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NOTICE OF APPEAL AND GROUNDS.
 Filed February 6, 1928.

New Jersey Supreme Court

HUDSON COUNTY. 10

THOMAS HURLEY, <i>Plaintiff-Appellee,</i> <i>vs.</i> PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i>
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To George E. Cutley, Esq., attorney of plaintiff-appellee, 586 Newark avenue, Jersey City, N. J. 20

SIR:
 TAKE NOTICE, that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in favor of the plaintiff and against the defendant in the above-entitled cause, and assigns the following grounds of appeal: 30

1. Because the Court, at the close of the plaintiff's case, although moved so to do by the attorney of the defendant on the ground that no negligence on the part of the defendant had been shown and on the ground that there was contributory negligence on the part of the plaintiff refused to non-suit the plaintiff.
2. Because the Court, at the close of the whole case, although moved so to do by the attorney of 40

Notice of Appeal and Grounds.

the defendant on the ground that no negligence had been shown on the part of the defendant and on the ground that there was contributory negligence on the part of the plaintiff refused to direct a verdict in favor of the defendant.

10 3. Because the jury found for the plaintiff contrary to the instruction of the trial court.

Dated, February 3, 1928.

HENRY H. FRYLING,
Attorney of Defendant-Appellant.

(Endorsed) "Service of a copy of the within notice of appeal is hereby acknowledged this 4th day of February, 1928.

20 GEORGE E. CUTLEY,
Attorney of Plaintiff."

30

40

Complaint.

SUMMONS.

The defendant was duly summoned.

COMPLAINT.

10

Filed February 1, 1927.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

THOMAS HURLEY,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY CO.,
a corporation,

Defendant.

*Action
at Law.*

20

Plaintiff complains of the defendant and alleges:

1. That defendant is a corporation of New Jersey and as such operated, managed and controlled certain electric railway cars in and about the City of Jersey City and elsewhere and is a common carrier of passengers for hire.

30

2. That on September 6, 1926, at about 7:00 P. M., the plaintiff Thomas Hurley, was lawfully driving a horse-drawn vehicle in an easterly direction along Pavonia avenue in the City of Jersey City, State of New Jersey.

3. That on said date and at said times the defendant corporation was the owner, user and

40

Complaint.

possessor of certain trolley tracks, rails and switches that are laid down on Pavonia avenue in said City of Jersey City.

10 4. That on said date when plaintiff was lawfully driving along said highway about five hundred (500) feet from the entrance to the Erie Depot and Ferry Slip the truck or horse-drawn vehicle which plaintiff was driving struck an open trolley switch or frog and a large rut or hole causing plaintiff to be hurled to the ground, and underneath the wheels of his truck, due to the negligence and carelessness of the defendant corporation.

20 5. The negligence of the defendant consists in this: That it negligently and carelessly maintained its tracks, roadbed, rails and switches; that there existed at that place at that time and for a long time previous a large rut or hole in said roadbed, and defective and improperly laid rails, tracks and switches, causing said highway to be in a dangerous and unsafe condition; that the defendant negligently and carelessly failed to keep said highway at that place in a reasonably safe condition as it was under a duty to keep for the plaintiff and others lawfully using said highway.

30 6. That by reason of the carelessness and negligence aforesaid plaintiff's right foot and ankle were crushed and had to be amputated, suffered bruises and contusions of the back and shoulders and nervous system shocked.

40 7. That by reason of the injuries received as a result of the negligence aforesaid plaintiff was for a great period of time confined to a hospital and home; has been unable and will for a long

Complaint.

time be unable to work; was forced to spend various large sums of money in an endeavor to cure himself, and will be permanently handicapped and hindered in making his livelihood, all to the damage and detriment of the plaintiff.

Plaintiff claims judgment in the sum of fifty thousand (\$50,000) dollars, together with costs. 10

GEORGE E. CUTLEY,
Attorney of Plaintiff.

20

30

40

ANSWER.

Filed February 25, 1927.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

10

THOMAS HURLEY,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY, a corporation,

Defendant.

*Action
at Law.*

20

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, in answer to the plaintiff's complaint, says that:

1. It admits the allegations contained in paragraph one of the complaint.

2. It denies the allegations contained in paragraphs two, four, five, six and seven of the complaint.

30

3. As to the allegations contained in paragraph three of the complaint, it has no knowledge or information thereof sufficient to form a belief, and therefore it denies the same.

FIRST DEFENSE.

40

1. It avers that the negligence of the plaintiff contributed to the happening of the said alleged accident, in that he negligently and carelessly exposed himself to the risk of such an accident and neglected to take precaution or to exercise care

Answer.

to guard and protect himself against such an accident; moreover, at the time and place mentioned in the complaint he was conducting himself in a careless, negligent and reckless manner and was not exercising care or taking proper precaution, and that he negligently, carelessly and recklessly placed himself in a position of danger at the time and place mentioned in the complaint.

10

HENRY H. FRYLING,
Attorney of Defendant.

20

30

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REPLY.

Filed February 28, 1927.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

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THOMAS HURLEY, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> PUBLIC SERVICE RAILWAY Co., a corporation, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>
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Replying to the answer filed by the defendant in the above-entitled cause of action, plaintiff says that:

1. He denies each and every allegation contained in the said answer.

GEORGE E. CUTLEY,
Attorney of Plaintiff.

Dated February 23, 1927.

30

40

JUDGMENT.

Entered January 24, 1928.

This action was tried before Honorable Henry E. Ackerson, Jr., with a jury, at the New Jersey Supreme Court, Hudson County, on January 18 and 19, 1928.

10

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

The jury returned a verdict in favor of the plaintiff and against the defendant in the sum of ten thousand (\$10,000.00) dollars.

	Whereupon it is ad-	
	judged that the plaintiff,	20
Damages \$10,000.00	Thomas Hurley, do re-	
Costs 57.59	cover of the said defend-	
—————	ant, Public Service Rail-	
\$10,057.59	way Co., a corporation,	
	the sum of ten thousand	
	dollars damages, together	
	with his costs, which have been taxed at the sum	
	of fifty-seven dollars and fifty-nine cents, making	
	in the whole the sum of ten thousand fifty-seven	
	dollars and fifty-nine cents.	30

Judgment entered January 24, 1928.

WM. S. GUMMERE,
C. J.

40

Opening.

TESTIMONY.

NEW JERSEY SUPREME COURT.

10

THOMAS HURLEY,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant.

Before Hon. Henry E. Ackerson, Jr., J., and a jury.

20

Jersey City, N. J., January 18, 1928.

Appearances:

George E. Cutley, Esq., for the plaintiff.

Henry H. Fryling, Esq., (by Mr. Higgins) for the defendant.

Mr. Cutley opened to the jury.

30

Mr. Higgins: May I ask Mr. Cutley whether he is relying upon the fact that the wheel of the wagon caught in a switch or whether it caught in a rut? He mentioned both.

Mr. Cutley: Both. He was down going toward the ferry when he came to the place where the switch turns over, there was a rut there. It is hard to distinguish, but he was thrown by that rut.

Mr. Higgins: I want to try to get the case made out by the plaintiff. Was it the rut that caused this accident or was it the switch?

40

Bradley L. Coley, direct.

Mr. Cutley: Both. If there was not any switch there there would not have been any rut there and if there was no rut there there would not have been this accident.

Mr. Higgins: I still think I should be advised.

The Court: I don't know how he can do it any more than that. He says it was the combined result of the switch and the rut. 10

(Mr. Higgins thereupon opened to the jury.)

BRADLEY L. COLEY, sworn.

Direct examination by Mr. Cutley.

Q You are a practicing physician in New York State? A A practicing surgeon.

Q Do you know Thomas Hurley? A Yes, sir. 20

Q He was a patient of yours, wasn't he? A He was a patient under my care at Bellevue Hospital.

Q What was the nature of his illness? A He had a chronic traumatic osteomyelitis, which in simple terms is a chronic inflammatory condition of the bone due to injury.

Q How long was he in Bellevue Hospital? A 30 He was there approximately eight weeks I would say; I don't remember the dates exactly. He was there in November and most of December, 1926.

Q Was he operated upon, doctor? A Yes.

Q What was the nature of the operation? A Amputation through the lower leg a few inches below the knee.

Q Did you operate upon him, doctor? A I did. 40

Bradley L. Coley, cross.

Q In your professional opinion, was it necessary due to his condition? A It was.

The Court: The condition which you found you diagnosed as due to what cause, traumatic or disease, or what?

10 The Witness: Chronic traumatic osteomyelitis.

The Court: And it was necessary to amputate that much of his leg in order to save the man?

The Witness: Yes. There is no advantage in saving an inch or two, more or less. When you have to take the leg off below the knee it is really a disadvantage to leave a foot or so on the leg even if the trouble is down at the ankle, where his was.

20 The Court: What I am getting at is, you had to do that operation?

The Witness: We had to do that operation. It was the surgical judgment of all of us who had him under our care that that was necessary.

The Court: That was your judgment, anyhow?

30 The Witness: Yes.

Mr. Cutley: Cross examine.

Cross examination by Mr. Higgins.

Q May I ask when he came under your care?
A The date of his admission you probably have that from the Bellevue Hospital records. I do not recall the exact date, but I think it was about the 12th of November.

40 Q And how long did you have him at the hospital? A I know he left just before the new

Bradley L. Coley, cross.

year; I think he was there until the latter part of December.

The Court: November 12th of what year did he come?

The Witness: 1926.

10 Q That was the same year he left, wasn't it, during November and December? A He was there as I said, about seven or eight weeks I thought, yes.

Q Now, doctor, when you first saw him, where was this injury? A It was the lower part of the calf of his leg about the ankle joint. He had suffered a compound fracture which had become infected.

Q Was the fracture healed? A No. 20

Q It was still— A There was still non-union.

Q Which leg was that doctor? A I do not recall the leg. I have the entire notes of his case here if you want me to refresh my recollection.

Q I don't want you to read your notes, I am perfectly satisfied with what you say doctor, but when you first saw him was the wound infected? A Yes.

Q Was it infected when he came into the hospital, do you know? A Yes. 30

Q And was the infection of such a character that it was necessary to amputate the leg? A Yes.

Q You say it would be better to take off a little more in the way you took it off—why is that, doctor? A It is a matter chiefly of fitting an artificial limb.

Q And you took that leg off at the best place? A The site of election, yes. 40

Bradley L. Coley, cross.

Q Where was the amputation, please? A It was at the junction of the middle and upper third or the calf of the leg, the lower leg.

Q And how much is there below the knee now? A I would say four or five inches.

10 Q And he has a good result so far as the amputation is concerned? A I have not seen the man since he left the hospital. My records show he had not quite healed when he left the hospital, so that I know nothing about.

Q But in the ordinary course of events it should have healed? A Yes.

Q And this stump was such that an artificial limb could be attached to it? A That again it is hard for me to say without having seen it.

20 Q I mean in the ordinary course of events, that would be so? A Yes, with this exception, that his stump instead of healing by primary union after the operation as it would have if he had been operated upon for a condition other than infection, became infected and had to be opened and the stump was a long time in healing or he would not have been in the hospital that long. That makes this difference: It makes the end of the stump more apt to be painful and less
30 apt to be fit for weight bearing as one which heals up by first intention.

Q When he left the hospital, it was to all intents and purposes cured, wasn't it, as to the amputation? You would not let him go out if it was still in such condition that it was infected? A If he insists upon going out we naturally—

40 Q Did he insist upon going out? A He was anxious to get home and we let him go before the wound was entirely healed. He promised to

Thomas Hurley, direct.

have dressings applied to it and to return to us if the stump gave him any trouble.

Q Did he return to you? A No.

Q Then in all probability it didn't give him any trouble? A We told him if it gave him any trouble to come back.

Q And he didn't come back? A No. 10

Q And the purpose of leaving this part of the leg on was to give him enough room so that an artificial leg could be fitted, is that correct? A That is right.

Mr. Higgins: That is all.

Re-direct examination by Mr. Cutley.

Q Was there any charge, doctor? Did he incur any charges or pay any fees or bills? A I do not just understand. 20

Q Did he pay anything for his medical service? A He didn't pay anything to me. Bellevue Hospital is a charity institution and the doctors worked there without fees. I received nothing for it. Whether or not he paid the nominal—

Mr. Higgins: I object.

Mr. Cutley: That is all. 30

THOMAS HURLEY, sworn.

Direct examination by Mr. Carlin.

Q What is your full name? A Thomas Joseph Hurley.

40 Q Where do you live? A 342 East 34th street. 40

Thomas Hurley, direct.

Q How old are you? A I will be thirty this August.

Q Are you married? A Yes.

Q About September 6, 1926, did you have occasion to drive along Pavonia avenue? A Yes.

Q In what direction were you going? A
10 Toward the ferry.

Q That is, in an easterly direction? A Yes, sir.

Q Now, at about 300 feet from the Erie depot, do you know they have a switch there?

Mr. Higgins: I object to Mr. Carlin giving these distances; let him describe where this thing happened.

Q Do you know the condition of the lower
20 part of Pavonia avenue? A I didn't know the switch was there that night.

Q Do you know about them now? A Now I do, yes.

Q Did anything happen there at that time? A Well, the night I was driving down from the Erie Railroad with a load on the truck, I was going down toward the ferry and I was thrown from the truck on account of the forward wheel hitting a hole right alongside of the switch.
30

Mr. Higgins: If the Court please I ask that that be struck out unless he saw that. In the opening Mr. Cutley said the place was covered with water.

Q What wheel did you say? A The front wheel on the left side.

Q The left front wheel? A Yes, sir.

Q What did it hit? A It hit the hole right
40 alongside of the switch.

Thomas Hurley, direct.

Q What happened to you? A I was thrown off the truck and the hind wheel passed over my leg.

Q What leg? A The right leg.

Q And what happened to your right leg? A Well, it was amputated. 10

Q That is at that time? A What do you mean?

Q Was it crushed or what? A Oh, sure. It was crushed from the hind wheel going over it.

Q What time was this? A About half-past seven, between half-past seven and eight; I could not tell you the exact time.

Q What was the condition of that night? A It was raining; it was raining something fierce. It was quite a storm. 20

Q Just at what point did this accident happen in regard to the switch? A Well, the hole was right alongside of the switch and the switch comes over this way from one track to the other; there is a hole or a rut, whatever you would call it, running parallel with the switch there.

Q And what happened to the front wheels of your truck? A Well, she naturally sunk into that when I hit it. 30

Q What way did your horse go? A He swerved over toward the right.

Q Were you driving a team? A No, I was driving a one-horse truck.

Q Was it loaded? A Yes, I had a load on the truck.

Q In what direction did your horse go? A It went to the right-hand side. I was going to the ferry, but the swerving of it drove him over to the right. 40

Thomas Hurley, direct.

Q And what way did the hind end of your truck go? A It swerved on this side and the front of the truck swerved that way, the tail of the truck swerved this way.

Q And your ankle was crushed underneath the hind wheel? A Yes.

10 Q Do you know where you were picked up that night? A Well, I don't quite understand.

Q When you were picked up were you conscious or unconscious? A I was conscious; I knew what happened.

Q And you knew what was happening at that time? A Yes.

Q Do you know where you were picked up? A Well, right there opposite the terminal where the trains pull in.

20 Q But I mean in reference to the switch. A I could not have moved from the switch; I laid right there.

Q Did you lay on the switch? A Certainly, I laid right there.

Mr. Higgins: I object, leading.

A I laid right there until the man came up to pick me up, and he asked me to walk and I told him I could not walk.

30 Q Who picked you up? A The driver that was following me.

Q What is his name? A Bonaventure.

Q He was following you? A Yes.

The Court: How many tracks are there in the street there?

The Witness: There are quite a few, your Honor; I could not say how many.

40 The Court: More than one line of two rails each?

Thomas Hurley, direct.

The Witness: There are two sets of tracks there and the road alongside of them, and it is all rutted.

The Court: After you were run over did you lie right there until the man came and picked you up?

The Witness: I laid there, I could not possibly move at all. 10

The Court: As you laid there did you see your location in the street?

The Witness: I sort of glanced at it, and I had a faint idea that there was a hole; naturally it was filled with water and the forward wheel hit it and went in.

The Court: Did you see the water in the hole? 20

The Witness: Yes, sir; I was all wringing wet from falling into it.

The Court: Can you tell us anything about that hole, in size?

The Witness: Just what I have told you, your Honor, that it was right alongside of this switch there.

The Court: How long alongside?

The Witness: The length of it. 30

The Court: Running with the rail?

The Witness: I could not say exactly, but I do not think I would be wrong in saying two feet, anyway.

The Court: And how wide from the rail out?

The Witness: Well, it is on both sides of it, your Honor; the rail, you might say, is just lying over this hole. 40

Thomas Hurley, direct.

