. Subsequently by legislative enactment that rule was formally made a rule of Court. Practice Act P. L. 1912, p. 399, rule 83.

That rule reads:

“Granting to a party a rule to show cause why a new trial shall not be granted, shall be a bar against him to taking or prosecuting an appeal except on points expressly reserved in said rule.”

A litigant is warned by the wording of Rule 83 that the "granting" of a rule to show cause automatically bars both the "taking" and "prosecuting" of his alternative review remedy.

A reservation by permission is excepted but that privilege may not be general.

The Court below is entitled to have "expressly" pointed out the particular questions to be reserved for an appeal and an opportunity to consider those questions and determine whether or not they are of sufficient importance to warrant the dual review which the law discourages and the rule prohibits. The only evasion of the positive prohibition in the rule is by "points expressly reserved." Logically this indicates an intention to permit particular points of law, evidence or practice which may raise new or novel questions to be presented to the Court below and by that Court reserved for the decision of a higher tribunal, if such decision be by the trial Court deemed reasonably necessary to avoid possible injustice. If upon every verdict below the unsuccessful party is to be permitted by an all embracing reservation, such as is here claimed, to hold his appeal in reserve the while he experiments with an application for a new trial, the exception defeats the rule.

By the phraseology used in the paragraph added to the rule in this particular case it would seem that the trial Court was only holding the case in *statu quo* until the day of the hearing of the rule. "Pending the hearing" of the rule, the Court said, execution is to be stayed and up until the time of that hearing the defendant may still abandon its rule, and, its exceptions being all reserved, it may appeal. If that was the intention of the Court it was clearly going beyond the permission allowed by the exception to the rule because "points" were not "ex-

pressly reserved" and the "*granting*" of the rule effected the bar, not the *hearing* thereon. Furthermore if the Court did intend that the defendant should have until the time fixed for the hearing on the rule to exercise its choice of remedies, it foreclosed its right to an appeal when it participated in that hearing.

Gregutis v. Steinberg (Sup. Ct. April, 1922), 116 Atl. Rep. (Adv. Sheets) 780.

And even could it be argued that defendant had brought itself, within the exception of the Supreme Court's rule against an appeal to it after grant of a rule to show cause below, a further proposition presents a bar to this attempt.

This suit was in the Common Pleas, a court of common law and constitutional jurisdiction. Unquestionably it had the right to review its own actions and control its own judgments.

The rule to show cause was not special, but general, thus presenting the entire case for argument and consideration. The trial was held to have been legal and the plaintiffs legally entitled to their verdicts but the amounts to be excessive.

Perhaps the Court had thought to hold defendant's exceptions free for an appeal up until the hearing. Whatever may have been its intention at the time the rule was allowed, when it determined that the judgment was proper and legal except as to amount it unqualifiedly offered to discharge its rule if plaintiffs would accept the reduction. Such a rule, absolute in its terms and without reservation or suggestion as to permitting a further appeal was, on motion of defendant's counsel, signed by the Court and entered in the minutes (pages 8 and

9). The Court in that rule says to the plaintiffs in effect: If you accept this reduction my rule including the reservation as to an appeal "shall" be discharged.

The reduction was accepted (pages 10-11). The rule was discharged—including its reservation—and judgment of reduction formally entered (page 9). There was then no rule existent containing any reservation of a permission to appeal. The appeal if not barred by the taking or hearing of the rule certainly was barred when the only means to keep it alive ceased to exist—the rule discharged.

The Supreme Court declares in Rule 129 that in its practice and that of the Circuit Courts the "granting" of the rule is a "bar" against "taking or prosecuting" an appeal, except on points expressly reserved in said rule. In the instant case, the Court below granted a rule. No points were expressly reserved. The reservation clause, as drawn by defendant's counsel, was ambiguous and indefinite. The Court considered the entire case and defendant took the opportunity it offered of ruling the plaintiffs to reduce their verdicts and have their judgment or in the alternative suffer a new trial. Defendant had accepted the Court's decision favorable to it without suggestion that it still intended challenging the legality of the Court's charge. It drew, presented, had signed, and filed the final rule which absolutely discharges and nullifies its previous order claimed to reserve an appeal privilege.

The reasoning used by the Court in *Meeker v. Boylan*, 27 N. J. L. 262, applies equally well here.

"The party applying for said rule cannot be permitted to select particular questions of law to be argued and decided on the motion for a new trial, and retain his bills of exceptions upon

other questions to be argued and decided by a writ of error (appeal)."

It is difficult to see how a rule can be thus absolutely discharged yet remain the only excuse for this attempted avoidance of the clear policy of the law and our courts to bring an end to litigation after a trial and the exhaustion of one remedy to review.

To review its own actions and control its own judgment was the unquestionable constitutional right of the Court of Common Pleas. The granting of a rule to show cause, the reservation of exceptions for appeal and the order discharging on terms were all discretionary matters. The doing or refusing to do any of these things would not be ground for review. The Court could grant the rule or refuse it; it could permit a reservation or refuse it. It could continue the reservation (if points had been expressly reserved), after hearing on the rule or dismiss the reservation at the time of such hearing. On the hearing the rule could be made absolute or discharged; it could be made absolute or discharged upon or without terms. Any such act of the Court of Common Pleas would be an act within its discretion and not reviewable.

Price v. N. Y. C. R. R. Co., 110 Atl. 126, 94 N. J. L. 10;

Pariser v. Pastelnick, 112 Atl. 187, 95 N. J. L. 261.

In this case, every question sought here to be reviewed was submitted to the Court below for review under its discretionary powers. The rule to show cause itself was general. Defendant thus submitted to the discretion of the Court the entire proceedings including the judgment. It then ruled thereupon and the matter was concluded. There can be no ap-

peal here, every point now raised having been submitted to the discretion of the Common Pleas Court and passed upon, resulting in a discharge of the rule to show cause, its reservation of exceptions and the formal entry of a judgment for the reduced amount.

Gaffney v. Illingsworth, 90 N. J. L. 490, 101 Atl. 243-244.

The Supreme Court in its *per curiam* opinion sustained defendant's right to appeal. The opinion says:

"On the hearing it was ordered that the rule be made absolute unless the plaintiff consent to a reduction of the verdict. The plaintiff did consent but no further rule seems to have been entered."

The language used by the trial Court in its finding upon the hearing on the rule to show cause was:

"It is ordered that the rule shall be made absolute as aforesaid as to the plaintiff who fails to accept such reduction *and shall be discharged as to the plaintiff who accepts such reduction.*"

The Court did not use the word "may" but the word "shall." Thus automatically, upon an acceptance being entered, the Court directed a discharge of the rule and an entry of the reduction. This rule was formally entered in the minutes, the formal acceptance was duly filed, and, by order of the Court, the judgment record was corrected and the judgment in its reduced form, without reservation or exception, entered.

In *Gaffney v. Illingsworth*, 90 N. J. L. 490, 101 Atl. 243, this Court held on a similar rule by a trial Court that "the defendant did not make the payment and the plaintiffs rule became absolute."

Had defendant said to the Court when applying for the rule to show cause that it intended first to ask that Court to review its entire proceedings in every particular, and then later challenge its original rulings irrespective of its determination on return of the rule, the Court below would not have been deceived. Counsel for the plaintiff, counsel for the defendant, and the Court, all adopted the theory of defendant that the single question at issue at the close of the case was as to the existence of the hole. Defendant's negligence was beyond dispute after its motorman had testified that he knew of the existence of the holes and could have seen the one in question had he troubled to look. If this was error it was an erroneous theory adopted by everyone concerned in the trial of the case and the case was concluded without defendant's counsel having suggested a change of position on that point.

"Elementary justice in reviewing the action of a trial Court requires that that Court should not be reversed upon an error committed at the instance of a party alleging it," Parker, J., in *Bahrey v. Poniatishin*, 95 N. J. L. 128, 112 Atl. 481.

"The case was tried by counsel upon both sides and submitted to the jury by the trial Court upon that theory, and this Court therefore will consider it only upon that status," Justice Minturn in *Berg v. Rapid Motor Vehicle Co.*, 78 N. J. L. 724, 75 Atl. 933.