The Court: But how far out from each side of the rail, if at all?

Mr. Higgins: If your Honor please, I do not like to interrupt, but I would like to find out when he saw all this.

10 The Court: Is this that night you were hurt?

The Witness: I seen it that night while I laid there, that is as I said, I had a faint idea what it was from the wheel.

The Court: You saw it that night?

The Witness: Yes, sir.

The Court: Have you seen it before?

The Witness: No, sir; I only had one occasion to go over there.

20 The Court: Did you come back afterward to the place where you lay that night?

The Witness: That night?

The Court: Did you ever go back afterward to the place where you lay that night?

The Witness: No, sir; I had no occasion to, your Honor.

30 The Court: Can you tell us which rail it was, that is, which track, whether it was on the east or west side of the street?

The Witness: Well, it was on the left track going toward the ferry. The tracks run parallel and there is one on each side and this was the left one, you might say.

The Court: And you were on the right side of the street?

The Witness: Yes, but there are two tracks there and the tracks going toward the ferry—

40 The Court: There are four sets of rails.

Thomas Hurley, direct.

The Witness: Yes, sir.

The Court: Which rail was it?

The Witness: It was the third rail from the sidewalk.

Q Who did you say picked you up? A Bona-venture. 10

Q Anyone else? A Well, there was someone there but I do not know who he was.

Q Where did they bring you? A They brought me into the Erie depot, I suppose; that is what I think it was anyway, I am not quite sure.

Q Where did you go from the Erie depot? A Into the Jersey City Hospital.

Q How were you taken there? A By ambulance. 20

Q How long did you remain in the Jersey City Hospital? A Well, I was discharged the 16th of September. 20

Q About ten days? A About ten days.

Q And then where did you go? A Then I was told to go home and to go to a hospital in New York; I was told that I came from New York, I could not stay over in Jersey City Hospital, so then I made arrangements to go to Bellevue about the 22nd of September. 30

Q And how long did you remain in Bellevue? A Well, I remained in Bellevue from the 22nd of September up to about the end of September, then I was transferred over to Welfare Island.

Q How long were you in Welfare Island? A The full month of October.

Q Then you went back to what hospital? A Well, I came home for two days and made arrangements to go into Bellevue again. That was on the 8th of November. 40

Thomas Hurley, direct.

Q And how long did you remain in Bellevue Hospital? A From the 8th of November until the 23rd of December.

Q On what day was it that your leg was amputated, do you know? A The 12th of November.

10 Q And from the time of the accident you were in and out of the hospital? A Yes, sir.

Q Both in Jersey City and in New York City? A Well, I didn't bother coming back to the Jersey City Hospital; I made all the visits to Bellevue Hospital.

Q And Dr. Coley, the man who just testified, is the doctor who treated you? A Yes, sir.

Q You have a wooden leg now, have you? A Yes, sir.

20 Q And how far is your leg amputated? A Oh, I could not figure how much of it is off, but do you want me to show you?

The Court: How far below the knee?

The Witness: About this far, your Honor.

The Court: About six inches below the knee?

The Witness: Yes, sir.

30 Q When did you get your wooden leg? A I just don't remember the date.

Q About when? A It was sometime in June, I believe; around the end of June.

Q And how do you get along as far as moving or walking or anything of that kind is concerned? A On crutches.

40 Q You were on crutches from the date of the accident? A From the date I was discharged from the Jersey City Hospital I came out on crutches and from then on I was stiff from lying

Thomas Hurley, direct.

in the hospital and naturally I didn't use crutches, but when I was out of the hospital I used the crutches.

Q By whom were you employed at that time? A David Oshinsky.

Q Where is he? A He is on the corner of Franklin street and Washington street now. He was then at 338 or 328 Washington street, New York City. 10

Q In what capacity were you employed? A As driver.

Q How much money did you make a week? A I got between fifty and fifty-five dollars a week; never got less than fifty dollars.

Q Was that your regular salary? A I never got less than fifty dollars a week.

Q Were you hired as a teamster? A Yes, 20 sir.

Q What was your salary supposed to be? A Fifty dollars a week.

Q And that is what you got? A Yes.

Q What business have you been in since the date of this accident? A Since the date of the accident?

Q Yes. A I have not been in no business.

Q Haven't you been working for anybody? A Well, I have been making an odd dollar here and there since I got this artificial limb. 30

Q But you have had no regular employment since then? A No, sir; I cannot say I was working for anybody and drawing a salary.

Q Why? Have you looked for work? A Naturally I had to get out and do something, but as it is I am only getting a few dollars here and there.

Q Did you pay any bills for the hospital or anything? A No, sir; but I got bills from Belle- 40

Thomas Hurley, direct.

vue Hospital and I got one bill from Welfare Island and if I am not mistaken I had a bill sent from the Jersey City Hospital.

Q You did not pay them as yet? A No, sir; I didn't have it to pay.

10 Q Have you paid any doctors or anybody for treating you so far as the clinic is concerned? A No, sir; all the treatments were done in Bellevue.

Q You purchased a wooden leg? A No, I didn't purchase it; it was my wife's mother that helped me to get that. She didn't help me, but she got it herself for me.

Q How much did it cost, do you know? A \$250—\$225.

Q How about any pain in the leg yet? A Well, occasionally.

20

Mr. Higgins: Please don't lead him.

Q Is it entirely cured? A It is cured, I can wear the limb and all, but there is occasional pain from the constant rubbing from the leg going in and out of the artificial limb.

Q Do you receive any treatment for it yet? A No, I do not receive no treatment.

Q When did you stop? A In June.

30 Q June of last year? A Yes, 1927.

Q And that is the time you got the artificial leg? A About that time. About the 23rd of June was the last visit I made to the doctor at Bellevue Hospital.

The Court: Is that the only pain you have had in connection with the leg, just the rubbing?

40 The Witness: Since I got the artificial limb?

Thomas Hurley, cross.

The Court: No, before.

The Witness: No, before, your Honor, it was not practically healed, there was just a small opening and once a month—

The Court: Did you have any pain from the time of the injury?

The Witness: Oh, yes; I had quite a bit of pain, your Honor. 10

Mr. Carlin: That is all.

Cross examination by Mr. Higgins.

Q After this injury you went to the Jersey City Hospital, did you? A Yes, sir.

Q And they kept you there for two weeks, did they? A No, from the 6th to about the 16th.

Q About ten days? A Yes, sir. 20

Q Then they let you go, did they? A Well, yes; one of the doctors told me I would have to go.

Q And where did you go then, please? A Well, I went home. He told me to go home.

Q How did you go home? A My wife—I sent word to my wife and she got hold of my brother, he is a hack driver—

Q You got home in an automobile? A Yes, sir. 30

Q How long did you stay home there? A Well, I don't think it was much more than a week or ten days.

Q Did you have a doctor at home? A Well, the insurance company sent a man there to look at the leg and he said to take an X-ray, but that is the last I ever saw of him.

Q Did he treat you? A He made two visits. The first visit was for an X-ray and the second visit was to order me into Bellevue Hospital. 40

Thomas Hurley, cross.

Q He did not treat you at all? A No.

Q Then you went to Bellevue? A Yes, sir.

Q And you stayed there how long? A That was around the 22nd or 23rd of September and I stayed there until the end of September and from there I went to Welfare Island and I stayed there
10 the full month of October, then I came home for a couple of days.

Q Did they let you go home? A They told me I would have to go home, over in Welfare Island.

Q Had they been treating your leg all that while? A Yes, they treated it over there.

Q How long did you stay home then? A I would not say more than a few days anyway.

Q Then what happened to you? A Then I
20 made arrangements to go into Bellevue, to find out just what could be done with the leg.

Q And they amputated the leg there, did they? A Yes, sir.

Q Now, when you went in the Jersey City Hospital, was there any open wound in your leg? A Yes, sure.

Q They treated it there, didn't they? A Yes.

Q Did it get any better after leaving the Jersey City Hospital? A Didn't exactly get any
30 better; it seemed to get worse.

Q Still they told you you would have to go? A Yes, they told me I didn't belong in Jersey City.

Q Well, they took off your leg in Bellevue Hospital? A Yes.

Q And now you are wearing an artificial limb? A Yes, sir.

Q And you walk without the assistance of any cane? A Oh, yes; I get along without a cane.

Q Who were you employed by at the time this
40 accident happened? A David Oshinsky.

Thomas Hurley, cross.

Q Where is his place? A Just now it is at Washington and Franklin streets, New York; at that time it was 328 or 338 Washington street.

Q In New York? A Yes, sir.

Q And this was a one-horse truck? A Yes,
10 sir.

Q A rack truck? A Yes, sir.

Q And where was your seat, please? A Right up in front of the truck.

Q Was there anybody on the truck with you? A No, sir.

Q What time of the day had you taken this truck out? A Well, I was ordered to the stable, I think, at three or four o'clock.

Q And then did you come to Jersey City at three or four o'clock in the afternoon? A I was
20 ordered to the stable at that time.

Q Had you been out before that or was that the first time you had come out that day? A That was the first time I was ordered out in the afternoon.

Q And you came to Jersey City? A Yes, sir.

Q And you went where, please? A Right to the Erie Railroad freight yard.

Q Whereabouts is that? A That is right up there above the milk station, right up near the
30 tubes. I just don't know the street there; I know it is Pavonia avenue.

Q How far from the ferry? A I just could not tell you how far it is; it is quite a ways up, though.

Q From the Erie ferry? A Yes, sir.

Q On Pavonia avenue? A Yes, sir; the freight yard is; yes, sir.

Q Would it be three or four ordinary city blocks from the ferry? A I would not want to
40

Thomas Hurley, cross.

say. I just cannot give you the definite distance on it.

Q Well, it is somewhere away from the Erie ferry and Pavonia avenue? A Yes, sir.

Q Up near the milk station? A Yes, sir.

10 Q Do you know where the Hudson and Manhattan tube station is? A Right in that section.

Q How far beyond that was it you went? A I don't think it was beyond that.

Q Did you have a load to deliver? A I was picking up a load from the freight yard to take to New York.

Q And what time did you leave the freight yard, do you know? A I could not say what time, because there was no clock around in the yard.

20 Q Well, about? A Well, it must have been between seven and half-past seven. It was shortly before I had the accident.

Q Shortly before you had the accident you started away? A Yes, sir.

Q What did you have on your truck? A I had a load of grapes on.

Q Were they piled up in the back? A Piled up high, you mean?

30 Q Yes. A I had a load of grapes on about seven crates high, I guess.

Q Would that be above your seat? A It may be one crate above or two crates—oh, yes, it would be above the seat, all right.

Q Did you have a top on the truck? A I had a canvas over it.

Q Over the truck? A Over the truck; yes, sir.

40 Q Now, these were piled up to the top of the canvas? A Not exactly to the top of the canvas; you had room to crawl in and out there.

Thomas Hurley, cross.

Q But the load was up over your head? A No, it was not up over my head; they might have reached as far as my shoulders.

Q And it extended out to the sides of the truck? A Yes, sir, from one side to the other.

Q Now, when you started from the station with your load of grapes, was it storming then? 10

A Yes, sir, it had been storming when we started.

Q One of the worst storms you ever saw? A I would not say that. It was quite a tough storm, though.

Q A very severe storm? A Yes, sir.

Q Thunder and lightning and heavy rain? A Yes, sir.

Q And this water that was on the street, how far up Pavonia avenue did it go? A That is 20 something I could not answer you.

Q Had it reached up as far as where you were taking your load? A No, sir.

Q Where did you first meet this water? By the way, the water covered the whole street all the way over to where you took on your load against the Erie freight platform? A No, the water was not up that far.

Q How do you know it did not go up over there? A It had not reached as far as the 30 freight station. All that water was down at the milk station, right across the way from where the trains come in.

Q Right where you were? A Yes, sir, where I met with the accident.

Q That is what I say; it extended over the street there? A Yes, sir.

Q The river had backed up, had it? A I don't know whether it was the river. It is hard for me to say that. 40

Thomas Hurley, cross.

Q Anyway, this water extended all the way down to the river as you were travelling down to the ferry house? A I do not know what you mean.

10 Q All this water that was all over the street there. A There is sort of an incline to the ferry, so I could not see how the water could reach up to the ferry house.

Q So you do not know whether the river backed up or not? A I don't know anything about that.

Q But there was water covering the whole street? A Yes, sir.

20 Q How far did your wheels go down in this water? How far up on your wheels did it reach? Did it reach as far as the hubs? A No, sir; it may have been three or four inches; it might have been less. I could not give you the exact figures.

Q Did it reach up to the hubs of your truck, the hubs of the front wheels? A When the wheel went into the hole?

Q No, I mean as you came along through this water on the street. A Oh, you mean did the water reach up to the hub of the front wheels?

30 Q Yes. A No, sir; I don't think it did.

Q How far up the wheels did it reach? A I could not say. I didn't look down.

Q Did it come up to the knees of your horse? A No, sir; it never came up to the knees of the horse.

Q Well, how far, about? A I cannot tell you.

Q Could you see the hoofs of your horse? A As he lifted them up I could see them.

40 Q But you could not see how far down they went into the water? A No, sir.

Thomas Hurley, cross.

Q How deep do you think that water was?

A That is something I could not answer you. I could not give you no answer on that.

Q Well, you saw it as you came along? A Yes, sir.

Q And as you came along you could not see the car tracks at all, could you? A No. 10

Q Nowhere along there? A Only up at the freight station, as I left the freight station.

Q Well, how far had you been travelling in this water before you met with the accident? A I could not answer that.

Q Can't you give us any idea on that? A No, sir; I could only guess at it and there is no use in my lying about it.

Q Don't you remember how long in your judgment you were travelling along there in the road where you could not see the tracks? A It might have been from here to the end of the court room. 20

Q How many feet do you say that is?

The Court: That is fifty feet, according to the survey of the county engineer.

Q Then you went fifty feet before this accident happened in this water? A Yes, sir. 30

Q Did you have a cover on your seat? A Yes, sir.

Q This heavy rain was beating down there, was it? A Yes, sir.

Q Were you getting wet? A I was underneath the cover sitting on the seat. I had the hood over it.

Q Now, when this accident happened, what caused you to fall? A The front wheel going into the rut alongside the switch there. 40

Thomas Hurley, cross.

Q You did not know there was a switch there before this accident, did you? A What do you mean?

Q Did you know there was a switch there before the accident? A I didn't know what was there.

10

The Court: You did not know of its existence there before this accident?

The Witness: No, your Honor, I had no occasion to go there.

Q And what did you feel, a jerk? A I felt the wheel sinking in.

Q Did you feel a jerk? A What do you call a jerk?

20 Q Did your truck jerk? A When she hit the switch she jerked.

Q You did not see the switch, did you? A No, sir, if I seen it I would not have driven into it.

Q What did you feel? A I felt the forward wheel going in and I was thrown right off.

Q You say you felt the wheel going into something; did you feel the truck lurch? A I don't know just what you mean by lurch.

30 Q You know what a jerk is? A Yes, sir.

Q And you know what a jolt is? A Yes, sir, when you hit something you cannot drive over.

Q Did you feel a jolt? A I felt the wheel going down and I was thrown off then.

Q I am asking you if you felt a jolt.

The Court: Did you feel the wheel hit anything?

40

The Witness: The forward wheel hit the switch when it went into a hole and the for-

Thomas Hurley, cross.

ward wheel struck the switch at the same time. You could not miss it.

Q You felt the wheel going into a hole, didn't you? A Yes, sir.

Q You did not know there was any switch there at the time? A I didn't know anything about it. 10

Q And you did not know anything about the hole? A I didn't know anything.

Q You fell off then? A Yes, sir.

Q How did you fall, on your back or on your feet? A I fell down this way.

Q Then what happened when you fell? A Then I felt a pain pass over the leg.

Q Which side did you fall on? A The left side, and the rear wheel passed over my leg. 20

Q The rear wheel passed over your leg? A Yes, sir.

Q And then what happened, did you lie there? A I laid there, holding my leg.

Q Did you see anything then? A I naturally looked.

Q Well, you did not see anything if everything was covered with water? A Well, if there is a hole there it will be covered with water. 30

Q As a matter of fact, you could not see it because of the water there? A You could not see the hole or the switch with the water covering it, but there was nothing stopped me from putting my hand—

Q Now, I don't want to stop you; your attorney will bring out anything he wants to bring out, but when you fell off the wagon into this water you could not see the tracks nor could you see any holes there? A No, I did not. 40

Thomas Hurley, cross.

Q Now, what happened to you? Did somebody pick you up? A Yes, the fellow from the truck that was following me picked me up.

Q Then where were you taken? A Into the Erie Railroad station at the terminal.

10 Q Did you ever go back to the place where the accident happened? A No, sir, I had no occasion to.

Q This place where your wheels struck the rut, how far was that from the ferry entrance? A From the Pavonia station entrance?

Q Yes. A Maybe two or three hundred feet. It might be more or less.

The Court: At this place where you fell off, was that at the intersection of a street?

20 The Witness: There was no street intersection there.

Q You had passed the Hudson and Manhattan Tube entrance, had you? A Yes, sir.

Q When this accident had happened, how near were you to the ferry entrance? A I was three or four hundred feet away.

Q And you could not see the sidewalk on account of this water, could you? A It was so dark you could not see it.

30 Q Was this at night? A It was between half-past seven and eight o'clock and due to the storm, it was dark.

Q This was during the time we had daylight saving? A Yes, it was in September.

Q And whatever darkness there was was due to the storm? A Yes, sir.

Q It was still daylight? A It was later than daylight, half-past seven in the evening.

40 Q Well, if there was not any storm it would have been daylight? A It might have been.

Thomas Hurley, cross.

Q But at this time, the storm caused it to be dark? A Yes, surely.

Q Was it very dark? A Sure it was. It was so dark that it required lights.

Q Well, could you see the sidewalk? A Not with the darkness you could not.

10

The Court: Did you have any lights on?

The Witness: I had a lantern underneath the floor of the truck. That lantern does not show the way at all.

The Court: Now you say the water covered the rails and what you choose to call the hole. How do you know that the switch and the hole were there?

The Witness: When I fell I put my hand 20 in to see what was the cause of my fall.

The Court: You did put your hand in?

The Witness: Yes, sir, while I was sitting there waiting for somebody to pick me up, your Honor.

The Court: What did this rail feel like?

The Witness: What do you mean?

The Court: You felt the rail you say?

The Witness: It was like a jog.

30

The Court: But you felt that?

The Witness: Yes, sure.

The Court: You felt the jog where the rails came together?

The Witness: Yes, sir.

Q You felt that? A Like here is the track and the hole is there and I put my hand there to see what caused the truck to throw me off.

40

Thomas Hurley, cross.

Q Now, going west on Pavonia avenue from the ferry, on your right is the Erie Railroad yard, isn't that so? A On your left going out?

Q I am talking now of going away from the ferry—all right, we will take it the way you were going. A Going away from the
10 ferry—

Q I will withdraw the question. You were traveling, you were traveling to the ferry, were you? A Yes, sir.

Q On your left was the Erie Railroad terminal and the yards where the trains come in, is that right? A Yes, sir.

Q And there is a picket fence that runs all the way from the ferry all the way up to the Hudson Tube station? A I would not say
20 how far it runs up, but there is a picket fence there.

Q It runs a long distance along there? A A long distance, yes.

Q Do you know whether there is a sidewalk there or not? A Sure there is a sidewalk.

Q Then comes the tracks, is that right? A Yes.

Q And are the tracks nearer to that sidewalk or are they nearer to the freight yards over on the other side of Pavonia avenue? A I believe they are nearer to the sidewalk.
30

Q That is a great big wide roadway from the sidewalk over to the freight depot on the other side, isn't it? A Yes, sir.

Q How wide would you say that was, 75 or 100 feet? A 75 feet I guess.

Q That is, the roadway? A Yes, sir.

Q And that runs that way all the way up to and beyond the Hudson and Manhattan Tube sec-
40

Thomas Hurley, cross.

tion? A Yes, sir—I don't know just how far it runs that way.

Q Now, when you fell down off the truck, you fell into the water? A Yes.

Q And the left side of your truck? A Yes, sir.

Q And did your horse continue on or did it stop? A After it switched he continued on for a few feet—I could not say how far he continued on.
10

Q Well, did the horse stop at once? A After the hind wheel ran over me.

Q Now, you said you felt something? A Yes, sir.

Q Where you were lying, which way were you lying, with your head towards the Erie Railroad yards or towards the freight depot? A
20 Towards the ferry.

Q Your head towards the ferry? A Yes, sir.

Q And your feet toward the west? A Yes, sir.

Q Which hand do you say you felt something with? A My left hand.

Q What did you feel? A I felt a hole right alongside the switch.

Q That is all you felt was the hole alongside the switch? A Yes.
30

Mr. Higgins: Now I ask that the testimony "alongside the switch" be stricken out.

Q You felt a hole, did you? A I don't see why you would like to have that stricken out, because—

The Court: Don't argue.

Q You felt a hole with your left hand? A I would like to answer the way I felt it.
40

Thomas Hurley, cross.

The Court: Well, tell him what you felt.

The Witness: I felt it right alongside of the switch.

The Court: Did you feel any switch?

10 The Witness: Yes, sir, you could feel the tracks lying there and the hole is on both sides of it. You could not help but feel it.

The Court: Not what you could not help, but did you?

The Witness: Yes, your Honor.

The Court: Do these tracks of the trolley company terminate at the end of Pavonia avenue, or start down there?

20 The Witness: I don't know whether that is the end of the run or whether it is the starting point from the ferry; it is one of the two, your Honor.

The Court: Well, how many feet away from the entrance to the ferry at the foot of Pavonia avenue did you fall?

The Witness: Well, as I told the man here, I said about two or three hundred feet.

Recess until 2 P. M.

30

—————
AFTER RECESS.

Examination by Mr. Higgins continued.

Q When you said you fell, you said you felt the hole with your left hand? A Yes, sir.

40 Q After you felt that hole did you get right up then or did you try to get up? A I could not get up.

Thomas Hurley, cross.

Q Somebody came and carried you away? A Yes, sir.

Q Did you move at all from the spot where you fell? A No, sir, I just laid there.

Q You stayed right where you fell? A Yes, sir.

Q Were you sitting up? A No, I was not sitting up. 10

Q Lying down, were you? A Yes, sir.

Q And with your left hand you felt that hole? A Yes, sir.

Q You did not feel any tracks, did you? A When I brought the hand up, when they picked me up, when I brought the hand up I could feel it. It sort of hit—

Q Your hand hit the track? A Yes, bringing it up like that. 20

Q Your hand hit a track then, did it? A Yes.

Q You just hit it as you brought your hand up? A Yes, sir.

Q You could not tell which track that was, could you, I mean, you could not see it, you only just felt it under the water, is that right? A Yes, sir.

Q And you could not tell whether it was the first, second or the third rail? A I could tell that all right because I know what rail the wheel was in; you could see the outside wheel was on the outside of the track. 30

Q But you say you never saw the tracks before? A Well, no.

Q You said you did not know there were any tracks there while you were traveling toward the ferry, didn't you? A There has always been tracks there, but I could not see them, I said. 40

Thomas Hurley, cross.

Q Let's get that straightened out. As I understood you you said you did not know there were any tracks there when you were traveling toward the ferry?

10 Mr. Cutley: I don't think he said that. I think he said he didn't know there was a switch there. He knows there was a track there.

Mr. Higgins: Well, let's ask him.

Q Did you know there were tracks there? A Sure I knew there were tracks there, they stand up above the street near the freight yard and they must have led right into the ferry house.

20 Q You say they must have led to the ferry house; did you see them? A Sure you could see them.

Q Did you see them when you came in from the ferry? A Not at the ferry, but I seen them up above when I left the freight house.

Q That was the first time you noticed them? A Yes, sir.

Q And that was opposite the point where you were loading your truck? A Yes, sir, when I came out of the yard I seen the tracks there.

30 Q But when you came down there you did not know whether there were tracks there or not? A There were tracks there, they led all the way down.

Q Well, how did you know that? A I knew they led all the way down; they would not stop in the middle of the street; I seen trolley cars running there.

Q When did you see the trolley car there? A When I was going over the ferry.

40 Q When you were coming from the ferry? A When I came up the ferry into Jersey City, and

Thomas Hurley, cross.

I was going up to the freight yard I seen the cars down there.

Q Where did you see the trolley cars? A Well, just what do you mean?

10 Q You say you saw a trolley car? A Yes; I seen a trolley car coming down toward the ferry.

Q Did you see one all the way down to the ferry? A No, I didn't look around which way it went.

Q How far were you from the ferry when you passed it? A I could not answer that, I could not say just how far away.

20 Q Did you know there were trolley tracks underneath the wheels of the wagon when you were driving over this water? A When I was going out of the freight yard, yes.

Q I mean when you came down towards the ferry and you struck this water that covered everything, did you know that there were tracks there? A Yes.

Q And before that had you come down anywhere near the rails or to the right of the rails? A I just can't understand you.

30 Q Well, when you left the freight yard up there when you took on your load, which side of Pavonia avenue are these yards on where you loaded up? A They were on the left-hand side of Pavonia avenue going west, like after you leave the ferry.

Q Would that be the south side of Pavonia avenue—do you know which way Pavonia avenue runs, does it run east and west? A Sure, it runs from the ferry out.

Q And that is east and west? A I imagine it is, isn't it?

Thomas Hurley, cross.

Q Where were these yards, on the south side of that street? A On the left-hand side.

Q As you were going out from the ferry? A Leaving the ferry.

Q Well, you went from the ferry to the yards?

A I went to the yards and put the load on.

10 Q Then when you drove out of that yard what did you do? A I came right out onto those tracks that led to the ferry.

Q Did you cross all the way across the road in order to make the turn? A You have to.

Q Why do you have to, it is a great big wide street, isn't it? A It is not so wide up there.

Q Why, it is wide all the way up, isn't it? A I don't know just how wide it is.

20 Q What did you do then? A I drove right out from the yard onto those tracks.

Q How many tracks are there at the point where you drove onto the tracks? A There is a track on this side and a track on that side, one for cars going one way and one for cars going the other way.

Q Four rails altogether? A Four rails altogether.

Q Did you turn toward the ferry then? A I turned toward the ferry.

30 Q And where were the wheels of your wagon when you were on that track? A The left wheels?

Q Where were the left and where were the right? A On the third rail from the sidewalk.

Q Which wheels were there? A Those were the left wheels.

Q The left wheels were in the third rail from the sidewalk? A Yes, sir.

40 Q And where was the right wheel? A Outside of the fourth; it ran alongside.

Thomas Hurley, cross.

Q That is, your truck is wider than the track?

A Oh, yes; the truck is wider than the track.

Q And the right wheels were on the right side of the fourth rail? A Yes, sir.

Q In other words, the most southerly rail of the four tracks? A Is that what you call the southern part of it? 10

Q Did you ride the furthest on your right? A Yes, sir.

Q Now, did you continue all that way down? A I continued that way, yes.

Q Why didn't you come down on the right side of the roadway? A Because it is worse there.

Q What is worse? A That side of the roadway.

Q What do you mean by worse? A It is all 20 ruts and holes there.

Q And you were traveling on the best part of the roadway? A Yes, the best part I thought.

Q And that was the reason you selected the trolley tracks to drive along? A Yes.

Q That is, it was the left part of the roadway? A Yes, sir.

Q Now, did you continue to follow straight in that line as you came to the water or did you swerve your horse either to the right or to the left? A No; I just kept on going. 30

Q You kept on going straight? A Yes, sir.

Q Until you fell down to your left, is that right? A Yes, sir; I fell on my left side.

Q And when you fell you fell to your left of your truck? A Yes, sir.

Q And your horse had not yet begun to swerve away from you, had he? A Oh, he swerved as soon as we hit this hole; it caused the truck to swerve one way and I went to the other side. 40

Thomas Hurley, cross.

Q All right, but did you go clear of the truck when you fell? A I fell right down alongside of it.

Q And then did the back wheel keep on going straight? A Well, she swerved a little; she came over to my way more.

10 Q Over towards you? A Yes, sir.

Q The horse was pulling to the right then, wasn't he? A Yes.

Q And then you say as they were lifting you up your hand struck a rail? A Yes, sir.

Q And that is all you know about the hole in the rail, is it? A Yes.

Q How long did you lie there before they picked you up? A Maybe ten or fifteen minutes; I would not want to say.

20 Q Before somebody came along? A Until this other driver that was coming down behind me could get to me.

Q When you fell there could you see where he was? A When I fell I hollered and I sort of lifted my head a little and I see the truck coming down.

Q How far was he behind you? A Might have been fifteen feet or more.

30 Q Didn't he come right over and help you then? A Jumped off his truck.

Q And then they picked it up right away? A As soon as they could get to me.

Q Then you did not mean you were there for fifteen minutes? A Well, ten minutes.

Q It was only the time he got off his truck and came over alongside of you, wasn't it? A Yes, sir.

40 Q Did anybody else help you? A Well, there was another man, but I do not know just who he was.

Joseph W. Obreiter, direct.

Q You do not know who he was? A No.

Q Who was this man that helped you up? A You mean the driver I am talking about?

Q Yes. A He is a man working in the same job as I did.

Q How much did you say you were earning at that time? A I was getting fifty dollars a week. 10

Q Were you paid a salary? A Yes, sir.

Q What was your salary? A Fifty dollars a week.

Q Wasn't it forty? A No, sir.

Q You are sure it was fifty? A Positive.

Q Who did you say you were working for? A David Oshinsky.

Q Was that your regular salary? A My regular salary, yes.

Mr. Higgins: That is all.

20

JOSEPH W. OBREITER, sworn.

Direct examination by Mr. Cutley.

Q You are a civil engineer? A Yes, sir.

Q Engaged in business in Jersey City? A Yes, sir. 30

Q How long have you been such? A Since 1897.

Q On or about the month of September, 1926, did you have occasion to make a survey of certain tracks on lower Pavonia avenue? A Yes, September 25.

Q Do you recall the date you made it? A I do.

Q And you took field notes, I suppose? A Yes, sir. 40

Joseph W. Obreiter, direct.

Q Did you make a map of it? A I did.

Q Have you got it? A You have it.

Q I show you this map and ask you if that is the one you made? A It is.

Q Is there a sidewalk on the right-hand side of Pavonia avenue? A Going which way?

10 Q Going north? A There is a sidewalk on the north side of Pavonia avenue.

Q And there is none on the other side? A None on the other side, no.

Q You have figured out where the switch is located on this map? A 53 feet—from the curb line to the rail is 17 feet and from here it is 63 feet.

Mr. Higgins: From where to where?

20 The Witness: From the north curb line of Pavonia avenue over to the freight platform.

Q How many feet is the switch from the Pavonia avenue ferry? A About 280 feet, to the eastern end of the cross-over.

Q From the eastern end of the cross-over to the ferry entrance is 280 feet? A Yes.

30 Q And you say there is 17 feet between the most southerly track and the northerly curb? A Yes, sir.

Q Did you examine that crossing? A I did.

Q And the switch? A I did.

Q Did you examine the depressions on either side?

Mr. Higgins: I object. Do not lead him.

The Court: What examination did you make with respect to the location and the pavement about this switch?

40

Joseph W. Obreiter, direct.

The Witness: I found holes in there.

The Court: Is this the only switch in that vicinity?

The Witness: The only cross-over, yes, sir.

Q What did you find, Mr. Obreiter? 10

Mr. Higgins: If the Court please, I think the complaint says 500 feet from the ferry.

The Court: Yes, "about 500 feet."

A I found a depression on the south side of the south rail at the switch of three and one-half to four inches below the top of the rail. That runs about six feet along the rail. I also found a depression opposite the frog. The depression there was an inch and a half below the top of the rail. That runs along the south rail about three feet. I also found a depression at the frog at the east end of the frog between the north rail of the east-bound track and the cross-over, a depression of two inches, and the pavement in there is very rough. Those are the depressions. 20

Q Where is the one that extended for the six feet? A Over here (indicating).

Q That is on the southerly track? A Yes, 30 sir.

The Court: Now mark the depression which you say is six feet long with an "A." Mark the next one with a "B." Mark the next one with a "C."

(Witness complies.)

Q On the most southerly track of the cross-over, did you find any depressions at or near the

40

Joseph W. Obreiter, cross.

track? A On the westbound track near the sidewalk, well, the pavement is very rough in there.

Q What do you mean by very rough? A Well, settlement of the pavement took place.

Mr. Cutley: That is all.

10

Cross examination by Mr. Higgins.

Q What is your business, Mr. Obreiter? A Civil engineer and surveyor.

Q Did you ever attend any school or— A Yes, sir.

Q What school? A Cooper Institute.

Q Are you a licensed surveyor of the State of New Jersey? A Yes, sir.

20 Q How long have you been such? A Licensed?

Q Yes. A Ever since the law went into effect.

Q How long is that? I just want to find out.

A That is in effect since 1922.

Q Where is your place of business? A 15 Exchange Place.

30 The Court: Are any of these depressions on the switch at the third rail out from the sidewalk?

The Witness: No; I didn't find any.

The Court: Any along the third rail?

The Witness: Yes, at the frog.

Q At the switch? A Not in the switch, at the frog at that point.

40 The Court: Is that where the two rails run into the cross-over?

Joseph W. Obreiter, cross.