In taking the exceptions, now the only ground for appeal, counsel did not attempt to make clear to the Court that he was adopting any other theory than the one on which the case had been tried and submitted to the jury. Exceptions were asked to a portion of the charge which portions were not exactly quoted (page 93)¹² and the Court then said, "that may be it; I don't remember it, but I don't think that

is all of it." To which counsel, instead of explaining to the Court what he had in mind, replied, "Well what your Honor said on that subject." There was absolutely no indication by defendant's counsel of his reason for objecting to the charge. Our decisions have uniformly held that the Court below should have clearly pointed out to it the reason for the exception as well as that an exception should be taken. And possible errors of the Court below which were not clearly called to its attention have been refused correction on review.

Noyes v. State, 41 N. J. L. 429;

Thibodeau v. Hamley, 95 N. J. L. 186, 112 Atl. 320.

In the *Noyes* case Justice Beasley said: "Counsel must put his finger on the erroneous proposition and thus point the mind of the Judge to it."

In this case counsel was indefinite in referring to that portion of the charge to which he was excepting. He had previously said, "The whole question in this case is about the condition of the street." He had so argued the case to the jury. The theory of the present appeal was never suggested to the Court below.

The rule to show cause reserved exceptions "*pending the hearing*" of that rule. Counsel argued in the Supreme Court that the reservation lasted only until such hearing. The Supreme Court on that point said, "If it were so the rule is still pending as it was made absolute upon a condition that the plaintiff should consent to a reduction of the verdict and the plaintiff has consented * * * the assent of the plaintiff to the reduction does not amount to a discharge of the rule, and no such order has been made." The rule was not to be made absolute upon condition that plaintiff consent to a reduc-

tion, as suggested by the Supreme Court. The wording of the rule was "and shall be discharged as to the plaintiff who accepts such reduction." Both plaintiffs accepted such reduction. Their acceptance was formally filed and docketed and a judgment of reduction was entered (page 9-10). Upon the entry of these acceptances the Court below said, the rule "*shall be discharged.*" If the Court directed that its rule must be discharged upon compliance with its condition it is difficult to see how a reservation existing only by virtue of that rule, and only so long as that rule existed, could continue when the rule ceased to exist. A continuance of reservations was still a matter of discretion with the trial Court but it did not even suggest a continuance of such reservations. Upon acceptance of this condition by the plaintiff it said not that a part of its rule should come to an end, but that the entire rule must be discharged.

The Supreme Court opinion also states that there is no force in the argument that the suit was brought originally in the Common Pleas. But the Common Pleas Court is a court of constitutional jurisdiction. The allowance of the rule, the allowance of reservations, the continuance of the rule or reservations, and the discharge of the rule with or without reservations were all consequently matters resting within its discretion. Under the decisions there can be no appeal from a determination of a lower Court of constitutional jurisdiction upon a matter resting in its discretion.

Gaffney v. Illingsworth, 90 N. J. L. 490;
101 Atl. Rep. 243-244.

As was said by the Supreme Court, the plaintiff counted on negligence of the defendant, viz.:

(1) In that defendant's agents stopped the car, opened the door, and invited plaintiff to alight at an unsafe place where a hole or opening existed.

(2) In that defendant's agents failed to exercise care to halt the car at a place where passengers might safely alight, and

(3) In that they failed and neglected to warn plaintiff of the dangerous hole or opening when she was alighting.

Then the Supreme Court said that the legal question was, granting the existence of the physical situation, did that show on the part of the defendant company, or its employees, negligence in permitting a depressed belgian block or an imperfection in the pavement at that point. But, irrespective of the creation or continuance of a hole, it was clearly actionable negligence if a hole existed which the motorman could or reasonably should have seen, and he stopped his car unnecessarily with the step over that hole and invited or permitted passengers to alight by way of that step, without warning them of the existence of such hole.

In *Nirk v. Jersey City H. & P. St. Rwy. Co.*, 75 N. J. L. 642, 68 Atl. 158, Trenchard J., said, "It was therefore clearly not negligence to open the door on the north side to enable passengers to alight, *unless it was a place where it would be dangerous for passengers to get down.*"

In *Walger v. Jersey City H. & P. St. Rwy. Co.*, 71 N. J. L. 356, 59 Atl. 14, Gummere, C. J., in the Supreme Court, said that it was for the jury to say whether a passenger taking the most direct course from a car on which he had been riding was not entitled to believe that he was safe in so doing, or at

least that he would not be put in jeopardy by anything done by the company.

The Supreme Court cites *Foley v. Brunswick Traction Co.*, 66 N. J. L. 367, 50 Atl. 340, as a case governing its decision in the instant case.

Mrs. Foley was injured as she attempted to descend from a trolley car. Garrison, J., said, "The point of the case was whether such an object as that which caused the plaintiff's fall would, in the exercise of reasonable care by the defendant, have been discovered, and, if discovered, have been removed."

In the Foley case the size of the stone in the street which caused the plaintiff to fall was a disputed question. Whether or not it could or should have been seen by the motorman was a disputed question.

But in this case the size of the hole was not in dispute; that its existence made it dangerous was not disputable; that it or similar holes were in fact seen by the motorman as he brought his car to a stop, was not disputed; that he knew those holes to exist at that point, was admitted; that he could have seen this particular hole, was admitted; that he stopped his car with the step at a point where he knew these holes existed, was admitted; that he then opened the door and invited passengers to alight by way of that step, was admitted; that he gave them no warning of the holes which he knew existed, was admitted.

Every essential feature to make conclusive his negligence and the defendant's responsibility was admitted, except the single question as to whether or not at this exact point this particular hole did exist.

The trial Court charged, "If the defendant company provided her with a reasonably safe place to alight why they have discharged their duty and have exercised a high degree of care; if such a place was provided then the verdict should have been in favor of the defendant company—no cause of action. Be-

cause if she met with an accident, as undoubtedly she did, there could be no recovery against the company simply because she met with an accident; you have to go further in your deliberations and ascertain that there was some negligence on the part of the defendant company before there can be a recovery—that is very clear.” The Court had charged that defendant owed no duty to keep the pavement in repair. Thereafter the Court again said, and subsequently repeated, that the question was whether the company, when it stopped its car where it did, provided a reasonably safe place for the plaintiff to alight.

In the Foley case Garrison, J., said that “The correct instruction there would have been that the defendant was liable for the plaintiff’s injuries if it failed to take reasonable precautions to see that the place provided by it for her discharge was a safe one for that purpose.” And again “It was the duty of the defendant to see that the place where it discharged the plaintiff was a safe one if reasonable precautions would make it so.” Further, “The idea expressed should be that the guilt of the defendant is to be measured by the degree of care it has put forth for the plaintiff’s safety.” The distinction counsel is now trying to point out to this Court is that here the facts are admitted, which in the Foley case were in dispute. And the only question, here remaining, therefore, was whether or not the place provided for the alighting of passengers was a safe place or one which defendant had taken reasonable precautions to assure would be safe. This the trial Court clearly presented to the jury.

In *Mason v. Erie R. R. Co.*, 75 N. J. L. 521, 68 Atl. 105, the other case cited by the Supreme Court as governing the present case, the facts were also quite different. In the Mason case plaintiff was not in-

jured as he stepped from the step of the car directly down, but later as he attempted to cross a ditch along the right of way. There was no admission by the defendant that its agents in control of the train knew of the dangerous condition claimed to exist beside the right of way, or that it was such a condition that it should have been known to them. There was no admission that they stopped the train at a point where they knew a condition existed which might by a jury be said to be dangerous. The very elements in dispute in both the Foley and Mason cases, which this Court pointed out should have been indicated in the charge, in the present case were admitted and so obviously were not necessary to be charged by the Court.

The Supreme Court also suggests an incorrect entry of a judgment for both plaintiffs for the full amount claimed without distinguishing as to apportionment. The state of the case demonstrates that the record in this regard was correct (page 2).

The Supreme Court also said that *all* exceptions were reserved and that this was as definite as if the reservations had been upon expressed points. Defendant could have no appeal unless by virtue of the permission contained in Rule 129 of the Supreme Court Practice Act, P. L. 1912, page 399, rule 83. An appeal is absolutely barred by this rule where a party applies for and is granted a rule to show cause "*except on points expressly reserved in such rule.*" The reason for this rule is well expressed in *Meeker v. Boylan*, 27 N. J. L. 262.

"The party applying for said rule cannot be permitted to select particular questions of law to be argued and decided on the motion for a new trial, and retain his bills of exceptions upon other questions to be argued and decided by a writ of error (appeal)."

In the instant case, the defendant goes further than was attempted in the Meeker case. It sought and secured a general rule to show cause: on that rule it submitted every question now raised on this attempted appeal to the discretion of the trial Court. The trial Court ruled against it as to the legality of the proceedings and judgment. Favoring the defendant, it ordered a reduction of the amount of the judgment. Plaintiffs accepted that reduction and defendant has the benefit thereof.

The Court below had no intimation that defendant, who was submitting the entire case to its discretion, would subsequently challenge the legality and sufficiency of its charge. The very purpose of limiting an appeal to "*points expressly reserved*" is to inform the Court below fully as to the intention of the defendant upon appeal that it may in the exercise of its discretion to which defendant has submitted, correct its errors, if such exist. Defendant here, it would seem, deliberately misled the Court below into believing that its exception taken to the charge was a mere formal exception. The trial Court received no explanation from counsel for the defendant when exception was taken and its counsel, in statements made to the Court itself and in the argument made to the jury, had clearly agreed that the only question, except as to damages, for determination by the jury was the existence or non-existence of a hole. Its motorman testified that such holes existed, that he could see them at the time of this accident, and that notwithstanding this, he had stopped his car with the steps directly over the grooved rail where witnesses testified this particular hole existed. Defendant's counsel below, therefore, addressed himself solely to the question of the existence of that particular hole. Thus the Court was led by defendant's counsel to believe that its charge

was absolutely in accord with his theory as to the single point on which the case turned.

2. GROUNDS FOR APPEAL.

Without the necessity of considering the grounds assigned plaintiffs respectfully urge that defendant's attempt to appeal should be dismissed. The grounds are however without merit.

These grounds challenge the charge of the Court. They seek to extract isolated phrases and from them argue error. This has already been frequently held to be improper:

Brown v. Spence, 79 N. J. L. 452, 75 Atl. Rep. 154;

Veader v. Veader, 6 N. J. Eq. 441, 99 Atl. Rep. 309;

Shoeffler v. Phillipsburg Horse Car Co., 90 N. J. L. 235, 100 Atl. Rep. 199;

Safer v. Baker, 104 Atl. Rep. 26 (Er. & App. 1918).

When the exceptions were taken the attention of the Court was not directed to the reason for the exception or was any specific objection made. Our decisions hold that the Court below should know the nature of the objection that error, if it exist, be there corrected and senseless litigation avoided.

The *Associates of the Jersey Co. v. Davison*, 29 N. J. L. 418.

And the reason for the rule concerning exceptions to admission of evidence declared in *D. L. and W. Ry. Co. v. Daley*, 37 N. J. L. 526-529, applies with equal force here.

The Court below granted a general not a special, rule to show cause and so permitted argument of

and considered the entire case in every aspect. The decisions are against dual consideration of the same questions:

Ashurst v. Atl. Coast El. R. Co., 66 N. J. L. 16, 28 Atl. Rep. 999;
Karl v. Diamond, 77 N. J. L. 178, 71 Atl. Rep. 46.

If, by any possibility, there is reason in defendant's argument that the trial Judge misconceived the law, charged it erroneously and misled the jury, such error was the error as well of defendant's counsel who said to the Court, "the whole question in this case is about the condition of the street." There were no requests to charge otherwise or more qualifiedly. And counsel did not suggest to the Court in taking his exceptions that he had changed his theory of the case and wished the Court to do likewise. The text-books and the reports indicate that in such a situation defendant may not complain:

4 C. J. 712, Par. 2625, *Austrian v. Laubheim*, 78 N. J. L. 178.

But the Court's charge taken as a whole fairly presented to the jury the legal rule applicable to the particular facts open for their determination. It is true that the Court said, "The company owed to the passenger, Miss Brown, to exercise a high degree of care in her transportation, and also provide a safe place for her to alight." In the same sentence however we read "whether the defendant company provided a reasonably safe place for her to alight from the trolley car on the morning in question" and, immediately following: "If the defendant company provided her with a reasonably safe place to alight, why they have discharged their

duty and have exercised a high degree of care, if such a place was provided, and the verdict then should be in favor of the defendant company, no cause of action. Because if she met with an accident, as undoubtedly she did, there can be no recovery against the company simply because she met with an accident; you have to go further in your deliberations and ascertain that there was some negligence on the part of the defendant company before there can be a recovery—that is very clear.”

The Court did not say that the jury could give plaintiffs a verdict if the condition of her foot resulted from the hole, but that subject to the admonition, “and that it was an unsafe place for her to alight or a reasonably unsafe place.”

The Court had charged defendants’ only request, viz: that defendant owed no duty to keep the pavement in repair.

If the hole was there, it was indubitably a dangerous place to stop and open the door. The existence of the hole was, beyond hope of argument, a jury question. That the motorman could have seen it was admitted. That he chose to stop over it and that at an unusual place was proven. He testified that at that point, “there,” as he put it, “it is impossible to stop when there is no holes,” and that it was against defendant’s rules governing his conduct to stop at such a place. He gave no warning whatever as he opened the door, though beneath the step was this spot where it was “impossible to stop when there is no hole there.” And there was no proof or legitimate inference contrary to this absolute proof of negligence—if this hole existed (*Werk v. Jersey City St. Ry. Co.*, 75 N. J. L. 642, 68 Atl. Rep. 158). As defendant’s counsel well said, “The whole question in this case is about the condition of the street.” Except as to damages that was the one and only

question open to the jury. The Court's charge in its entirety met the facts at issue and properly presented the legal rules applicable.

In conclusion plaintiffs urge that this appeal must be dismissed as improper and without merit.

ALBERT S. WOODRUFF,
*Attorney for and of Counsel
with Plaintiffs-Appellant.*

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New Jersey Court of Errors and Appeals

ETHELREDA BROWN, by her father and next friend, James F. Brown, and JAMES F. BROWN in his own right, <i>Plaintiffs-Appellants,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		
PUBLIC SERVICE RAILWAY COMPANY, <i>Defendant-Appellee.</i>	}	

BRIEF OF DEFENDANT-APPELLEE.

Statement.

The plaintiffs-appellants, hereinafter called the plaintiffs, obtained verdicts against the defendant-appellee, hereinafter called defendant, in the Camden County Court of Common Pleas. The plaintiff, Ethelreda Brown, claimed that while a passenger in one of the defendant's cars at Warren street, Gloucester, New Jersey, the car was stopped and the door opened, and that she, in attempting to descend from the steps of the car to the street, stepped into a hole or opening between the rails of the defendant's tracks and was thrown to the street, thereby suffering injuries, the allegations of negligence being that the plaintiff was invited to alight "at an unsafe place, and where a hole or opening existed, formed by the switches and defendant's rails there laid in the street, and in that defendant's said servants and agents then and there failed to exercise care to halt said car at a place where passengers might safely alight, and in that they failed and neglected to warn said plaintiff of said dangerous hole or opening when she was alighting."

The plaintiff, James F. Brown, demanded damages because the other plaintiff was his daughter, and because

he had to expend moneys in attempting to cure her, and also lost her services and earnings.

One of the defenses (p. 5) is contributory negligence on the part of the plaintiff, Ethelreda Brown.

The jury (p. 6) found for the plaintiff, Ethelreda Brown, damages in the sum of five thousand dollars, and for the plaintiff, James F. Brown, damages in the sum of fifteen hundred dollars, and the Court thereupon ordered judgment final in favor of the plaintiffs and against the defendant for the sum of sixty-five hundred dollars, besides costs.

Judgment (p. 6) was thereupon entered for the plaintiffs and against the defendant in the whole sum including costs, of sixty-five hundred and eighty-four dollars and thirty-two cents (\$6,584.32).