The Witness: That is where the two rails cross.

The Court: That is what I mean.

The Witness: Yes.

Q At the easterly end of Pavonia avenue there is the Erie ferry, isn't there? A Yes, sir. 10

Q Where are the entrances for the trucks? A By reference to the continuation of these tracks?

Q Where are they on the street with reference to Pavonia avenue? A They are about the center of the roadway between the curb and the freight platform.

Q What is that, the entrance or the exit? A The entrance or exit, I don't know which.

Q That is, for trucks? A Trucks and teams.

Q Where is the first street that you meet driving from the Pavonia ferry toward the west, the first cross street? A I don't know— 20

Q Well, it is 1,000 feet or more away? A Oh, yes; it is about the entrance to the McAdoo tubes.

Q It is over 1,000 feet away at least? A Yes, sir.

Q Or 2,000 feet? A Yes.

Q And what is the width of the roadway at the ferry or from the curb to the freight depot? 30

A I don't know; I didn't measure that. It gets pretty wide down there; it is wider down there than it is here.

Q Where do you first measure the width? What is the furthest point east that you measured the width? A Right here at the cross-over.

Q Didn't you measure it down here at all toward the east of that? A No.

Q You say it is still wider down there? A Yes, there is a jog in the platform here. 40

Joseph W. Obreiter, cross.

Q At the point of this switch, what is the width of the roadway? A Forty-six feet, from the south rail to the freight platform

10 The Court: This depression you have noted here on the third rail, how long was that?

A At the frog?

Q On the third rail. The third rail from the sidewalk. A That is four feet along the rail.

Q Along which rail? A Along the third rail out from the sidewalk.

Q How deep is it? A Two inches below the top of the rail.

20 Q Well, is it two inches all around there, or does it graduate? A Practically so; the blocks have just dropped down.

The Court: The paving blocks, you mean, have dropped down?

The Witness: The paving blocks, yes.

Q The paving blocks have dropped down? A Settled. It is all filled ground there.

30 Mr. Cutley: I ask that that be struck out.

Q Where with reference to that frog is this depression? A Why, at the east end of it.

Q That is to the east of the frog where the southerly rail of the cross-over passes over the third rail from the sidewalk? A Right.

Q And it is east of that cross-over? A Right up against the frog.

40 The Court: You mention blocks. What kind of blocks are they?

Joseph W. Obreiter, cross.

The Witness: Belgian blocks.

Q Is that the case where these other depressions are, that the Belgian blocks have dropped down or sunk? A Yes.

Q Now, what is this mark on the map you have "A" here? A That is the depression. 10

Q Where is that, please? A That is the depression on the fourth rail from the curb, at the switch.

Q How much of a depression is that? A That is three and one-half to four inches below the top of the rail.

Q Extending how long? A Six feet along the rail and a foot and a half out from the rail.

Q Well, you do not mean that it is—how deep would you say it is? A Three and one-half inches at the rail, then it gradually slopes and a foot and a half outside it starts to go down through the rail. 20

Q And this point B, what is that? A That is another depression. That is three feet long on the north side of the fourth rail; that is an inch and a half below the top of the rail.

Q Whereabouts is that? A That is just opposite the frog as indicated there. 30

Q At the fourth rail? A Yes, sir.

Q This point A is at the fourth rail, at the switch, isn't it? A Yes, sir.

Q That is the one furthest west you are talking about? A Point A is.

Q Now, what is the width of this sidewalk, please? A I didn't figure that sidewalk. The sidewalk is seven or eight feet wide.

Q Then it ends up against a picket fence there? A Yes. 40

Joseph W. Obreiter, cross.

Q And north of the picket fence is the Erie Railroad terminal? A Yes.

Q Now, going from the curbing toward the south, the first rail is how far from the curb?

A Two and one-half feet.

10 Q And the second rail? A The second rail is four feet eight and one-half inches more.

Q And those two rails make up the westbound track; is that right? A Right.

Q The distance between the west and the east-bound track is what? A 4.40 feet.

Q And the distance between the third and fourth rail, or the rails of the eastbound track?

A Four feet eight and one-half inches, standard gauge.

20 The Court: In this vicinity where you have indicated depressions, are there other depressions in the street around there? In other words, what is the condition of the pavement generally in that immediate vicinity?

The Witness: Well, the paving is very poor in that vicinity.

30 The Court: I mean are there any other depressions and holes except alongside the rails?

The Witness: Yes; that vicinity out here is full of holes.

The Court: Due to the sinking of the blocks?

The Witness: Yes, due to the settlement. It is very soft in there.

40 The Court: In this vicinity where the cross-over is, and so forth, the depressions you have indicated are not the only depressions in that vicinity?

Joseph W. Obreiter, cross.

The Witness: No, there are others there, but I have not noted them because these were the worst on September 25, 1926.

Q What do you mean by the worst, the worst in the vicinity of the tracks? A Yes, sir.

Q But you do not mean the worst in the road? 10
A No.

Q Are there worse holes in the roadway? A Yes.

Q And is it a fact that this pavement between the tracks in the vicinity of the switch is in better condition than any other part of the roadway? A I would say from a point about thirty feet west, the paving between the tracks there is in excellent condition, but this part here is—well, I don't know why they didn't pave that— 20

Mr. Higgins: I object.

The Witness: It is poor.

Q What do you mean; it is poorer than up here? A Yes, sir.

Q But this pavement here is in very much better condition than that part of that roadway over here, isn't it? A I would not say in very much better condition; I would not say it was in 30
any better or in any worse condition.

Q Don't you know there are holes all over the roadway over there? A I know there are holes there.

Q You are familiar with this section of the town and the roadway there? A Yes, sir.

Q And you know that the ground underneath there is all soft territory? A Yes.

Q And the sinking of these blocks and all these holes around there that you have seen are 40

Joseph W. Obreiter, cross.

due to the soft earth underneath? A Yes. They were not placed upon a concrete base.

Q Are you familiar with the conditions down there, the way water comes in over the tracks?

A No.

10 Q Were you ever down there when the water came in? A No.

Q Well, if water came in and covered this pavement around there, due to that soggy condition of the soil underneath, it would have a tendency for the blocks to sink? A Well, of course, if the water got through and kept it soggy, you would have bad pavement.

Q Did you know there was a catch basin there for water near this switch? A You mean the drain there across the tracks?

20 Q Yes. A Yes.

Q Where is that, please? A I didn't measure that, but it is maybe twenty-five or fifty feet west of the cross-over.

Mr. Higgins: I would like to have this photograph marked for identification.

(Marked Exhibit D. 1 for identification.)

30 Q I show you Exhibit D. 1 for identification and ask you if that looks like the general location down there where this switch is? A Yes.

Q Now, this depression, you say, is east of the frog on the third rail. Whereabouts is that on the picture? A You would not see that on this picture because it is on the other side of the frog.

40 Q Will you mark this, please, with an "A" where you say that depression would be—mark that "C," please, to keep it uniform with the map.

Joseph W. Obreiter, cross.

(Witness complies.)

Q Where is the depression you say is marked "B"? A Here.

Q And the depression you have already marked "A." A That is about the way it runs, about six feet along there. 10

Q That shows the general condition down there, doesn't it? A Yes.

Q Did you see a drain up against the sidewalk there? A This catch basin?

Q Yes. A I didn't pay much attention to that.

Q Do you know whether that is there or not? A It must be there, it is on the photograph. I have not seen it myself, so I could not say.

Q Is that about the way it looks? A That is about the looks of the general conditions down there. 20

Q And can you see those depressions that you speak of there? A Well, you can see the "A" but you cannot see the other ones because of the way the photograph was taken.

Mr. Higgins: I would like to have this photograph marked for identification.

(Marked Exhibit D. 2 for identification.) 30

Q I now show you Exhibit D. 2 for identification. A It does not show very well on the photograph. You can see this one.

Q Well, this one on the third rail, that looks about the way it did on the day you surveyed there, doesn't it? A Yes.

Q Isn't that about the general condition in these places over here? A Yes, it is very poor in there all the way through in there. 40

Joseph W. Obreiter, re-direct.

Q Now, referring to the picture marked Exhibit D. 1 for identification, you said that showed generally the condition there? A Yes.

Q That shows the paving there between the rails? A Yes, sir.

10 Q It shows it better than the paving to the side of it, doesn't it? A That is very true.

The Court: Does that picture he shows you correctly represent the conditions as you saw them there?

The Witness: Yes, but the pictures are taken in such a way that as you get further away you do not see the spots in it, but that shows the condition just about the way it was. It shows the condition of the paving right straight through.

20

Q Referring to Exhibit D. 2 for identification. A Yes, that is a close view.

Q And that shows the general condition? A Yes.

Q Have you ever laid any railway tracks? A Trolley tracks?

Q Yes. A Not trolley tracks, no.

Q Have you ever laid paving? A Oh, yes.

30 Q Where? A Jersey City and Hoboken.

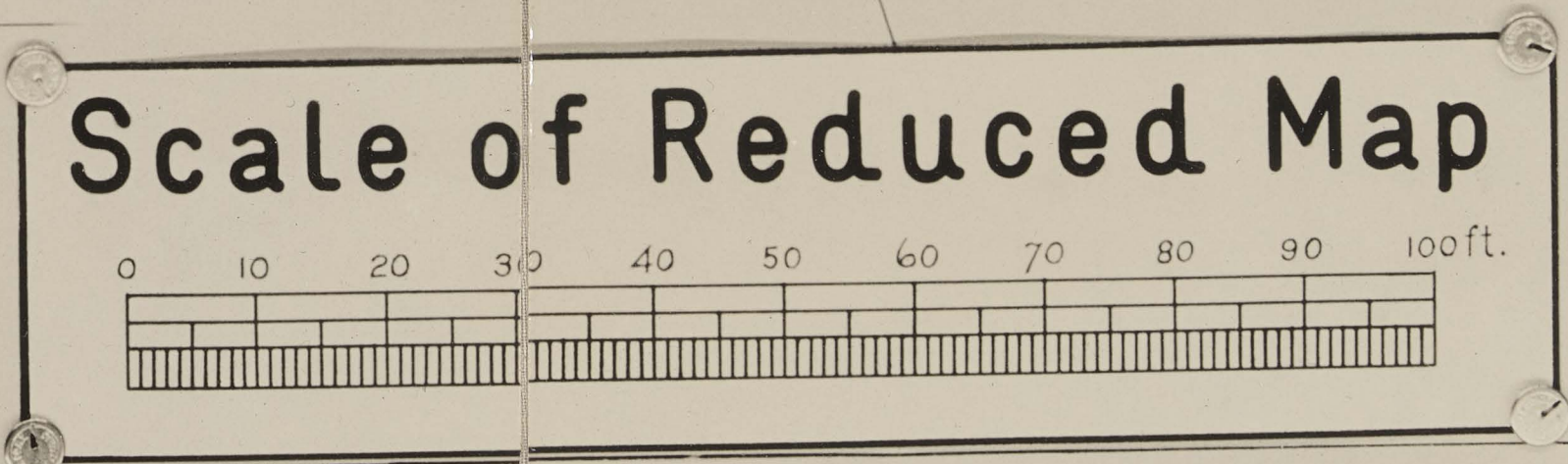
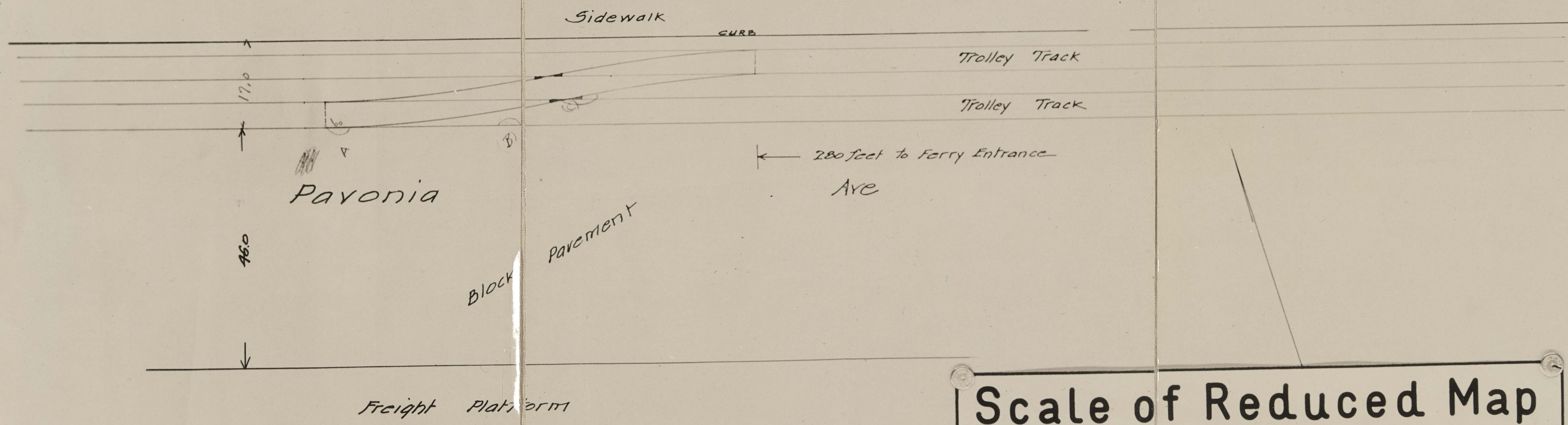
Mr. Higgins: I think that is all.

Re-direct examination by Mr. Cutley.

Q Mr. Higgins I believe asked you something about the condition of the pavement between the tracks about 30 feet away and you said that it was in very good condition. A Thirty feet away?

40

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J.W. O'briener
 C.E. & Surveyor
 Jersey City, N.J.
 Sept. 25-1926

Scale 1" = 10'

Anthony Bonaventure, direct.

Q Thirty feet away, yes. A West of the switch.

Q That was in good shape? A Oh, yes; that paving between the tracks about 30 feet west is in very good shape, fine shape.

The Court: At this point I understand the depressions are not confined to between the tracks or about the tracks, but they are at different places in the street? 10

The Witness: Yes.

Mr. Cutley: That is all. I offer the map in evidence.

The Court: It is according to scale?

The Witness: Oh, yes.

The Court: It may be received.

(Marked Exhibit P. 1 in evidence.) 20

ANTHONY BONAVENTURE, sworn.

Direct examination by Mr. Carlin.

Q How old are you? A 30.

Q Where do you live? A 120 Elizabeth street.

Q Where are you employed now? A David Oshinsky. 30

Q In September, 1926, were you employed by the same man? A Yes, sir.

Q And David Oshinsky is the same employer of Hurley or he was at that time? A Yes, sir.

Q How long were you employed by David Oshinsky? A Ten years.

Q What is the nature of your employment?
A Well, I drive a truck there and when we get busy I am foreman. 40

Anthony Bonaventure, direct.

Q Do you come over to Jersey City very often? A Yes.

Q In and about the month of September were you over to Jersey City? A Pretty nearly every night.

10 Q For how long have you been coming over to Jersey City? A Oh, about seven years.

Q And where do you go in Jersey City? A To the local yards.

Q What do you mean by that? A The Erie local yards.

Q Is that one of your stations? A Yes, sir.

Q What do you haul there? A We haul all kinds of vegetables and fruit.

Q You work for a commission merchant? A Yes, sir.

20 Q And you have occasion to use Pavonia avenue? A Yes, sir.

Q During the last seven years? A Yes, sir.

Q On an average how many times? A Well, we average twice or three times a night; it all depends upon how busy we are.

Q Do you remember September 6th, 1926? A Yes, sir.

Q Driving along Pavonia avenue? A Yes, sir.

30 Q In what direction were you driving? A Towards the ferry.

Q That is in an easterly direction? A Yes, sir.

Q With reference to Hurley's truck where were you, how many feet in back? A About 15 or 20 feet.

Q 15 or 20 feet back of Hurley's truck? A Yes, sir.

40 Q You know the locality in Pavonia avenue? A Yes, sir.

Anthony Bonaventure, direct.

Q And you know that switch or cross-over at the end of Pavonia avenue? A Towards the end of Pavonia avenue, yes.

Q Well, about the end. A Yes, about the end of it.

Q Do you know how many feet from the entrance to the depot it is, about? A About 250 or 300 feet. 10

Q Do you remember September 6th, 1926? A I do.

Q Do you remember coming to the place where that switch is located? A Yes.

Q Did you see anything happen to Hurley at that place? A Well, Hurley was in front of me and I am right in back of him about 15 or 20 feet away from him and I see Hurley's truck, the front part of the truck, swerve, like going down into a hole— 20

Mr. Higgins: I ask that that be struck out.

The Court: Strike that out. You may tell what you saw. How far were you away then?