The defendant obtained a rule to show cause, the concluding paragraph of which is as follows:

“It is further ordered that pending the hearing of this rule execution be stayed, and that all exceptions taken in this cause be reserved.”

There do not appear in the record any formal reasons that were pressed on the argument of the above-mentioned rule to show cause, but the fact was, and from the well-established practice of our courts the only inference is, that matters to which exceptions had been taken were not before the court and were not arguable or argued under the rule. If reasons had been formally prepared and presented, and if any of them had attempted to raise the questions to which exceptions had been taken and reserved, such reasons would necessarily have been stricken out on motion. The rule aforesaid was argued and the Court (p. 8) making a rule to show cause absolute unless the plaintiffs should, within ten days, enter in the minutes of the Court, rules consenting to the reductions of their respective verdicts to twenty-five hundred dollars, and one thousand dollars respectively, the rule being so drawn that either or both of the plaintiffs could accept or reject.

An agreement to accept the reduced amount was signed, and filed, and judgment (p. 10) for the reduced amount was entered. The defendant thereafter took an appeal, on the exceptions which it had reserved, to the New Jersey Supreme Court, the grounds of appeal (p. 122), being two in number, and relating to charges of the Court to the jury to which exception had been duly taken at the trial.

The Supreme Court, by its opinion (p. 124) reversed the judgment in favor of the two plaintiffs, and a rule of reversal and remittitur was entered (p. 128). Thereafter, the present appeal was taken (p. 129) and the single ground of appeal (p. 130) is—"1. That the New Jersey Supreme Court reversed the decision of the Camden County Court of Common Pleas, although it was error so to do."

ARGUMENT.

Plaintiffs on this appeal attempt to develop the following propositions:

1. That the granting of a rule to show cause is a bar against taking or prosecuting an appeal except on points expressly reserved in the rule;

2. That a statement—"That all exceptions taken in this cause be reserved" is not an express reservation of points in the rule;

3. That, as the Trial Court admittedly had discretion in the matter, and therefore the reservation of exceptions in the rule must have some meaning, it necessarily means, and only means, that between the time of the granting of the rule and the time of the arguing of the rule, there was reserved to the defendant the option by the reservation in question of abandoning the rule and proceeding with its appeal, but that this option ceased when the defendant argued the rule to show cause;

4. That the rule to show cause in question, aside from this *ad interim*, entirely temporary, reservation of ex-

ceptions, was general in its terms, and that all subjects that might justify a new trial were argued under said rule;

5. That the rule to show cause was (p. 7), under the terms of the rule reducing the judgments (p. 8), by virtue of the agreement to accept the reduction (p. 10) discharged, and that such discharge of the rule to show cause necessarily ended its existence, and ended the reservation of exceptions contained within it, leaving the defendant subject to the bar against appeal which arises through the granting of a rule to show cause with no points expressly reserved in the rule;

6. That in any case, the alleged errors in the Judge's charge did not, for reasons stated, justify a reversal.

These same topics (although in that case the discharge of the rule to show cause was absolute and unconditional) are treated of, by this same plaintiffs' attorney, in the case of *Kathryn Rothfuss*, by her father and next friend, Alfred Rothfuss, and Alfred Rothfuss in his own right, plaintiffs-appellants, v. *Public Service Railway Co.*, defendant-appellee, which is before this court for argument at the same time as is the present case. The two cases, so far as concerns the points now under discussion, should be considered together.

As to the Right to Appeal.

It is undoubtedly the fact, under Rule 129 of the Supreme Court, the granting of a rule to show cause is a bar to taking or prosecuting an appeal except on points expressly reserved in said rule.

But the claim of the plaintiffs that the words in the rule in the case at bar do not constitute an express reservation of points, is, in our opinion, baseless. The words are: "And it is further ordered * * * and that all exceptions taken in this cause be reserved." The words in the printed book (top of p. 8) are: "All *exception* taken," but the leaving of the "s" off the word "excep-

tion" is a misprint, the rule in that respect being in the plural, to wit, "exceptions." So, the points expressly reserved are *all* the exceptions. It is difficult to conceive of a more *express* reservation of points. If only *some* of them had been reserved, those reserved would require specific description, but with the reservation of *all* of them, such specific description of those reserved became unnecessary, for with such reservation of *all*, there was no room for uncertainty or confusion.

The language of the last paragraph of the rule to show cause in the case at bar is—"And it is further ordered that pending the hearing of this rule execution be stayed and that all exceptions taken in this cause be reserved." Counting, perhaps, on the fact that there is no comma after the word "stayed," the plaintiffs assume to think that the words—"Pending the hearing of this rule" govern the entire paragraph, and that when argument on the rule to show cause took place, the reservation of exceptions came to an end. We submit that such a construction is not harmonious with the practice of our courts. The purpose, in a rule, of reserving exceptions, is to argue the rule on points not so reserved, and subsequently to appeal, if desired, on the points reserved. Any other purpose or construction is forced, and unnatural, and should not be adopted unless the language employed leaves no other course possible. Such a case was *Gregutis v. Steinberg*, decided by our New Jersey Supreme Court and reported in 116 Atlantic Reporter, page 780. There, according to the decision, "The rule further provided that the allowance thereof should not prejudice the right of the defendant to take an appeal to the Supreme Court, in case he should abandon the rule to show cause for a new trial." Obviously, such a rule was a conditional rule, merely reserving to the defendant the right to abandon it or to argue it. There were no "points expressly reserved." The defendant's decision to argue the rule was necessarily a decision not to abandon the rule, and the Supreme Court very properly held that, having chosen to argue the rule

rather than to abandon it, the defendant could not thereafter appeal. But we submit that in the case at bar the language of the reservation of exceptions does not, in reason, bear such a construction.

Whether or not the Supreme Court was correct in its reasoning (p. 125, ll. 10 to 20), that despite the acceptance by the plaintiffs of the reduction in their respective verdicts, the rule to show cause is still pending, we consider a question of no importance. Obviously, the theory of Rule 129 is that "Points expressly reserved" can be taken advantage of by appeal after the rule has been disposed of. With the rule made absolute, and a new trial granted, there would be no need of appeal on the points reserved. It is when the rule is discharged, that the litigant has need of his appeal on those points. The theory advanced by the plaintiffs in the case at bar that the continued existence of the rule to show cause is necessary to uphold the reservation of exceptions contained in said rule seems meaningless.

The plaintiffs make the mistake of thinking that the rule created the reservations, wherein the fact is that the rule excepted the reservations. Once the rule, with reservations was granted, the Court's power over the reservations was gone, and the Court could not, as plaintiffs aver on page 16 of their brief, dismiss the reservations at the time of the hearing on the rule.

The true meaning of Rule 129 obviously is, that the granting to a party of a rule to show cause shall be a bar against him to taking or prosecuting an appeal, *provided, however, that this shall not apply to points expressly reserved in said rule.*

The plaintiffs in their brief make the assertion that on the argument of the rule to show cause all matters were before the Trial Court and all matters were there argued. The plaintiffs are incorrect in both of these assertions. As a matter of law, no points on which exceptions had been reserved were before the Trial Court on the argument of the rule to show cause, and as all exceptions had

been reserved, no points of law whatever were before the Trial Court on the argument of the rule. As a matter of fact, and in this we are compelled to challenge the veracity of the plaintiffs, the only matters argued on the argument of the rule to show cause were the weight of the evidence and the excessiveness of the verdicts. The record does not show any reasons in the matter of the rule to show cause. It appears to be the custom, in the Courts of Common Pleas and in the Circuit Courts, where a rule to show cause is arguable before the same judge who tried the case, to dispense with formal, written reasons; but the law is well settled that points reserved in a rule are not open for argument before the Trial Judge, and the necessary presumption is that such Judge would refuse to hear argument on points so reserved.

In the case of *Ashhurst v. Atlantic Coast Electric Railway Co.*, 37 Vroom 16, the Supreme Court said:

“The practice is entirely settled to the effect that where a rule to show cause is granted, reserving exceptions, this court on the hearing of the rule to show cause will not consider any question that is comprised within the exceptions. The reason on which this practice is founded is obvious. The party applying for the rule, and the trial court in granting it, designed that the questions raised by the exceptions should be heard in the Court of Errors and Appeals, and expression of opinion in this court upon those matters would be nugatory, if adverse to the party holding the bill of exceptions, and would operate no farther than to disqualify the judges who sit in this court from sitting in the Court of Errors and Appeals on the argument of the writ of error.”

In the case of *Holler v. Ross*, 38 Vroom 60, the Supreme Court said, in connection with a case certified from a Circuit Court:

“In the case of *Ashhurst v. Atlantic Coast Electric Railroad Co.*, 37 Vroom 16, it was decided that, on a rule to show cause why a new trial should not be granted, of an issue joined in this court and tried at the Circuit, if exceptions are reserved in the

rule, this court will not consider any question that is embraced within the exceptions. It follows that in a like situation of a Circuit Court issue such questions cannot be certified to this court for its advisory opinion, and, indeed, that the Circuit Court itself cannot consider such questions, for the practice settled in this court must prevail in the Circuit Courts. Section 299 of the Practice Act (Gen Stat., p. 2582) provides: 'That the justices of the Supreme Court shall, and may, adopt uniform rules of practice in all matters not regulated by the law for the government of the Circuit Courts, and the same, from time to time, alter, repeal and modify as occasion may require.' This provision must be held to extend to rules of practice settled in decisions as well as to those formally promulgated as standing regulations. In the present case the rule to show cause was granted on the very day that the opinion on the Ashhurst decision was filed, but the practice declared in that decision was not thereby newly settled, although it had not been stated in any case previously reported. The result is that, under the ruling stated, questions embraced in exceptions reserved in a rule to show cause why a new trial should not be granted of an issue formed and tried in a Circuit Court are not pending in that court, and therefore do not present a case of doubt and difficulty, for which case only the Practice Act provides certification for the advisory opinion of this court. Gen. Stat., p. 2574, §247."

In *Minichino v. Public Service Railway Co.*, 35 New Jersey Law Journal 284, Justice Dungan, referring to the cases of *Ashhurst v. Atlantic Coast Railway Co.*, 37 Vroom 16, and *Holler v. Ross*, 38 Vroom 60, said:

"A careful reading and consideration of these two cases convinces me that the defendant's exceptions to the refusal of the court to grant the motions for non-suit and for direction of verdict deprive this court of any right to consider upon this rule to show cause the question whether or not the verdict of the jury is contrary to the weight of evidence. That question is not now pending in this court, but is a subject of consideration upon the defendant's exceptions. In the reservation of

the exceptions taken to the refusal to non-suit and direct a verdict the defendant has withdrawn from the consideration of this court the precise questions upon which its principal argument for a new trial is rested."

In the case of *Christy v. N. Y. C. & H. R. R. Co.*, reported in 92 Atlantic Reporter, p. 395, our New Jersey Supreme Court says:

"Where the reasons relied on for a new trial were that the verdict was against the evidence, that it was against the weight of the evidence, and that it was contrary to the charge of the court, a motion to strike out the reasons because exceptions taken at the trial were reserved will be denied, since those objections manifestly are not the subject of exceptions."

The court said:

"Manifestly they are questions that are peculiarly the subject of a rule to show cause and not the subject of exceptions."

Rule 129 of the Supreme Court is based upon Paragraph 83 of the Practice Act of 1912. As embodied in the Practice Act of 1912 it applies, necessarily, to the Courts of Common Pleas, and, of course, the decisions of our Supreme Court that the reservation of exceptions in a rule to show cause takes from the Trial Court, on argument of the rule, those points so reserved, are necessarily binding upon the Courts of Common Pleas. The decisions are based upon the only reasonable logical conclusion. Furthermore, Paragraph 254 of the Practice Act of 1903, provides that—"The justices of the Supreme Court * * * shall make all such rules and regulations as may be necessary to obviate any difficulties that may arise in the practice of the courts of law by reason of any omissions or defects in the same," &c. We submit that the decisions of the Supreme Court as to matters of practice are the equivalent of its rules, and are binding upon the Courts of Common Pleas.

"A decision of the Supreme Court is to be considered the law of the State until reversed by the Court of Errors,

and all judges and inferior courts are bound to so accept it." *State, Flaucher v. Camden*, 27 Vroom 244.

In the case at bar, when the plaintiffs aver that the entire case was argued under the rule to show cause, they are wrong as a matter of fact, and if they make that averment because of a supposed inference from the record, they are wrong as a matter of law.

The plaintiffs (p. 15 of their brief) quote from the case of *Meeker v. Boylan*, 27 New Jersey Law 262, decided in the year 1858, which says:

"Having conferred with our brethren on these questions, we all unite in the opinion, that although some diversity of practice has prevailed, the true rule is, that where a party who has obtained bills of exceptions applies for a rule to show cause why a new trial should not be ordered on the points contained in the said bills, or any of them, it should be made a condition of granting the rule, if insisted on by the other party, that before entering the same, all the bills of exceptions be abandoned, and that the party applying for said rule cannot be permitted to select particular questions of law to be argued and decided on the motion for a new trial, and retain his bills of exceptions upon other questions to be argued and decided on a writ of error. If the rule to show cause is applied for solely on points which cannot be raised on a writ of error, the bills of exceptions need not be abandoned; but in that case it will be proper to make the rule special, so as to confine the argument to the grounds upon which the rule has been allowed."

It is worth noting, in the foregoing, the words—"if insisted on by the other party." It is also worth noting the words—"If the rule to show cause is applied for solely on points which cannot be raised on a writ of error, the bills of exceptions need not be abandoned." The decision (1858) was of course long before the Practice Act of 1903, which by Paragraph 214 allowed a reservation of exceptions in rules to show cause, and the Practice Act of 1912, which by Paragraph 83 did the same. In view of the present Rule 129 of the Supreme Court, it seems

needless to waste time on *Meeker v. Boylan*. The historical development of the present practice is interestingly discussed in the case of *Finley v. Handley*, 21 Vroom 503.

As to the Merits of the Appeal.

The complaint (p. 3) avers an injury to the plaintiff Ethelreda Brown while she was alighting from a trolley car, in that "she stepped into a hole or opening between the rails of defendant's tracks at or near their junction and was thrown to the street."

The fifth paragraph of the complaint avers:

"5. Said accident was occasioned entirely by reason of the carelessness and negligence of defendant's servants and agents operating and in control of said car, in that they stopped said car, opened the door thereof, and invited passengers to alight, at an unsafe place, and where a hole or opening existed," &c.

The averment is of negligence. Under the evidence, it assumably was for the jury to say whether or not the defendant below had been negligent. But the Court, in its charge to the jury, did not leave to them this question of negligence.

The Court charged (p. 117, l. 16):

"I think the question in this case for the jury to determine is as to whether, when she alighted from this car, there was a depressed Belgian block. Mr. Kelly, the contractor, said that the block was of a certain size, which seemed to corroborate another witness who testified as to the size of this depression. There were a number of witnesses who have been here for the defendant company who say there was no such depression, and that there never had been, so that that is the whole question in this case, as I see it, a question of fact as to whether there was this hole in the pavement, and if there was this hole in the paving, the question, for the jury is then whether the de-

defendant company provided a reasonably safe place for this young lady, the passenger of the defendant company, to alight. I cannot determine it; that is the reason we call in a jury to determine from the testimony as to whether there was this depression in the pavement."

The exception to this charge appears on page 120, line 32. It formed the first ground of appeal (p. 122) of the defendant in the Supreme Court.

The foregoing charge made the primary question for the jury the existence or non-existence of a depressed Belgian block. The Court said: "So that is the whole question in this case, as I see it, a question of fact as to whether there was this hole in the pavement." The next part of the Court's utterance was: "And if there was this hole in the paving, the question for the jury is then whether the defendant company provided a reasonably safe place for this young lady, the passenger of the defendant company, to alight." The next utterance of the Court was: "I cannot determine it; that is the reason we call in a jury to determine from the testimony *as to whether there was this depression in the pavement.*"

So, in the charge objected to and above quoted, there were three distinct utterances, but not a single one of these utterances left to the jury the question as to whether or not the defendant below had been negligent.