The Witness: About 15 or 20 feet. I seen the truck swerve, the front part of the truck, then the truck went down again and swung. I saw Hurley on the ground and I got off my truck and went over to him and asked him what happened to him and he said— 30

The Court: Not what he said, only what you saw. What happened.

The Witness: I just spoke to him—

Q What did you do? A I picked him up from the ground. 40

Anthony Bonaventure, direct.

Q At what point? A Right where the switch is.

Q At the switch? A Yes.

Mr. Higgins: I object to the leading.

The Court: Don't lead. Describe where he was. 10

The Witness: He was right by the third track and his feet were on the second track, laying down—

Mr. Higgins: From which way?

The Witness: His head was toward the Erie depot.

Q His head was toward the curb? A His head was toward the curb, right.

Q Where was his truck at that time? A Well, his truck kept going. 20

Q What do you mean by that? A The horse was thrown to one side and the truck was still going.

Q Did you see the wheel go over his leg? A No, sir.

Q Do you know what happened to him? A I went down and picked him up and we brought him—another fellow came over to me, Tom was so heavy I could not lift him up and another fellow came over and both of us picked him up and brought him to some office in the Erie depot. 30

Q You were fifteen or twenty feet in back of Hurley? A Yes, sir.

Q And you were driving your truck the same as Hurley? A Yes, sir.

Q And yours was loaded, too? A Yes, sir.

Q What happened to Hurley's truck as it hit the switch there? A Well, Hurley's truck, when I saw the front part of the truck, the front wheels 40

Anthony Bonaventure, direct.

swerved and he was knocked over again and I noticed his horse going on the right—he had a gray horse at that time and you could not miss it—and I seen Tom on the floor.

Q You mean on the ground? A Yes, sir, lying down on the ground.

Q Did you see Hurley's leg at that time? A I could not see it at the time because he had his stockings and pants on. I noticed his leg in the office. 10

Q Did you see its condition then? A Yes; the whole bone was fractured and everything.

Q You say you came over that way for about seven or eight years? A Yes, sir.

Q Daily, or what? A Pretty nearly every night.

Q And you know the condition of that locality there in and around the switch? A Yes, sir. 20

Q Can you tell us what the condition of the switch was or in that locality at the time?

Mr. Higgins: I object. Had he been there before the accident?

Mr. Carlin: He said he had been there for seven or eight years.

The Court: How long before the accident did you notice the place where the accident happened? 30

The Witness: Oh, about three years.

The Court: When was the last time before the accident you saw it?

The Witness: Well, this was on a Sunday night. I was there Friday night. Of course, we do not work Saturday night.

Q Well, prior to that, when were you there?

A Every night before that. 40

Anthony Bonaventure, direct.

Q You were there every night? A Every night.

Q Can you tell us the condition of that place where the switch is? A Yes, sir.

Mr. Higgins: I object.

10 The Court: Did you see Mr. Hurley lying there that night?

The Witness: Yes, sir.

The Court: And he was between the second and third rails, his body?

The Witness: Yes, sir.

The Court: Out from the nearest curb?

The Witness: Yes, sir.

20 The Court: Well, now, what was the condition of the pavement as you observed it on the Friday before?

The Witness: Right there where the switch is was a hole about—

The Court: Not where the switch was, but where this man was.

The Witness: Where he was lying there, well, there is a hole there about three and a half or four inches.

30 The Court: Three and a half or four inches what?

The Witness: Below the car tracks.

Q Did you see any holes where this switch is at that time? A Yes, sir.

Q How many holes can you remember? A There were several holes there all along there.

Q Do you know how deep those holes were? A Yes, sir.

40 Mr. Higgins: I object unless it is first shown what holes he is talking about.

Anthony Bonaventure, direct.

The Witness: Before you come to the switch and all along where the switch is.

The Court: How about out in the street?

The Witness: Part is good.

The Court: Are there depressions there?

The Witness: Yes, sir.

10 The Court: At that time, about the time of the accident?

The Witness: Yes, sir; it was just as bad.

The Court: Were there depressions all the way across the street, in different places?

The Witness: Yes, sir.

The Court: Is there any slope to the street there?

The Witness: Yes, sir.

10

20

Q Now, did you notice any holes around this point? A I did.

Q About how many did you notice? A There are several there.

Q Do you know how deep they are? A They run from holes two inches, two and a half inches, three inches deep, inside the rail and outside the rail, between the third and fourth rails.

30 Q Did you see where Hurley was lying? A Yes, Hurley was lying on his side.

Q And did you notice a depression there? A Right where the switch is. When we brought him into the depot I went back to the spot where we picked him up to find out what the trouble was and I noticed the switch and the hole.

Q And Hurley went to the hospital and you left him, did you? A Yes, sir.

40 Q Did you know the salary of a driver for this company at that time? A Yes, sir.

40

Anthony Bonaventure, cross.

Q What was it in September, 1926? A Fifty dollars.

Q Was that the flat rate? A Yes, sir.

Q At that time did you make any overtime on occasions? A When we were busy we could make five or ten dollars a week more.

10 Q But the regular rate was fifty dollars a week? A Yes, sir.

Q Hurley got fifty dollars, you knew that? A Yes, sir.

Mr. Carlin: That is all.

Cross examination by Mr. Higgins.

Q Had you come from New York with Mr. Hurley that night? A Yes, sir.

20 Q You went to this freight yard and got your load? A Yes, sir.

Q And you went out together? A From the freight yard, yes.

Q And he started out ahead of you? A We both went to the yard at the same time.

Q Did you have the same kind of a truck that he had? A Yes, sir.

Q Where is this yard you went to? A It is on Pavonia avenue.

30 Q And how far is it from the ferry? A About 1,000 to 1,300 feet—I could not tell you.

Q It is a good distance beyond the switch, isn't it? A Yes.

Q How many blocks would you say? A I would say it is about 1,000 feet or 1,300 feet.

Q Now, when you left the freight yard, what part of the roadway was Hurley on going toward the ferry? A We always—

40 Q Not what you always do, what you did that night. A This night we were riding on the

Anthony Bonaventure, cross.

trolley tracks, the left wheels by the third rail and the right wheels outside the fourth track.

Q His left wheels were on the third track and his right wheels were on the right side of the fourth track, is that it? A Yes, sir.

Q On the side of the fourth track? A Yes, sir. 10

Q When did you turn in on those tracks that night? A Right from the yard.

Q Then you came right on down straight? A Yes, sir.

Q There was a terrific storm on that night, wasn't there? A Yes, sir.

Q And it was raining very heavily? A Yes.

Q Lightning and thunder? A Yes.

Q And did that storm interfere with your view? A I don't think so. 20

Q Was there light enough for you to see? A There was enough light.

Q Was it daylight? A I would not call it daylight, but you could see.

Q About what time of day was it? A It was between seven and half-past seven.

Q Well, was it dark or light? A Well, I would not call it very dark; it was around getting dark.

Q But there was this terrific electric storm? A Yes. 30

Q And did the water that was over the street extend up to the yards where you came out of? A No, sir. That stopped about 500 feet from the yard.

Q You met the water 500 feet from the yard? A Yes, sir.

Q How much further did you have to go to the ferry? A Oh, on the average about eight or nine hundred feet. 40

Anthony Bonaventure, cross.

Q How far did Hurley go before he fell under the truck? A From the yard?

Q From the time you met the water up to the point where he fell off, how far did he go? A About 300 feet.

10 Q And as you went toward the ferry, the water kept getting deeper, did it? A Parts were deeper and some parts were not.

Q But it covered all the roadway that you went over? A I won't say it covered all the roadway, no.

Q The water covered all the tracks, didn't it? A Part, not all of it.

Q Well, it covered the tracks where the accident happened, didn't it? A No, I could see the car tracks.

20 Q Did you hear Hurley say he could not see the switch? A I didn't hear him; I was not paying attention.

Q And you say you could see the tracks? A I could see when I went back again, yes.

Q Did you see these tracks when you were picking Hurley up? A I could not tell you, I was more anxious to pick up Mr. Hurley. I didn't take notice if the water covered the tracks or not. I was more anxious about Mr. Hurley.

30 Q How far were you behind Hurley when he fell? A About fifteen or twenty feet.

Q That is, your horse was fifteen or twenty feet behind him? A Yes, sir.

Q Were you running your horse or walking? A Walking.

Q His horse was walking and your horse was walking? A Yes, sir.

40 Q All the way down? A Yes, sir.

Anthony Bonaventure, cross.

Q Could you see Hurley as you were driving behind him? A No, sir, I cannot see Hurley, but I am driving right behind him.

Q Why not? A Because we had the cover up that night on account of the fact that it was raining.

Q What was the next you saw with reference to Hurley's truck? A I seen the front part of his truck swerve; the horse got thrown on the right side.

Q What do you mean by thrown? A Got thrown on the side.

Q He turned you mean? A He turned, I noticed when the horse swerved on the left and he went right back again on the right.

Q You saw the horse turning? A Yes, sir.

Q Then did you see Hurley jump off? A No, sir.

Q You did not see him? A No, sir.

Q When did you first see him? A I seen him on the ground.

Q And where was the truck then when you saw him on the ground? A Why, the horse was still going.

Q Had the truck passed him? A Yes, sir.

Q And where was Hurley lying in the roadway? A He was lying between the third and the second tracks.

Q Now, you could not see the track at that time, could you? A You could notice—

Q Could you see the track? A Not at that particular moment.

Q All right, how was he lying? A He was lying on the side.

Q With his head which way? A His head toward the ferry depot.

Anthony Bonaventure, cross.

Q Which side was that? A Where the fence is, toward the fence.

Q Was it toward the ferry? A Toward the fence, this way.

10 Q His head toward the sidewalk? A Yes, sir.

Q And was he on his right side or his left side? A On his left side.

Q And you picked him up with somebody's help? A Yes, sir.

Q Do you know who it was that helped you pick him up? A No, sir, it must have been a fireman or an engineer.

Q Where did you take him? A We carried him into the office of the Erie Depot.

20 Q All the way down to the ferry? A Not all the way down; there is an entrance there.

Q A shanty? A No, there is a little gate; we tried to open the gate and we could not open them, and somebody opened the window and we put Tom through the window.

Q There is a little house there? A Yes, sir.

Q Where was that, toward the ferry, or did you have to walk back toward the place you came from? A Toward the ferry.

30 Q How far did you walk carrying him? A Oh, about 200 feet, I suppose.

Q From the point where this accident happened to the place where you took Hurley in, you had to go 200 feet, is that right? A Yes.

Q That would be about the length of a city block? A Practically.

Q Up to that point you had not noticed the tracks? A No.

40 Q And you say you came back then? A Yes, sir.

Anthony Bonaventure, cross.

Q It was raining all this time, wasn't it? A Well, it was stopping a little; there was thunder and lightning.

Q I mean, all the time while you were taking Hurley down to this house and coming back, it was raining, wasn't it? A Yes.

10 Q Now when you came back there could you tell what point you had picked Hurley up at? A Yes.

Q How could you tell where you had picked him up? A Because I could see where the posts was there and I went to the nearest post.

Q Wasn't the water covering everything there? A Not everything.

Q Wasn't it covering all the tracks? A The biggest part of the tracks was covered.

20 Q You could not see the tracks there, could you? A I looked around and I put my hand down and I noticed the switch and the hole there.

Q You could not see but you put your hand down and felt it? A Yes, I felt it where that switch was.

Q You could not see it? A I won't say I seen it, but I felt it.

Q You did not see it but you felt it? A I felt it.

30 Q Didn't you just say you saw it? A I didn't tell you I saw it. Let's get that right. When I went back again I just wanted to see how all this happened and I looked around and the first thing I seen was the hole, then I felt around and I felt the switch and the hole.

Q What part of the track did you feel? A I felt it right on the third track.

Q You felt the third track? A Yes, sir.

40 Q What did you do, go feeling around the water holes? A No, I just went to this particu-

Anthony Bonaventure, cross.

lar spot and I felt along; there was all holes all along the tracks.

Q Whereabouts? A Where Mr. Hurley fell.

Q Does this picture look like the place, going away from the ferry? A Yes, sir.

10 Q That is where you came down? A Yes, sir.

Q Where were these holes you say you saw there? A Right around here.

Q Around here? A In between here and all along here.

Q Show me the holes there. A I cannot show them on the photograph there.

Q Do you see any holes there? A Well, I won't say I see any holes in the photograph there.

Q I am asking you now if you can show me any holes on the photograph? A Along in here.

20 Q Are you talking about the time of this accident? A Yes, sir.

Q There was a hole there at the time of the accident? A Yes, sir.

Q Whereabouts? A All along this side and between here and here, and all along here.

Q I want to know if there were any holes on this track as you came along there? A All the way up?

Q Yes. A No.

30 Q The track was in good condition and the reason you picked out the track was because it was in better shape than the roadway? A Yes, sir.

Mr. Higgins: I would like to have this photograph marked for identification.

(Marked Exhibit D. 3 for identification.)

40 Q As you come down here, there are a lot of holes down there? A Yes, sir.

Anthony Bonaventure, cross.

The Court: Are you referring now to the tracks and out in the roadway?

The Witness: Yes, sir.

The Court: It is all paved with the same material, is it?

The Witness: You mean in there between 10 the trolley tracks?

Q Isn't it Belgian block in between the car tracks? A Yes, but it is smoother up here.

Q And between the tracks it is smoother, isn't it? A Yes, sir.

The Court: But it is all Belgian block, isn't it?

The Witness: I don't know what you call 20 Belgian block.

The Court: Stone blocks.

The Witness: Stone blocks; yes, sir.

The Court: And that goes all the way across the street?

The Witness: Yes, sir.

Q Referring to Exhibit D. 2 for identification, does that look like the roadway, looking toward the ferry? A Yes, sir. 30

Q Does that show the holes you are talking about? A This doesn't seem to show it.

Q This hole you say Hurley went into is not shown anywhere on that photograph? A No, sir.

Q All right, then, referring to Exhibit D. 3 for identification; is that the switch there where you say Hurley fell? A Right over here.

Q Will you mark that, please; mark the place where he fell? A With an X? 40

Anthony Bonaventure, cross.

Q Yes. That is where he was lying, was it?

A Yes, sir.

Q Mark that with your initials. A (Witness marks photograph.)

Q That is where Mr. Hurley was lying? A Yes. If you show me the other one I can maybe
10 tell you better. There were holes all along the switch here.

Q Where do you see them on this picture? A Right here.

Q All right; isn't that the switch there? A I could notice it better on this picture.

Q Are there holes on this picture? A I don't see it on the photograph, but naturally you could see better if you go over there.

Q You say you put your hand down and felt
20 a hole? A Yes, sir.

Q Where was that hole, please? A Right where the switch is.

Q Well, you marked this picture "A. B."; is that where it is? A Around that switch.

Q And that would be just east of the switch, on the third rail from the curb? A Yes, sir.

Q Now, did you feel the rail? A Yes, sir.

Q Was it a straight rail where you felt it? A No, sir.

Q What was it? A It was a curve, like.
30

Q Why did you go feeling down? A I was told to go down there and see how this thing happened.

Q And you went around feeling the rail? A The first thing I felt was a big hole, then I felt the rail there.

Q How deep was this hole you felt? A Three and a half or four inches.

Q And how wide? A I guess about three or
40 three and a half inches.

Cornelius S. Cassidy, direct.

Q And how long was this hole you put your hand into? A On an average about a foot, I guess.

The Court: Did it extend out from where the switch was?

The Witness: Beyond and up further
10 where the switch was.

The Court: And the same condition existed out in the street also?

The Witness: Yes, sir.

Mr. Higgins: That is all.

CORNELIUS S. CASSIDY, sworn.

20

Direct examination by Mr. Cutley.

Q You are a patrolman in the Jersey City Police Department? A Yes, sir.

Q How long have you been such? A Eight years.

Q What precinct are you connected with? A The second.

Q In the month of September, 1926, were you connected with the Second Precinct? A The
30 Second Precinct, yes, sir.

Q Were you detailed to the scene of this accident? A No, I was not detailed.

Q You were not detailed? A No, sir.

The Court: Is that on your beat?

The Witness: That is in my jurisdiction.

Q What is your post? A I am a motorcycle reserve man.
40

Cornelius S. Cassidy, direct.

Q Reserve man in the Second Precinct? Yes, sir.

Q Is Pavonia avenue in the Second Precinct?

A Yes, sir.

10 The Court: Do you know the course of the trolley tracks on Pavonia avenue two or three hundred feet up from the ferry?

The Witness: Yes, sir.

Q You were not working about 7:40 that evening? A No, I worked up to about four o'clock that day.

Q You had no connection with this accident? A No, I was not near it, didn't see anything happen.

20 Q How long have you been in the Second Precinct? A About six years.

Q Do you ever have occasion to use Pavonia avenue? A Daily.

Q For how long? A About six years at that time.

Q Do you go down to the end of Pavonia avenue, to the Erie Railroad? A Yes, I go down to the ferry house.

30 Q And that has been continuously for the last six years or so? A Yes, sir.

Q Do you know where the switch is about the end of Pavonia avenue? A Yes, sir.

Q Do you know how many feet it is from the entrance to the ferry? A About 150 feet, I should judge, from the ferry house.

The Court: Well, is that the only one in that vicinity?

40 The Witness: Yes, sir.

Cornelius S. Cassidy, direct.

Q In the month of September, 1926, you had occasion to visit around there? A I rode up and down there; yes, sir.

Q Did you notice the condition of the pavement? A In and around the particular section you speak of, the road was in bad condition. 10

Mr. Higgins: I ask that that be stricken out. He was asked if he noticed it.

The Witness: Yes, I noticed it.

Q What was the condition of the pavement around the switch at that time?

Mr. Higgins: What date is this?

Mr. Cutley: September 6, 1926. 20

A It was in bad condition.

Q What do you mean by bad condition, officer?

A The condition of the roadbed there. I don't know whether stones had been sunk or what has happened, but it is in very bad condition.

The Court: Over how big an area of the roadway does that condition extend?

The Witness: Well, the roadway across the length of that street, guess it is about fifty feet, is not in such good condition, but the tracks— 30

Mr. Higgins: I object.

Q For how long a time did that condition exist down there? A It existed for quite a length of time, to my knowledge.

Q About how long, would you say? A Say, maybe, about a year. 40

Cornelius S. Cassidy, cross.

Q Did you see it almost daily for that period of time? A Yes, I had occasion to use that street daily for that length of time.

Q Now, in and around the switches, you say, it is in bad condition?

10 Mr. Higgins: I object; please don't lead.

A The roadway is in bad condition.

Q What do you mean by bad condition? A By that I mean that the cobblestones between there may have either sunk or there are cavities in the road, anyhow.

Q Is that the condition in the vicinity of these tracks? A That is the condition at the cross-over west of and leading to the cross-over.

20 The Court: Are these cavities in other places than along the tracks?

The Witness: Yes, sir.

The Court: At places where wagons travel when they are not on the track; is that right?

The Witness: Yes, sir.

The Court: Is there a grade at this point?

The Witness: No, sir; it is kind of flat there.

30 Mr. Cutley: Cross examine.

Cross examination by Mr. Higgins.

Q You have been down there how long? A I have been there about six years.

Q And you say the roadway in the tracks is—
A Well, up to say about twenty feet before you hit this switch the roadbed is fairly good.

Q It is good until you get down to this point?

40 A Yes, sir.

Cornelius S. Cassidy, cross.

Q But other than right in the tracks, the roadway is all ruts, isn't it? A Well, there are parts of the roadway that are not so good.

Q And the roadway in the tracks is the best part of the road? A Up to that point.

Q As you get closer to the ferry it gets worse?
A After you leave the car tracks, it is not as good as the car tracks. 10

Q Do you remember the night of this accident? A I was not working then; I was relieved.

Q Did you go down there that night? A No, sir.

Q When did you next go there? A I went there two days later.

Q Was there any water in the street then? A 20 No, there was no water.

Q Well, you know on occasions when there are severe storms and severe wind, the water comes up on Pavonia avenue? A Yes, sir.

Q And covers it up to what point, do you know? A It has covered it as far as the tube station.

Q And it covers the whole roadway, doesn't it? A Yes.

Q And that has been going on for years, hasn't it, as long as the place has been down there? A Yes, sir. 30

Q Do you remember November 21, 1927? A Well, I remember the date, but I just cannot recall any incident.

Q I show you a picture. That is that point down there, isn't it? A That is in that vicinity, yes.

Q Do you remember the day of that storm?
A No, sir; I do not. 40

Bernard J. Farmer, direct.

Q Well, that is all covered in that picture, isn't it? A It looks like it there.

Q The water is up to the wheels on that truck in the photograph, isn't it? A Yes, sir.

Q Don't you remember that storm on February 1, 1927? A No, sir; I don't remember the storm.

Q Didn't you ever see the water come in like that? A I have never seen it that way, no, sir. I have seen it down there where it was so that you could not get down with a truck, I think in 1923 or 1924; then they raised that place down there.

Q Don't you know that on the night of this accident it was all flooded with water? A No.

Q You did not go down there? A No, sir.

Mr. Higgins: That is all.

BERNARD J. FARMER, sworn.

Direct examination by Mr. Cutley.

Q You are attached to the Second Precinct, Jersey City? A Yes, sir.

Q And have been for how long? A Eight years.

Q And are you familiar with the locality at Pavonia avenue near the ferry house? A Yes, sir.

Q Do you live down there? A No, sir; I do not.

Q Have you been on post down there? A Yes, sir.

Q Were you at the scene of this accident on Labor Day a couple of years ago? A Right after the accident; yes, sir.

Bernard J. Farmer, direct.

Q How soon after the accident did you get there? A We got the telephone call at the station house, I believe, about 7:30, and we arrived there about 7:40.

Q Where was Mr. Hurley at the time? A He was lying on two desks in the station master's office of the Erie Railroad.

Q Do you recall if it was raining at the time? A It was.

Q Very hard at that time? A Not very hard at the time.

Mr. Higgins: What does that mean, when he arrived?

The Witness: When I arrived.

Q How did you get down there? A In the patrol wagon.

Q Did you have any difficulty getting there with the wagon? A No, sir; we did not.

Q What was the condition of the street with regard to whether or not there was water on it? A There was a little water on the street, but there was no such thing as a flood.

Mr. Higgins: What time was that?

The Witness: 7:40.

Q Did you make a report? A I made a report.

Q Did you see the switch that night? A I did not take any notice of it.

Q You have done duty along there, haven't you? A Yes, sir.

Q And you know that switch? A Yes, sir.

Q Have you had opportunity to observe the condition of the pavement right near the switch? A I have.

Bernard J. Farmer, direct.

Q And that is due to the fact that you were on duty down there? A Yes, sir.

Q What was the condition of that pavement in September, around Labor Day, 1926?

10 Mr. Higgins: Is this prior to this accident?

Mr. Cutley: Yes.

A Why, it looked to me like the Public Service—

The Court: No, no; tell us about the street.

The Witness: The street at that point is in very bad condition.

20 Q What do you mean by that? A The cobblestones are lower than the rails at the cross-over.

Q How much lower? A About four inches.

The Court: Is that because of a depression in the blocks there?

The Witness: A depression in the stones.

The Court: Does that condition exist in other places along there in that immediate vicinity?

30 The Witness: Well, prior to when the street was paved, yes.

Q I show you this map. Do you know whether or not there is a depression in this place?

Mr. Higgins: Where is that, please?

The Court: Let him indicate if he can where they are.

40 Q Show us where they are. A This is the eastbound tracks coming in here—

Bernard J. Farmer, direct.

Mr. Higgins: That is the westbound track.

The Witness: Well, this is the eastbound track. He was coming down Pavonia avenue and he struck it right in here, the cross-over—

Mr. Higgins: I don't mind Mr. Cutley 10 telling him the directions on this map. Now he has him going the other way.

The Witness: Well, I say this is the eastbound tracks and this is the westbound track. As he was coming down Pavonia avenue he was coming on the eastbound tracks and he hit this cross-over—

The Court: What do you want to find out?

Mr. Cutley: I want to find out whether 20 or not the roadway is depressed between the tracks.

The Witness: Right in here they are.

The Court: Put a mark there.

(Witness complies.)

Q Now, what is the nature of those depres- 30 sions; are they holes or what? A Why, in these depressions of the street the blocks are sunken and the rails are three or four inches higher than the blocks.

Q And you have indicated the third and fourth rails at the cross-over? A Yes, sir.

Q How long has that condition existed, to your knowledge? A Why; quite some time.

Q Prior to September 6, 1926? A Why, yes; about two years.

Mr. Cutley: Cross examine.

Bernard J. Farmer, cross.

Cross examination by Mr. Higgins.

Q Officer, the mark you made here, is that where you say the hole was— A I won't say that is where the hole was, but I will say that that marks where the depressions are.

10 Q Do you know which is north and which is south? A Yes, sir.

Q Is that the north rail at the switch where you marked it? A Yes, sir.

Q And that rail is beyond the first and second rail from the sidewalk, isn't it? A Yes, sir.

Q What time did you get down there? A I arrived there about 7:40.

Q And you do not know how long before that that this accident happened? A I do not.

20 Q Where did you find them, in the stationmaster's office? A In the stationmaster's office of the Erie Railroad, lying on two desks.

Q Now, when you arrived there was it still raining? A Yes, it was raining.

Q Hard? A I cannot say hard, no.

Q You remember the storm that night? A Yes, sir.

Q It was a very severe storm? A Yes, sir.

30 Q And the water was up in the street so that the tracks were covered? A It was not covered from any flood; it was covered from rain water.

Q It was covered? A Yes.

Q How far back did the water extend from the ferry house? A It did not extend back at all; it was just the rain water that was there.

Q Well, it was all over the street, wasn't it? A No flood, no.

Q Well, there was water covering the whole roadway, wasn't there? A Well, yes.

Frank E. Leonard, direct.

Q How deep was it? A Maybe about an inch or so.

Q Now, then, the roadway to the right of the tracks as you go toward the ferry house—the pavement at the tracks is the best pavement on Pavonia avenue? A Yes, sir.

Q And it was at that time? A Yes, sir. 10

Mr. Higgins: That is all.

Re-direct examination by Mr. Cutley.

Q That is up to a point twenty feet—

Mr. Higgins: I object; leading.

Q Where was this wonderful roadway he is talking about? A That is at a point twenty feet east of the cross-over. 20

Mr. Cutley: That is all.

FRANK E. LEONARD, sworn.

Direct examination by Mr. Cutley.

Q You are a resident of Jersey City? A Yes, sir. 30

Q And you have lived in lower Jersey City how many years? A All my life, 34 years.

Q In the Pavonia avenue section? A Yes, sir.

Q In the vicinity of the Erie Railroad station? A Down that way.

Q Have you had occasion in all your life to use that roadway? A Yes; I rode down there lots of times. 40

Frank E. Leonard, cross.

Q Were you employed by the Erie Railroad at one time? A Yes, sir.

Q For how many years? A Well, I was with the Erie Railroad working around the ferry.

Q Do you know this section of lower Pavonia avenue we are talking about? A Yes, sir.

10 Q You are a chauffeur? A Yes, sir.

Q And you have been driving down there for a good many years? A Yes, sir.

Q Have you noticed the condition of this switch near the ferry house? A Yes, sir.

The Court: Did you notice it in September, 1926?

The Witness: Yes, sir; I have.

20 Q And what has been the condition of it? A Well, down as far as the station where the milk comes in it is bad.

Q When you say it is bad what do you mean? A It is all ruts.

Q Can you drive an automobile over it with safety? A Well, you have to slow down to about five miles an hour unless you can hold the track.

30 Mr. Cutley: Cross examine.

Cross examination by Mr. Higgins:

Q You know the vicinity down there, do you? A Yes, sir.

Q And what is the condition of the roadway to the right of the tracks as you go down there beyond this switch? A Well, the pavement is in bad condition.

40 Q Are you familiar with the fact that when there is a heavy storm there are floods down

Joseph W. Obreiter, re-direct.

there; you know that, don't you? A I seen it down there.

Q Before the accident on September the 6th? A Yes, sir.

Q And you know that the water floods the whole roadway on Pavonia avenue? A Years ago. 10

Q What do you mean by that?

The Court: Before September 6, 1926.

The Witness: Well, I have seen it pretty nearly half ways to the tube.

The Court: We will recess now until 10 A. M. tomorrow morning.

20

10 A. M.

Mr. Cutley: May I be permitted to recall Mr. Obreiter, the surveyor?

The Court: You may call him back.

Mr. Cutley: I would like to offer these interrogatories in evidence.

The Court: They may be received.

(Marked Exhibit P. 2.) 30

Re-direct examination by Mr. Cutley.

Q I understand in the course of your testimony yesterday you said you had been engaged in laying some kind of track?

Mr. Higgins: He didn't say that.

The Court: Pavement.

The Witness: Pavement. 40

Joseph W. Obreiter, re-direct.

Q What kind of pavement? A Block pavement and asphalt pavement.

Q In view of what you have testified to yesterday and as to your knowledge of conditions at the switch on the lower part of Pavonia avenue near the Erie station, what would you say as to whether traffic over that switch would enlarge that depression?

Mr. Higgins: I object to that because it is leading. He might ask what caused this.

Mr. Cutley: I will reframe the question.

Q What in your opinion would be the effect of continual heavy traffic over the switch and over the depressions as you saw them in September, 1926?

Mr. Higgins: If the Court please, is that intelligent? It seems to me to be a little too broad.

The Court: In what respect?

Mr. Cutley: I will reframe it.

Q What in your opinion would be the result of traffic such as has been testified to in this case going over that particular pavement at that switch? A Why, it tends to make it worse right at the switch on account of the trolleys running back and forth—

Mr. Higgins: I object.

The Court: What was the cause of the depressions in the roadway other than those at this switch?

The Witness: Why, the foundation under it and the heavy traffic going over it. It would not sustain the load.

Joseph W. Obreiter, re-direct.

The Court: At any point, is that what you mean, in that particular radius?

The Witness: Of the switch? Yes, right straight through.

The Court: In the roadway or in the tracks, either one?

The Witness: Yes; but it is worse on the tracks on account of the trolleys running in there. There is always a certain jar that the track is given when the trolley makes the switch and it tends to loosen up the pavement alongside of it. It has always been a problem to hold pavement alongside of a track.

The Court: This condition alongside the third rail at or near this switch which you have told us about, what was the cause of that, in your opinion?

The Witness: In my opinion the cause of that was the switch loosening up the blocks and the heavy traffic going over it drove them down still more on account of the soil underneath. It did not have a proper foundation. I don't know whether you can get it there. It is all filled ground there.

The Court: Was it due to the laying of the kind of pavement upon the ground where it was, or was it in any way due to the construction or the manner of construction of the switch and the rail itself?

The Witness: Well, the rails are standard construction, there is no question about that, but it is due to the pavement that is put in alongside of it. As I said before, it is always a problem to hold the pavement alongside of a trolley track, even on good

Joseph W. Obreiter, re-direct.

subsoil, especially on a switch or a curve where the trolley car comes along and always gives the rail a certain jar when it is making the turn.

10 The Court: Did you examine the switch and the rail at this time?

The Witness: Why, superficially, yes.

The Court: Was there anything wrong in the construction or in the maintenance of that track there?

The Witness: No; the track is all right.

The Court: Proper kind of a rail, was it?

The Witness: Standard.

The Court: Proper kind of a switch?

20 The Witness: Standard.

The Court: Was there anything about the construction or maintenance of that switch which, if the pavement had been properly laid, would have in any way produced the condition which you found?

The Witness: I think the maintenance was probably a little lax.

Mr. Higgins: I move that that be stricken out.

30 The Court: Strike that out.

The Court: What I am trying to ascertain is this: Whether you on your examination saw any evidence, from your experience as an engineer, of an improper laying or maintenance of the rail or the switch which caused this hole, or tended in any way to make that particular depression?

The Witness: As I said before, the maintenance of it.

40 The Court: What do you mean by that?

Joseph W. Obreiter, re-cross.

The Witness: I mean that the pavement was laid in there and the trolleys continually going over it and the trucking and the soil in which it was laid, all—

The Court: What did the trucking have to do with it, that is what I want to know?

The Witness: Well, when the trolleys 10 come along and hit the rail it loosens the blocks and the trucks come along and drive them down, and that is continuous where you have heavy traffic that way.

The Court: That may be a theory, but I want to know what you found on that occasion as the producing cause of the hole that you have testified to along this third rail.

The Witness: That is from experience I 20 found in all manner of pavement. I simply applied it to this. I didn't go underneath to find out—I didn't take up the streets to find out.

The Court: You have mentioned about trucks and so forth going along at the point of this rail, and that that in some manner would cause some difference there. Now, in what way? What caused that in your opinion? You examined it. I am referring now 30 to the rail or the switch.

The Witness: At that particular point?

The Court: Yes.

The Witness: Well, it is only a theory, that is all and which I will have to apply to this case.

Re-cross examination by Mr. Higgins.

Q This paving condition from the switch to 40 the ferry and from a point west of the switch all

Joseph W. Obreiter, by the Court.

over the road where there are ruts, is all due to the boggy and sandy condition of the soil down there, isn't it? A Due to the soil and the heavy traffic over it.

Q Of course, there is heavy traffic over the paving? A Yes, sir.