The charge came very close to averring that the verdict of the jury should hinge upon the existence or non-existence of the depression. So far as it left to the jury the other question, as to whether or not it was "a reasonably safe place * * * to alight," the charge, winding up with the issue "to determine from the testimony as to whether there was this depression in the pavement," colored the prior proposition by pretty nearly making the prior proposition hinge upon the latter.

The law on the subject is well outlined in the case of *Foley v. Brunswick Traction Company*, 37 Vroom 637, in which case appears the following syllabus:

“A passenger alighting from a street car at a temporary terminus selected by the defendant, stepped upon a stone in the highway and sustained injuries for which she brought suit. The jury was instructed that the plaintiff could recover damages if the place selected by the defendant for her to leave its car was not a safe one for that purpose. Held, that this instruction was erroneous, because it did not submit to the jury the question of the defendant’s negligence, which was the gravamen of the action.”

The subject is also treated of in the case of *Mason v. Erie R. R. Co.*, 46 Vroom 521, in which case the jury was instructed as follows:

“It undoubtedly is the duty, under the law, of this defendant, as well as all railroads, to provide a reasonably safe place for its passengers to alight from its train; there is no question about that. * * * It must provide a reasonably safe place for its passengers to alight from its train.”

The court there held that the above instruction was erroneous, among other things saying:

“The instruction exhibited by the first of the foregoing exceptions was erroneous in that it incorrectly stated that the duty of the plaintiff-in-error was to provide a reasonably safe place for its passengers to alight from its trains, whereby the jury was permitted to determine whether reasonable care had been exercised by the plaintiff-in-error not from the qualities of its conduct in that respect, but solely by the jury’s opinion as to the results of that conduct. The duty of the railroad company was, is perhaps needless to say, merely to exercise reasonable care to provide a safe place for its passengers to alight. *Dotson v. Erie Railroad Co.*, 39 Vroom 679.

“‘This distinction is fundamental,’ as was said in the opinion of this court in *Foley v. Brunswick Traction Co.*, 37 Vroom 637, ‘since it marks the dif-

ference between a carrier's liability for negligence and its guaranty of safe carriage. * * *,"

In the case at bar, the Court further charged (p. 118, l. 32) as follows:

"You are to confine your deliberations entirely as to what happened in connection with her alighting from the car on the day in question, as to whether the condition of her foot was brought about by any hole in the paving, and that it was an unsafe place for her to alight or a reasonably unsafe place. I think that is the whole case as I see it."

The exception to this charge appears on page 121. It formed the second ground of appeal of the defendant in the Supreme Court (p. 123).

By the last quoted charge, the Trial Court, practically at the end of his remarks, made the entire issue on which the jury was to decide the question of liability consisting of three things, to wit:

1. Was there a hole in the paving?
2. Did such hole bring about the condition of plaintiff's foot?
3. Was it an unsafe place, "or a reasonably unsafe place" for her to alight?

The expression "a reasonably unsafe place" would seem to give the jury a wide latitude, and would permit them to apply the appellation "unsafe" to a condition that was only very moderately so. Streets are never free from depressions. The whole subject is one of degree. The expression—a reasonably safe place—is understandable, but the expression "a reasonably unsafe place" has a dubious sound.

The words used—"and that it was an unsafe place for her to alight or a reasonably unsafe place," almost suggests to the jury the conclusion at which they in fact arrived.

The use of the word "that" instead of the word—whether—was improper.

The charge under discussion did not leave to the jury the question as to whether or not the defendant below had been negligent.

It is not a positive duty to stop a car at a safe alighting place. The duty is to use due care to do so. There are streets so under process of excavation, &c., that they afford no "safe" alighting place, and the duty of the trolley company then is to select the best place available. There are streets that present a fair surface but cave in under pressure of the foot. There are times when owing to darkness, even the most careful motorman may fail to discover minor depressions in the roadway, and there are times when persons with weak ankles can turn them accidentally when stepping from a car when there is very little depression in the pavement, or perhaps none at all. The issue in every case should be, and is, as to whether or not there was negligence on the part of the defendant.

In the case at bar, the accident (p. 3) occurred December 13th. Plaintiff said (p. 25, l. 15): "A It was dawn, it was getting daylight; it was dawn. Q It was a little after seven o'clock in the morning, wasn't it? A Yes."

This case is not being argued on the weight of the evidence, so any extensive discussion of the testimony seems out of place. Certainly, unless liability was admitted, which it was not, the question of the defendant's *negligence* was for the jury, and the issue was not whether or not there was a hole in the street. It was not for the Trial Court to say, and it is not for this Court to say, that the stopping of a trolley car with its exit door near a hole in the pavement is a negligent act. Even if all the physical facts which the plaintiff's evidence tended to prove were admitted to be true, the stopped car, the hole, and the injury, could the Trial Court have directed a verdict for the plaintiff? Most assuredly, no. The great question still to be decided, and which under our Constitution must be left to a jury of twelve men, was—was the defendant, in doing what it did, negligent? A still further question

was as to whether the plaintiff Ethelreda Brown was contributorily negligent. This, also, was for the jury. But the Trial Court hinged the entire question on the existence or non-existence of the hole, and in effect told the jury that if they found that the hole existed they should find for the plaintiffs. Obviously, if the defendant had admitted the existence of the hole, the Court, to be consistent with itself, would have directed a verdict for the plaintiffs. From a legal standpoint, the ruling that he made, and the ruling which, under the latter supposition, he would have made, are the equivalent of each other, and equally erroneous.

The plaintiffs in their brief make much of the fact that the main issue of fact in the case was the existence or non-existence of the hole. Mr. Fryling, for the defendant (p. 104, l. 11), said: "*Mr. Fryling*. I am ready to rest, but I have this suggestion, if the Court please. The whole question in this case is about the condition of the street, according to the plaintiff's case, and of these rails. I don't know any better way for the jury to determine the facts in the case than to see the situation themselves, and I respectfully ask for the jury to have the privilege of viewing the place where the accident occurred."

The above request was denied because the time was too long after the accident. The language employed by Mr. Fryling in making the request has been commented on by the plaintiff on page 3 of their brief in an attempt to show that Mr. Fryling, for the defendant, made that the sole issue in the case. The language was employed by Mr. Fryling for the purpose of obtaining a jury of view, which he failed to obtain. It was perhaps rather loosely said, but after all that was the vital material question in the case. If there was *no hole*, the defendant was not negligent. If there was *a hole*, then the issue was not so simple, for the question of negligence of the defendant had still to be passed on by the jury, and likewise the question of the contributory negligence of the plaintiff, Ethelreda Brown, had still to be passed on by the jury. See defense of con-

tributory negligence (p. 5). Furthermore, Mr. Fryling's remark was "The whole question in this case is about the condition of the street, *according to the plaintiff's case*, and of these rails." Mr. Fryling was talking about the question of the *physical facts in the case*. It is absurd to argue that it thereby became unnecessary for the jury to consider the inferences and conclusion deducible from those physical facts. There are all sorts of holes in the street, some dangerous and some not. Sometimes persons with weak ankles will hurt themselves where there is *no hole*, or where there is a very trivial hole, and the trivial hole may or may not be a cause. Perhaps on that December morning there was snow hiding the alleged hole. Ethelreda Brown, in her testimony, at one time indicates that the alleged hole was *under the step of the car* (where nobody would be expected to step into it), and later says that she did not see the hole at all. She said (p. 20, l. 6): "A I stepped from the trolley and I put my foot down and my heel caught on the rail and threw me into a hole with a terrible wrench; I looked down and everything got black, I grabbed hold of the trolley and I fainted. * * *

Q Now, you say you tried to catch yourself; what did you take hold of? A The rail of the trolley. Q What do you mean? A The handle of the trolley. Q How had you stepped down, do you recollect? A Just like anybody else would step down. Q And where was this rail that caught your foot, and where was the hole? A It was in the track. Q How? A In the track. Q I mean where with respect to the step? A *Right underneath the step*. Q Did you have any chance to step over it? A No. Q Why not? A There was people in front of me." But on cross examination this plaintiff said (p. 24, l. 21): "A It has been so long—I couldn't see the hole."