10 Q And that is true of everything, at the switch and outside of the switch and all over, isn't it? A Yes, due to the traffic over it.

Q All over the paving, that is, as the paving is laid down there now, the ordinary traffic going over that depresses those blocks, isn't that so? A Yes, sir.

Q Due to the sandy condition of the soil? A Mud, I guess it is.

20 Mr. Higgins: That is all.

By the Court.

Q From your examination at this point in the immediate vicinity of this switch and at the third rail from the curb on the side on which the tracks were laid, was there anything about the construction of that switch or the rail or the maintenance of it or the operation over it that in any manner affected this depression that you speak of? A 30 Why, no; it is standard construction.

Q That does not answer the question. A No, I don't think that this particular rail affected this pavement any more than any other rail would affect the pavement laid somewhere else, I mean affect the pavement any more than as the rail anywheres else would affect the pavement. It is always a hard problem to hold the pavement between the trolley tracks, especially on a switch.

Q These are Belgian blocks and stone blocks?

40 A Yes, sir; bluestone blocks.

Joseph W. Obreiter, by the Court.

Q This whole upper third rail which you say is about three foot long, was that on one side of the rail or on both sides? A On one side.

Q The outer side, not between the rails, but on the outer side, was it? A Why, that is right east of the frog on the third rail.

Q What I want to know is, is it between the 10 two rails of one single track or was it on the outside? A One was on the inside and one was on the outside.

Q At the same place, I mean taking one hole, did it extend on each side of the rail or just on one side? A On one side.

Q Tell us concretely and finally what in your opinion was the cause of the depression at the point which we have just indicated at this third 20 rail? What was the producing cause of it; what was the reason for it? A Well, in my opinion, it was caused by the—

Mr. Higgins: What is the point you are asking him about now?

The Court: At this point.

A Why, due to the tracks—the trolleys crossing over it lossens the blocks and the heavy traffic 30 coming along pushes those blocks down, causing them to settle on account of the foundation under it.

Q In your opinion this particular hole would have existed there regardless of the trolley tracks or not? A I don't think it would have existed there if the trolley track was not there; it might have been a different kind of a hole there, but not that kind of a hole.

Q Just explain what you mean by that. A 40 Why, that one had a sharp edge on it on account

Joseph W. Obreiter, by the Court.

of the track building up a wall on one side of it. The other holes throughout the rest of the pavement were rounded out.

Q Do you know what the effect of traffic at that particular point was on this depression? A No, I do not. 10

Q A while ago you said that because of the traffic passing along the street at this particular point, that had some effect on it. How do you explain that? A Traffic always is quite a large factor in the settlement of paving.

Q Has traffic itself, disassociated with the rail along there, anything to do with this hole? A No, I don't think so.

The Court: At this particular place, the producing cause of the depressions are what? 20

The Witness: This particular hole was due to the track that was laid there.

The Court: Now, what about the traffic, what part does that play in producing them?

The Witness: Suppose there was not any traffic at all over the pavement between the tracks, you would have a regular corduroy pavement between the rails due to the settlement of the blocks between the ties; it would not settle on the ties. 30

The Court: Had the operation of traffic over the rails or over the switch anything to do with this particular depression?

The Witness: I say it would help it some.

The Court: In what way?

The Witness: Because it would be worse.

The Court: Well, how?

The Witness: Well, make larger holes. 40

Joseph W. Obreiter, by the Court.

The Court: That is the result, not the cause. Why?

The Witness: On account of the traffic going over it.

The Court: What would the tracks or the switch or the operation of cars over them have to do with the hole, that is the point, if you can give an opinion on it? 10

The Witness: It helps to loose the blocks alongside the track, and traffic coming over it pounds it down there between the ties, therefore causing a hole.

The Court: That is due to the traffic. Probably I am not clear in my questions. Traffic is not being sued here; this trolley company is being sued. At one point you have said that the operation of the trolley cars over this rail had something to do with the depression there and now you have said that apparently it was standard construction and that the tracks were properly laid and maintained. Maybe I am wrong about that, but I understood you to say so. If that is so, how could the operation of trolley cars over it have any causative effect upon the depression? 20 30

The Witness: Why, I told you I didn't think it was properly maintained.

Mr. Higgins: Which does he mean?

The Witness: The pavement.

The Court: Now, let's understand this once and for all. Are you tying the cause, the producing cause of this depression at this third rail near the switch which has been designated, to the condition of the sub- 40

Joseph W. Obreiter, by the Court.

soil and the traffic over it with any effect of the construction of the switch and rail or the operation of cars over it?

The Witness: No. The operation of cars over it, not the construction, but the operation of cars over the switch.

10 The Court: Now, what did that do, in your opinion, toward causing this depression?

The Witness: The operation of cars over these tracks, caused the blocks to be loosened.

The Court: All right. Now, did you find that condition to have existed and that the blocks were loosened?

20 The Witness: Yes, I found one block entirely out.

The Court: And you think that was due to the operation of the trolley cars?

The Witness: I think it got so loose that something must have knocked it out; I don't know if the trolley did or not.

30 The Court: Is it your opinion that the operation of cars over this rail at this point and the switch loosened the cobblestones so that it made them more susceptible to a depression than they otherwise would have been at that point?

The Witness: Absolutely.

The Court: No doubt about it? That is your judgment as an engineer?

The Witness: Yes, sir.

The Court: And from your examination?

40 The Witness: Yes, sir.

Joseph W. Obreiter, re-cross.

By Mr. Higgins.

Q You say there was a block out? A Yes, sir.

Q How do you know there was ever a block there? A I didn't know that.

Q Then, why do you say— A I say there is 10 a block out.

Q You do not know what caused it to be knocked out, do you? A No, sir; I said that.

Q Now, this rail was standard construction, wasn't it? A Yes, sir.

Q And when you speak about the trolley cars running over these tracks, you do not know how this track is laid, what the foundation is, I mean you yourself, do you? A Only from observa- 20 tion I know about it.

Q What do you mean by observation; do you know what the construction of the tracks is? A Why, yes; I don't believe there is any concrete there. 20

Q Do you know that? A Only from a superficial observation.

Q On the top? A Yes, sir.

Q You did not go down to find out if there was any? A You can tell pretty nearly.

Q You did not go down, did you? A No. 30

Q Don't you know there is not any vibration over this track at all? A Any vibration?

Q Yes. A No, I think not.

Q Did you observe anything going over this track to find out if there was or not? A There was not anything there when I was there.

Q Of course. And you don't know yourself whether there is any there or not? A There must be vibration.

Q Why do you say there must be vibration? 40

A On account of the soil that it is laid on.

Joseph W. Obreiter, re-cross.

Q So far as you know, this track is of standard construction? A Absolutely.

Q And you said before that there had not been any more wear or tear around those tracks than any other tracks, isn't that so? A Yes.

10 Q Now, even if the rails were not there at all at the point that the Court called your attention to, on account of the condition of the soil, ordinary traffic, trucks, automobiles and that sort of thing might cause the sinking of that pavement there on account of the soil; isn't that so? A Yes.

20 Q And if these tracks were not there and the hole was there and you were asked your judgment you would have to say that it was due, in your opinion, to the subsoil, wouldn't you? A I don't believe that hole would be there in the same shape if the tracks were not there.

Q What do you mean by the same shape? A I mean it has a sharp edge along one side of it.

Q What has a sharp edge? A The hole. The track forms a wall up on one side.

Q Of what? A Of the hole here. The other holes are oval shaped.

30 Q Aren't these paving blocks—what do you mean it has sharp edges? A I mean the track running along that way with the hole right in here, I mean if that track was not there, you would have a dish-shaped hole.

Q You mean if that track was not there, that hole would extend where the track is? A It might. I would not say that it would not.

40 Q But the only reason that it did not is that the rail is there and this paving block is sinking beside the rail; isn't that so? A The paving blocks are sinking; yes, sir.

Charles Jewett, direct.

Mr. Higgins: That is all.

Mr. Cutley: The plaintiff rests.

Mr. Higgins: I most respectfully move for a non-suit on the ground that there has been no negligence shown on the part of the defendant in this case and on the further ground that whatever happened to this man was due to his own negligence. 10

The Court: In view of the testimony that has just been offered there is sufficient in the case for the Court to shift the responsibility to the jury, and while it has a great many of the aspects of the case of Johnson against the Public Service Railway Company, nevertheless it has also some of the aspects of the case of Geise against the Mercer Bottling Company, and it is not for the Court to pass upon the weight or the sufficiency of the proof; it is only as to whether or not there is such proof as requires the Court to send the case to the jury, so I will deny your motion and allow you an exception. 20

DEFENSE. 30

CHARLES JEWETT, sworn.

Direct examination by Mr. Higgins.

Q What is your profession? A Civil engineer.

Q How long have you been such? A 1885.

Q With whom are you now connected? A The New York Railways Corporation. 40

Charles Jewett, direct.

Q What is your office there? A Chief engineer.

Q How long have you been such? A Since August 1, 1924.

10 Q And were you connected with any other railway companies or road construction companies or companies engaged in the construction of tracks or paving? A I have been connected with this company or its predecessors since 1890.

Q And in that capacity did you have charge or anything to do with the paving and the laying of tracks? A Yes; I was in the construction department continuously until 1919.

20 Q And you are conversant with and know the methods of paving streets and laying of trolley tracks, are you not? A Yes, sir.

Q Did you make an examination of the switch at the foot of Pavonia avenue about 250 or 300 feet from the Pavonia ferry? A Yes.

Q On what date did you make the examination? A January 6, 1927.

Q And did you examine the tracks and switch? A I did.

30 Q Did you examine the paving there and in that vicinity? A The paving connected with the switch and cross-over.

Mr. Higgins: As I understand, if the Court please, the only hole or depression that we are concerned with is the one marked "C" on the map that is in evidence.

The Court: The third rail out from the curb on the side of the street where the tracks are laid, at the frog?

40 Mr. Higgins: Yes.

Charles Jewett, direct.

Q I show you a picture; does that look like the general condition of those tracks on the day you examined them, and the streets? A Yes.

10 Q And at the point marked "C," the third rail from the sidewalk, which would be at a point where the two tracks of the switch crosses the third track, what have you to say with reference to the pavement at that point? A I gave that no particular notice more than the other pavement; there is nothing out of the ordinary.

Q But you did notice that particular point? A I did, with the others.

Q Did you notice the condition of the pavement generally in the vicinity of that track? A Just a cursory glance.

Q Just a cursory examination? A Yes.

20 Q Did you observe the switch and the rails? A Yes.

Q What have you to say as to the construction of those, as to whether they are standard or otherwise? A They are standard, and I found them in first-class condition.

The Court: When was that?

The Witness: January 6, 1927.

30 Q Did you observe cars and traffic going over these switches or this switch and particularly at the frog marked "C"? A No, I saw no cars going over it at the time of my examination.

Q Did you observe traffic going over it? A No.

Q Well, what examination did you make to find out whether there was any vibration or not?

40 A We always determined that in our track, and I did in this case, look for any bulging of the rail and pavement that shows up in the widening

Charles Jewett, direct.

of the parts and usually a little slop-over of mud, and I found none of that in the whole length of the cross-over.

Q What have you to say as to the firmness of those tracks with respect to vibration? A As good as tracks can be made under those conditions, on the earth on which they are built.

Q They are firm, are they? A Yes.

Q Are these tracks on this switch in good condition? A Very good.

Q Now, what in your opinion is the sinking of the paving due to at the point marked "C" in this photograph, and "A" and "B," and the sinking of the pavement generally in that neighborhood? A To the use of the pavement by vehicular traffic.

Q Would the nature of the soil underneath have anything to do with it? A That would lessen the life of its resistance to vehicular traffic.

Q And in your opinion are these depressions due to the subsoil, the sinking of the soil and the sinking of the pavement into that soil? A Yes.

Q The presence of these tracks in the street at that point, they have nothing to do with these depressions, have they?

Mr. Cutley: I object to that.

The Court: Sustain the objection.

Q Have the tracks in this vicinity anything to do with the depressions at the point marked "C" on this map and photograph? A Only in this particular, guiding vehicular traffic along these rails, concentrating the traffic wear on one line, the same as a wagon rut in an ordinary road. That is all it has to do with it.

Charles Jewett, direct.

The Court: Just explain that again.

A I mean the truck itself has nothing to do with the depressions other than guiding the vehicles in a straight line along the tracks, and they follow one after the other in that same line or rut. For instance, it is a very common thing that they have one wheel in the rail and the other wheel is allowed to go over on the outside of the rail. To illustrate, the average tread of wagon wheels in New York is about six feet one inch and when they ride the rail with one wheel the other wheel projects over the rail fourteen inches to sixteen inches and that wears out the pavement at that point, and that is where we are continually repairing, about fourteen to sixteen inches outside of the rail.

The Court: Would the scraping of the wheel alongside the railroad track, the rail itself, have something to do with that?

The Witness: Nothing whatever. It merely directs the wheels of these vehicles into the same line of pavement. It gets in more destruction than if it was varied in its direction.

Q Is there more resistance at this rail at this point than at the Belgian blocks?

The Witness: Yes, sir.

The Court: Considerably more?

The Witness: Considerably more.

The Court: What effect, if any, would that have on wagons crossing over the rails at the point heretofore indicated?

Charles Jewett, direct.

The Witness: From my experience there is no difference so long as the pavement is capable of sustaining the vehicular loads.

The Court: And the rail would have no effect in retarding a wheel going over under the conditions as you found them?

10 The Witness: Yes, it would retard it.

The Court: Would that arise from the greater resistance of the rail than of the Belgian blocks so far as their susceptibility to the subsoil is concerned?

The Witness: That would be due merely to the difference in elevation between the pavement and the rail. It is customary in putting in a new pavement to leave the blocks a trifle higher than the rail, a quarter of an inch to a half inch.

20 Q When you speak of the greater resistance of the tracks as compared to the Belgian blocks, are you speaking of the resistance of the tracks and the blocks or the resistance of the soil underneath? A As I understood your question it was "resistance to traffic." Of course, the rail will stand more than the pavement per square foot or per square inch of area.

30 Q That is, the track itself will stand up better under traffic than the paving itself? A Yes.

40 Q Now, what effect would water covering the paving, that is, frequent covering over of the paving—what effect would that have upon the paving at that point? A That pavement, being sand paving—that is, the joints were not protected with any waterproofing material—the water permeates through those joints and collects under the pavement as the soil varies in its permeability. In some places it does not go through

Charles Jewett, cross.

the soil and lies under the pavement. That forms a muddy composition and the blocks will settle. There is a churning motion due to the traffic.

Q In your opinion did that condition exist there? A Apparently it did.

The Court: A churning motion? 10

The Witness: Yes, sir. Sometimes from the pounding on the blocks they will go down and come back and sometimes they will bridge over and as the traffic goes over they will depress and come back and will keep that motion up and finally break through.

Mr. Higgins: That is all.

Cross examination by Mr. Cutley.

20 Q You are connected with the Engineering Department of the defendant company, are you? A No.

Q Where is your place of business? A 123 West 146th street, Manhattan.

Q You are a civil engineer? A Yes, sir.

Q And you have been for some time? A Yes, sir.

Q You made this examination on January 6, 1927? A Yes. 30

Q Where do you practice your profession? A I have spent most of my time with the railroad company. I began my service with the Broadway Cable Railroad in 1890 and I have been with them since then with the exception of about nine months when I was with the River and Harbor Improvement. Prior to 1890 I was mining in California.

Q Are you now connected with any Public Service Railway Company? A The New York Railway Corporation. 40

Charles Jewett, cross.

Q What kind of a switch is this there, what is the name of it? A A tongue switch.

Q Has it any other name? A No.

Q Sure of that? A Well, sure in this manner, that the different makers like Borden and the Ramapo have their own patterns which no other maker is allowed to copy. They are known as patented switches.

Q Can you tell me now what is the name of that switch? A No, I could not tell you.

Q Did you ever see a switch like it before in your life? A Yes.

Q Where? A We have them. One here is a Wharton switch.

Q Would you say this is a Wharton switch or a Lorraine switch? A I do not know. One I know is a Wharton. Wharton makes two different patterns.

Q You say one is a Wharton? A Yes. There are two switches in the cross-over.

Q Could there be two different switches on one cross-over? A Yes, that is correct.

Q And there are two different switches down there, isn't that correct? A Apparently.

Q Well, what is the difference in them? A A different maker, probably. They are both tongue switches. These different makers are all trying to obviate the wear and tear at the heel of the switch where they will get loose from vibration and street dirt gets in. They have been working on patterns for years to form a heel that will not wear.

Q What difference was there in the number one switch and the number two switch when you saw it down there? A I didn't see any difference.

Q Didn't you just tell me that there were two different switches? A I saw one marked Whar-

Charles Jewett, cross.

ton and the other I saw no mark on and I concluded that they were two different makes of switches.