The idea of plaintiff's foot going under the step is advanced by the testimony of Edgar V. Evans, for the defense (p. 95, l. 7): "Q When she hollered you were still up on the step? A I was on top. Q You couldn't see where she was going? A It looked as though she was

under the step. Q Her foot being under the step and you up on the platform, you couldn't see where it was, and what was happening under there? A No. Q Your first thought was to help to get her into the store? A Yes. Q And that is what you did, helped the other man get her into the store? A Yes."

Perhaps, on that December morning, her foot slipped on the pavement, and so went under the step.

It is readily conceivable that the jury might have found a slight hole to exist, and yet, if the Court had allowed them, have found the defendant free from negligence. It would be difficult to find a public street absolutely free from depressions of some degree. But as to most of them, no man in his senses would say that it was negligence to stop a trolley car beside them. This girl, Ethelreda Brown, suffered an accident seven years before the present trial, in which, in West Philadelphia (p. 15), an automobile passed over her, resulting in a fractured pelvis, from which she suffered for four years. Samuel Shaw, a witness for the defense, and the motorman of the trolley car said (p. 64, l. 4): "A Then I looked and I saw a young lady holding on to the grab-handle, and that quick somebody had hold of her, and they grabbed her so she wouldn't fall. I got off the car, too, and they helped her in the store on the corner. Q Did you go in the store? A I did. Q Did the young lady say anything in your presence? A She did. Q What was said? A *She told me her ankle turned over, said it was her bad ankle. Q Did she tell you anything else? A I asked what was the matter with her ankle, and she said she had it hurt in a motor accident five years before and it had never been right since.*"

Four persons, in all, testify to having heard Miss Brown attribute her accident to the previous weak condition of her ankle. In addition to Motorman Shaw, above quoted, note the following:

George Jackson Hammel, the conductor (p. 72, l. 12): "A She said she had been in an automobile accident

about five years before and her ankle had never been the same since; it was her bad ankle she had hurt."

Edgar Y. Evans (p. 94, l. 6): "Q Did you hear Miss Brown say anything when you were in the store? A She said she had a weak ankle, she had hurt it before * * *

Q You mean she said that this particular ankle was weak?

A She said her ankle was weak, yes. Q Did she say how it became that way? A I didn't hear her. Q You were in there? A I was in there, but not all the time."

Wilmer Morrison (p. 97, l. 4): "Did you hear Miss Brown make any statement in the store? A When the conductor asked her for her name she said: 'There is no use giving you my name, it is only my sore ankle,' that is all I heard her say. Q Anything else? A Only about the sore ankle, that is all."

And all Miss Brown's rebuttal on the foregoing topic (p. 106) was: "I don't remember," and "I don't know."

Under that testimony the jury might have found that the alleged hole, even if a hole existed, was not the proximate cause of the accident; or, that a hole too trivial to come, as a stepping place, within the negligence class, was, with the weakness of the girl's ankle, the cause of the mishap. The jury might have found "that it was an unsafe place for her to alight or a reasonably unsafe place," and yet, if permitted, have found the defendant free from negligence, for what might have been unsafe for this plaintiff, in her weakened condition, might not have been unsafe for a passenger of normal strength and vigor.

But from the way the case was put to the jury they were practically guided into reasoning *from result to cause*, and would readily decide that as long as Miss Brown hurt her foot there, and as long as there was evidence of a depression in the pavement, it must have been "a reasonably unsafe place," whatever that may mean, "for her to alight," regardless of what it might have been as to normal persons.

It is true, as plaintiffs claim in their brief, that the Court in its charge (p. 116, l. 30), speaks of the necessity of the jury finding some negligence on the part of the defendant before there can be a recovery, but this utterance has no saving grace for two reasons. First, because the Court has so fully and so incorrectly, in his charge, defined the acts which *conclusively*, according to the Court, show negligence, and second, because of the principle laid down in the case of *Niebel v. Winslow*, 88 New Jersey Law 191, as follows:

“Nor is the injurious error of charging the plaintiff’s request in anywise cured or rendered harmless by the fact that the correct rule had been stated to the jury in the body of the charge; for, as was said by this court in the case of *State v. Clayton*, 83 N. J. L. 673, ‘It is argued that this error was harmless because in the body of the charge the degrees of murder had been accurately defined. So they had, but how were the jury to know which was the law?’ ”

Is to the effect of contradictory instructions, see the case of *Schroeder v. Public Service Railway Co.* (N. J. Supreme Court), 118 Atlantic Reporter, page 337.

It was not merely in the parts of the charge objected to that the Trial Court defined its position in this matter. The Court said (p. 116, l. 10): “And the Court charges you that, in view of that relation the company owed to the passenger, Miss Brown, to exercise a high degree of care in her transportation, and also provide a safe place for her to alight; and that is the whole question in this case as I see it; with all the witnesses and with all the arguments that we have had, the only question in this case is whether the defendant company provided a reasonably safe place for her to alight from the trolley car on the morning in question.”

The Court further said (p. 116, l. 33):

“Dealing with the facts in the case, and considering this question as to whether the defendant company did provide a reasonably safe place for her to alight, it is a

disputed question as to whether there was a block, a Belgian block, to which they referred today, that was depressed to such an extent," &c.

The Court further said (p. 117, l. 35): "If there is a recovery, if you find that it was not a reasonably safe place for her to alight, the recovery for the father would be the loss of services," &c.

The plaintiffs on page 3 of their brief profess to find an "open door" in the testimony of Shaw, the motorman of the trolley car, doubtless an illiterate man and clumsy in expression, and profess to find in a portion of his testimony on page 66 of the Book an "unqualified admission of conduct conclusively negligent under the circumstances proven." That the Court may not be misled by this extravagant assertion, we quote the motorman's testimony at that point more fully, to wit (p. 66):

"Q Was there any hole in the paving? A None whatever. Q Was there any hole out in the paving alongside of the track at the switch, between the curb and the switch? A No hole at all; as you see it now is the way it was. Q Any hole there now? A No, sir. Q At any time since the paving was laid and the tracks were laid, have you ever seen a hole there? A Never saw a hole anywheres near there; no, sir. (Cross examination by Mr. Woodruff): Q Did you look for the holes? A Naturally, that is the first thing we do is look around? Q Why? A That was our orders, we were to take all precaution when an accident happened anywheres near the car or beyond the car. Q Isn't it orders to take precaution before an accident happens? A Yes. Q Not to stop over the holes? A *It is impossible to stop when there is no holes there.* Q That is your orders, not to stop over these kind of places? A Yes, sir."

Beyond a little bad grammar on the part of the motorman we see nothing in the foregoing for the plaintiffs to make a time about; but building on the italicized words as a base, and giving to them a meaning not justified by

their context, they make the following statement on page 18 of their brief:

“Defendant’s negligence was beyond dispute after its motorman had testified that he knew of the existence of the holes and could have seen the one in question had he troubled to look.”

The foregoing utterance has not a scintilla of excuse. Its only basis is the unfair twist given to the motorman’s evidence on page 66 of the Book. The motorman was Samuel Shaw. His testimony begins on page 61 of the Book. The Court will find nothing in it justly to uphold the foregoing quotation from the plaintiff’s brief. Following the same fancy, the plaintiffs on page 22 of their brief have the effrontery to say:

“But in this case the size of the hole was not in dispute; that its existence made it dangerous was not disputable; that it or similar holes were in fact seen by the motorman as he brought his car to a stop, was not disputed; that he knew those holes to exist at that point, was admitted; that he could have seen this particular hole, was admitted; that he stopped his car with the step at a point where he knew those holes existed, was admitted; that he then opened the door and invited passengers to alight by way of that step, was admitted; that he gave them no warning of the holes which he knew existed, was admitted.”

We again affirm that nothing in the motorman’s testimony fairly supports these statements. The same disregard of facts appears in plaintiffs’ brief near the top of page 24, in discussing the case of *Mason v. Erie*, where in an aim to differentiate the case at bar, they say:

“There was no admission by the defendant that its agents in control of the train knew of the dangerous condition claimed to exist beside the right of way, or that it was such a condition that it should have been known to them. There was no admission that they stopped the train at a point where they knew a condition existed

which might by a jury be said to be dangerous. The very elements in dispute in both the Foley and Mason cases, which this Court pointed out should have been indicated in the charge, in the present case were admitted and so obviously were not necessary to be charged by the Court."

More of the same appears on page 25 of the plaintiffs' brief, where they say:

"Its motorman testified that such holes existed, that he could see them at the time of this accident, and that notwithstanding this, he had stopped his car with the steps directly over the grooved rail where witnesses testified this particular hole existed."

And all of these alleged admissions have as a basis the testimony of Motorman Shaw on page 66 of the Book. If there were such an admission by the motorman, it would only be evidence, and would have no conclusive binding effect, as plaintiffs appear to think; but in face of the motorman's statement (p. 66, l. 13): "A Never saw a hole anywheres near there; no, sir." The construction which plaintiffs try to put on his answer at page 66, line 30, is absurd. There was a large amount of testimony in the case that no hole existed at the place in question when the plaintiff injured her foot, and testimony of four witnesses (pp. 64, 72, 94 and 97) who state that Miss Brown admitted that her weak ankle was the cause of her mishap. While all this is not important on this appeal, we, nevertheless, feel impelled to justify our position, especially in view of the highly biased assertions of the plaintiffs in their brief, as to the factual strength of their case.

John M. Kelly (p. 53) laid the street paving in question (p. 54), completing same in January, 1919 (p. 55, l. 20), and when he finished his work in January, 1919, there was no such hole there.

Charles Stiff (p. 58), chief draughtsman for Lorraine Steel Co. (p. 59), in the business for 29 years; his com-

pany made the rails, switches and frogs laid at the place in question, and they were of standard construction; witness examined tracks and paving and street the morning of the day he was testifying, and found "a beautiful job of installation and completion of pavement." The pavement was brought up flush with the surface of the rail, an A-1 job, not only laying the track, all tight joints, but also the pavement was in perfect condition. The pavement was not sunk, and in his opinion no repairs had been made; but he had not seen the place at time of accident.

Samuel Shaw (p. 62), motorman of trolley car in question, said (p. 66) that there was no hole in the paving.

George Jackson Hammel said (p. 71), that he was the conductor in charge of the car (p. 72): "Q Were there any holes in the paving? A No, sir."

Jacob B. Hahn (p. 76), Chief of Police, South Yard, New York Ship, was a passenger on the trolley car (p. 77), alighted at the rear of car, saw the lady with a foot in the curve, standing hanging on the handle of the car. He examines photo (Exhibit D. 2 for identification), saying: "A Her foot was on the right rail there near the curve. * * * (P. 78, l. 2) Q At the point where the plaintiff was standing was there any hole in the paving? A No, sir. Q Was there any hole in the paving about there? A Not that I took notice of; I looked pretty good, too, to see if there was a hole. Q Witnesses have testified there was a hole four or five inches deep and twelve or thirteen inches long in the paving alongside of the switch; was there any such hole there? A No, sir." Witness remembers when the construction work was done. It was all completed sometime before the accident. Witness has been in that vicinity continuously since, and has seen no repairs at that spot since paving was originally laid, although "A I ride over there three or four times a day." He says that at the time of the trial the paving and railing were in (top of p. 79) "A First class condition."

Horace Riker said (p. 81), that he was a passenger on the car, and got off at that place, at the front end, after Miss Brown (p. 82). He did not look at the condition of the paving, but (p. 83) when he stepped down to the street it seemed to be all right, and he did not see any holes.

John V. Thomas (p. 84) was a passenger on the car and got off on the front end. He was accustomed to travelling on that route night and morning. The paving was in (p. 85) about the usual condition; he did not notice any unusual condition of the street then. He did not know the nature of the accident and did not look at the paving. He still continues to go over that route off and on, and does not remember having seen any repairs made at that spot.

Richard Addis said (p. 87) that he was going to work, coming off his porch, when he heard the young lady "holler"; that the fellows were carrying her into the store. Witness had lived in that neighborhood, at 418 North Broadway, three doors below Warren street, for nearly five years. The paving always looked pretty good to him, no holes in it, near the track or anywhere about the vicinity where the front of the car was.

Jesse A. Hill said (p. 89) that he was a passenger on the car, and got off the rear end. (P. 89, l. 36): "Q When you saw her stepping from the car, where did she step to? (p. 90) A She seemed to step right down on to the street. Q Were there any holes in the street where she stepped down from the car? A Not to my knowledge, I didn't notice any? Q Could you have seen them if there were any holes there? A I probably would have. * * * Q Have you seen at any time any holes in the paving? A Never took any notice of any. Q What was the general condition of the paving at the point where the front of the car was? A Well, it is like all Belgian blocks. Q Laid? A Some depression between the blocks filled with concrete, I didn't notice anything exceptional about it?" * * * (P. 89.) Q Well,

since the time of the accident have you continuously travelled over that route? A I have Q During that time have any changes been made in the tracks, curves, switches or paving in that vicinity? A Not to my knowledge."

Harry S. Chandler said (p. 92) that he saw where the car stopped, that the condition of the paving as far as he knew, was good, that he did not know of any holes in the paving but that he did not have his attention called to the paving, and did not look to see what hurt the girl.

Edgar Y. Evans said (p. 93) that he was a passenger on the car, and got off the front and at that point. When she stepped off it looked as if she stepped on the track, at the curve. Witness did not see any holes in the paving at that point. If there were any holes, he says that he would have seen them.

Wilmer Morrison said (p. 96, l. 21): "A I walked—got off the car and walked to the corner, and just then I heard her holler and some men there grabbed hold of her and helped carry her into the store. Q At the time you walked over and heard her holler, did Miss Brown have hold of anything? A The handrails. Q Where were her feet? A On the ground. Q How were they with respect to the rail? A I didn't see no rail at all where the feet were. Q Were there any holes in the pavement where her feet were? A No, sir. Q Were there any holes in the pavement anywhere in that vicinity near the front of the car? A No, sir."

J. Walter Wright (p. 98), superintendent of maintenance of way of the defendant company, said that he has had charge of the tracks in that division since October 1, 1917, that he was familiar with the place where the accident happened, that there have been no repairs or alterations or any changes made either in the tracks, switches, curves or paving in the vicinity of that corner, that on December 13, 1919 (date of accident), there were no holes in the paving there, and that there are no holes there now. He says that he has been in the vicinity very

frequently, and if any changes or repairs were made in the paving alongside of the tracks or any changes in the tracks he would in his official capacity know it, and would give the orders to have it done.

J. M. Waters (p. 100), an engineer employed by the defendant company, is familiar with the location, saw it yesterday, there were no holes in the pavement, and says that no changes have been made in the paving or construction of the tracks, curves or switches since same were originally laid in 1918. A person stepping from the step of the car cannot step on the switch because the step of the cars overhang from 18 to 20 inches, making it impossible to step on the switch. There is a groove in the curved rail, one and 9/16 inches wide, and one and 3/8 inches deep. It is standard guard rail. There were no holes alongside of the switch or alongside of the curved rail in the pavement anywhere, and "it is one of the best pieces of work we have on the property."

Richard R. Miller (p. 103), photographer, recognizes two photographs of the spot which he took the day before the trial, and he says he did not see any depression or openings between blocks or holes of any kind in the paving. The photographs, D. 1 and D. 2, are put in evidence.

We are not arguing the weight of the evidence, and have not stated in this brief the evidence in the plaintiffs' case as to the existence of the alleged hole, but this mass of evidence as to the non-existence of any hole leads us to believe that the plaintiff was mistaken when she says that she stepped in a hole, and to believe that her injury was due to her weak ankle, of which she had spoken in the hearing of Shaw (p. 64), Hammel (p. 72), Evans (p. 94), and Morrison (p. 97). When Miss Brown (p. 106), is questioned on this latter subject in rebuttal, she does not remember.

We ask that the appeal be dismissed, and that the judgment of the Supreme Court, reversing the judgment of the Camden County Court of Common Pleas, be affirmed.

Respectfully submitted,

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Defendant-Appellee.*