Q Would you be surprised to learn that both of those switches are Lorraine switches? A Yes.

Q Did you make any measurements there that day? A No.

Q Your function was just to inspect the make of the switches? A To observe the condition of the tracks.

Q And you made an observation as to whether or not this was an efficient roadbed, didn't you? A A casual observation.

Q What was the result of your casual observation? A Of the roadway?

Q The roadbed immediately adjacent to the switches. A I call them not in perfect condition, but in good operating condition. I made the same examination as I would at Times Square, to find out whether they were in safe operating condition.

Q Did you ever see one like this one at Times Square? A One what?

Q A switch.

Mr. Higgins: I object—I withdraw the objection.

A These switches are what are known as electric or contact switches and in New York we use the same kind as you will find at the Pavonia ferry with the exception that near the point of the switch there is a breaking tongue which we use to connect to the underground mechanism to operate them.

Q With the exception of the operating attachment the switches are the same? A Practically.

Charles Jewett, cross.

Q Then, you would not have two different switches in one cross-over? A May and may not.

Q Does that occur very frequently? A Oh, yes. If I have a switch of the proper radius that will gauge with the make, I put it in.

10 Q Did you notice the roadbed about fifteen feet west of this cross-over? A I didn't take any more than a general view of it. I made no measurements or estimates.

Q You do not know anything about the sub-soil? Do you know anything about the character of the soil down there? A Except as I have seen it when—I was a commuter a good many years ago on the Erie Railroad and I saw this street being laid, so I have a good idea.

20 Q How many years ago was this paving put in? A That I could not tell you.

Q In what years did you commute? A From 1904 to 1923.

Q When do you remember any paving being done down there, fifteen years ago?

Mr. Higgins: I object.

A I do not know.

30 Q You say you remember this paving going on there? A I remember the paving going on, but I do not remember the date.

Q Wasn't it more than fifteen years ago? A I don't know the date.

Q Did you notice any depression on number four track; that is the fourth from the curb? A Not particularly; no, sir.

Q You would have noticed it if it had been there? A Any particular depressions?

40 Q You heard Mr. Obreiter on the stand, didn't you? A Yes.

Harry L. Newby, direct.

Q And what he says you practically coincide with as far as the matter of depressions is concerned?

Mr. Higgins: I object to that.

The Court: Sustain the objection.

Mr. Cutley: That is all.

10

HARRY L. NEWBY, sworn.

Direct examination by Mr. Higgins.

Q Where do you reside? A 232 Bay street, Jersey City.

Q Where are you employed? A Erie Rail- 20 road.

Q And were you employed there on the night of this accident? A Yes.

Q Where were you located, please? A At the ferry.

Q Were you in that vicinity the night Mr. Hurley was injured? A Yes, sir.

Q Do you know about what time that was? A I should judge about 7:30 or 7:40.

Q Where did you see Mr. Harley for the first 30 time? A The first time I seen Mr. Hurley was in the station master's office, lying on two desks.

Q Where is that located? A The west end of the depot.

Q Did you see Mr. Hurley's truck? A I did.

Q Where was that? A Out in the street.

Q Whereabouts? A Just about ten feet this side of the switch.

Q Which side do you mean? A The east side of the switch. 40

Harry L. Newby, direct.

Q Where was it with reference to the tracks?

A The tail was practically over the last track, the fourth track.

Q Was there anybody in it? A No, sir.

10 Q Did you see the condition of the street that night? A We had a very heavy rainfall.

Q How deep was the water in the street? A Just about an inch or two inches.

Q Covering over the tracks? A Yes, sir, and the cobblestones.

Q And how far back did that extend? A It extended all over that neighborhood on account of the rain.

Q How long have you been down at the Erie? A About twenty-five months.

20 Q Have you ever seen the tide back up over that street? A I did.

Q How often did that occur? A Every time you have a good windstorm.

Q And how far does the tide back up over Pavonia avenue? A Back up, I should judge, a distance of about fifty feet.

30 Q How often does that occur? A Every time you have a good windstorm and every time you have a good big floodtide, maybe once every two or three months.

Q Now, how far up Pavonia avenue does this water back up? A About fifty feet.

Q What do you mean by fifty feet? Does it back up as far as the Hudson tubes? A No, about half of that, not even half, about three-quarters.

Q Well, up beyond the switch? A Up beyond the switch.

40 Q And how deep is it? A Well, I should judge about two inches. Sometimes when you

Harry L. Newby, cross.

get a good big storm it is as high as the curbstone there.

Q And how many inches would that be? A About four inches.

Q Was there a storm the night Mr. Hurley was hurt? A Yes. 10

Q Was it still on? A Still raining, yes.

Q You did not see Mr. Hurley brought in? A No, sir.

Q What was the character of this storm? A Well, there was thunder and lightning that night.

Q Was it a very heavy storm? A It was one of the worst we had, I guess; one of the worst I can remember.

Q Raining? A Raining.

Q Thunder and lightning? A Thunder and lightning; raining very hard. 20

Mr. Higgins: That is all.

Cross examination by Mr. Cutley.

Q You say this flood was about two inches deep? A Yes.

Q Is there any slope at all on that street? A A little slope.

Q And that tends to make the water run over to the southerly side of Pavonia avenue, doesn't it? A Yes. 30

Q You have had occasion to pass this cross-over? A Twice a day.

Q Were you there at the time of this accident? A Yes, sir.

Q Did you look at it at that time? A No.

Q Prior to this time had you had occasion to look at this cross-over? A I came down there twice a day. 40

Charles R. Powelson, direct.

Q Was your attention ever directed to this particular switch? A No.

Q You were not interested in it? A No.

Q Where was this truck when you saw it? A The horse was headed toward the milk platform when I seen it.

10 Q Where was the wagon? A The wagon was kind of catacorner.

Q Well, about ten feet away? A About ten or fifteen feet this side of the switch.

Mr. Cutley: That is all.

Re-direct examination by Mr. Higgins.

20 Q What do you mean by this side, east or west? A On the east side or the south side.

Q South of the— A South of the tracks.

Mr. Higgins: That is all.

CHARLES R. POWELSON, sworn.

Direct examination by Mr. Higgins.

30 Q Did you go to the vicinity of the foot of Pavonia avenue around where the switch which is concerned in this case is located? A Yes, sir.

Q And did you make some photographs of that vicinity? A Yes, sir.

Q I show you a photograph marked Exhibit D. 1 for identification. Did you take that photograph? A Yes, sir.

40 Q On what date did you take it? A December 2, 1926.

Motion for Direction of a Verdict.

Q And does that show generally the condition of the street? A This is looking east on Pavonia avenue and shows the switch there.

Mr. Higgins: I offer the picture in evidence.

(Marked in evidence Exhibit D. 1.)

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Q I show you another photograph and ask you if you took that photograph. A Yes, sir.

Q What does that represent? A That is looking west showing the switch on the eastbound track.

Q And did you take that on the same day? A Yes, sir.

Q What day was that? A December 2, 1926.

20

Mr. Higgins: I offer this picture in evidence.

(Marked Exhibit D. 4 in evidence.)

Mr. Higgins: That is all.

Mr. Cutley: No questions.

Mr. Higgins: The defense rests.

Mr. Higgins: I respectfully move for the direction of a verdict in favor of the defendant on the ground that there is no evidence of negligence on the part of the defendant in this case and on the further ground that the plaintiff is guilty of contributory negligence.

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The Court: I think those questions are for the jury and I will deny the motion and allow you an exception.

(Both sides thereupon summed up to the jury.)

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Charge to Jury.

definition of negligence. So, you see, it becomes necessary for you to know in this case whether or not there was any duty on the part of this defendant with respect to this plaintiff, with regard to the depression in this pavement into which the plaintiff claims his wagon ran, causing him, as he says, to fall to the pavement.

10 Now, at the outset you must know that the mere fact that the defendant had its tracks in this street, standing alone, casts no duty upon the defendant to maintain and repair the pavement of that street; that duty, so far as it appears in this case, was the duty of the city; at least, it was not the general duty of this defendant. In other words, in the absence of anything to connect this hole or depression where the

20 plaintiff claims to have fallen with the construction, maintenance or operation of the defendant's tracks or roadbed, as distinguished from the pavement in the street, there would be no liability on the defendant's part.

Now, some of you may say, "Well, we have heard that sometimes charters provide that railway companies must maintain a portion of the highway in view of the franchise that is given them to lay their tracks in the public streets."

30 You are not concerned with what may be in other cases. There is no such evidence of that here, and even if it were here the situation might be such as to make that immaterial in view of certain decisions that have been handed down in this State. So, it follows that any depression or defect in the pavement of this street, disconnected with the maintenance, operation and use of this railway, would impose no liability on this railway company, even though that hole or depression might be between or alongside of the rails

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Charge to Jury.

of its tracks. It is undoubtedly, gentlemen, the general rule that a street railway company which has the right to lay its tracks in the public street must use reasonable care to lay them in a proper manner and to keep them in a state of proper repair, referring now to the rails and the sleepers and what may be called the trackage of the company; but the question of the liability of such a company for failing to keep the surface of the street in repair is quite a different one, and insofar as this case is concerned, there is nothing to cast the duty of street repairs on this defendant company. But, gentlemen, it is the duty of a street railway company, having its tracks in a public street, to adopt such a construction of its roadbed, rails or switches and so maintain and repair the same and operate its cars over the same as will not normally cause an excessive wear or create a dangerous condition in the adjoining parts of the highway, and if such construction, maintenance, operation or use does cause an excessive wear or a dangerous condition in the adjoining parts of the highway, the railway company is under a duty to use reasonable care to guard against creating such a dangerous condition in the highway and if such care be not used and an accident result which might reasonably have been anticipated, then if such fault is the proximate cause of an accident and the condition was known to the railway company or had existed for so long a time as in the exercise of reasonable care the railway company could have known of that condition and had the opportunity to repair it, and the party injured in the accident was free from contributory negligence, then the railway company would be liable.

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Charge to Jury.

In this case, however, all the parties seem to agree that the tracks and the switches of this railway at this location were of standard construction, and so it is for you to say whether the defendant in the maintenance and use of these tracks normally caused an excessive wear or produced a defective condition in the pavement or the adjoining parts of the highway at the place where the accident happened. It was under a duty to use reasonable care to guard against such a situation, and if the company did not use such care and the resulting accident was such as might reasonably have been anticipated, the defendant was prima facially negligent, provided the condition had existed for so long a time as either the defendant knew of it or should have known of it in the exercise of reasonable care. But if these elements were not present and have not been proven to your satisfaction by a fair preponderance of the evidence in this case, there would be no liability on the part of this defendant company; that is, there would be no negligence with which it could be chargeable, and if there was a depression in the pavement where the plaintiff claims it was, into which his truck ran, which caused him to fall, but it was not connected with the defendant's railway and nothing was done or omitted in the maintenance or operation of the railway itself which produced the alleged depression, the defendant would not be negligent or liable.

So, you see, gentlemen, you have to apply these rules I have given you with great care because otherwise you may do an injustice to one party or to the other.

Now, if this defendant company was not negligent under these rules I have given you, you

Charge to Jury.

would be obliged to bring in a verdict in its favor and against the plaintiff, a verdict of no cause of action, even though in this accident this plaintiff may have lost a part of a leg or as a result of the accident may have lost a part of his leg.

But, gentlemen, if this defendant company was negligent, then it becomes incumbent for you to decide whether or not such negligence was a proximate cause of this accident.

By proximate cause we mean that cause which naturally and probably led up to and which might have been expected to produce the very thing that happened. It is the moving efficient cause of an accident without which the accident would not have happened.

So, if you find that the defendant company was negligent but its negligence was not a proximate cause of what happened to this man Hurley on this occasion, then again you would have to find in favor of the defendant company and against the plaintiff, a verdict of no cause of action.

But if the defendant was negligent and its negligence was a proximate cause of this accident, then you will proceed to the next question, and that is whether or not the plaintiff, Mr. Hurley, himself was guilty of contributory negligence. That is raised as a defense here on the part of the defendant, and, therefore, the duty rests upon the defendant of establishing it to your satisfaction by a fair preponderance of the evidence in this case.

Now, as the driver of a truck along this highway, he was required to exercise such care for his own safety as a reasonably prudent person would have done confronted with the same situation. He was required to make such observations with respect to the condition of the street and to

Charge to Jury.

exercise such judgment to avoid running into depressions and holes in the pavement as a reasonably prudent person would have done under the same circumstances. Now, if you find that he did that which a reasonably prudent person would not have done or he failed to do that which a

10 reasonably prudent person would have done and because thereof and as a result thereof he contributed in any degree to the happening of this accident, no matter what degree that may have been, he would be precluded from having a recovery as against this defendant, because in cases such as this, gentlemen, you are not permitted to weigh the relative degrees of negligence and to say, for example, if one party is ninety-five per cent. negligent and the other only five per cent.

20 negligent, that there could be a ninety-five per cent. recovery in favor of the party who is only five per cent. negligent. Negligence on the part of each of the actors in an accident who are involved in a lawsuit growing out of an accident, if it contributed in any degree to the happening of an accident, would preclude a monetary recovery on the part of either of them.

If, after giving due consideration to this evidence, you reach the conclusion, gentlemen, that

30 this plaintiff is entitled to a verdict as against the defendant, then he is entitled to be compensated for the injuries which he personally sustained as the natural and proximate result of the accident. That would include pain and suffering for so long a time as you find that he has experienced pain and suffering. It would include any disability that he has sustained as a result of this accident. The testimony is that because of this

40 accident the lower portion of his right leg from about six inches below the knee had to be ampu-

Charge to Jury.

tated. Now, if that was the natural and proximate result of this accident, he is entitled to be compensated for that loss. If he lost any earnings as a result of this accident, he is entitled to be compensated for that also. I think there is some testimony here that his regular salary was fifty dollars a week and sometimes he made something extra, and that he has not worked regularly

10 down to the present time, although my recollection is he said he did some jobs now and then at the present time. You will remember what the testimony is throughout the case, gentlemen, and use, of course, your own recollection if it does not agree with what the Court has given you as the Court's recollection of the testimony. If he has lost any earning capacity or power as a result of this accident, he is entitled to be compensated

20 for that also.

In conclusion, I wish to warn you, because I have found that some jurors who have not had much experience in court think that because when a motion is made by the attorney for the defendant in a case for a non-suit or for the direction of a verdict in favor of the defendant and that is denied by the Court, the Court is endeavoring in some way to convey to the jury that it thinks

30 that the defendant has not a good defense and that the verdict should be in favor of the plaintiff. I am quite sure that none of you have any such idea in this case, because if you have, gentlemen, disabuse your minds of it at once because the Court has nothing whatever to do with your peculiar function of deciding what the facts in this case are. The Court is here to give you instructions in the law which you are to apply to the facts as you find them. When the Court gives you the rules of law, the Court has no

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Further Instructions to Jury.

10 further right to intrude the Court's opinion into your deliberations or into your verdict. That is solely your function, and in deciding these motions I may assure that the Court had no opinion one way or the other as to whether the plaintiff should succeed or the defendant should succeed in the final outcome and result of this litigation. The Court was merely deciding that in this case there was evidence which the Court believed should be submitted to you in order that you might find out what the facts were and then from the facts, under the rules of law that the Court has given you, decide whether or not liability should be imposed upon the defendant.

20 Now, take the case, gentlemen, and allow neither passion, prejudice nor sympathy or favor for one side or the other to influence your verdict. No one can criticise you if you observe the oath you have taken and if you follow the rules of law that the Court has given you, your verdict will be a right one, no matter for which side it may be rendered.

(The jury retires.)

30

2:00 o'Clock P. M.

(The jury returns for further instructions.)

The Foreman: We would like to know whether at the time of this accident there was a law existing at that time that required the trolley company to keep the roadbed in repair.

40 The Court: All you can take is the evidence in this case. Even if there were a statute, it would have to be shown to apply to this particular com-

Further Instructions to Jury.

pany. In other words, the statute might be one under which this company was not organized, so that so far as this case is concerned you may take it as a fact that there is no statute, no ordinance or anything of the kind that requires this trolley company to either lay the pavement on the outside of its tracks nor between the rails. 10

The Foreman: There seems to be a thought among these gentlemen that there was a law at that time and owing to the fact that here in the last Legislature it was repealed—

The Court: I know your thought and I might say that regardless of that law you are not concerned in this case with any statute either upholding that duty or relieving them from that duty. So far as this case is concerned, you may take it as flat that you are not concerned with any ordinance, any contract or any statute requiring this trolley company to keep the pavements in repair—disassociated from any duty to maintain and operate its tracks and its roadbed, and when I say roadbed I am referring to the sleepers, the rails and so forth that go to make up a trolley company's trackage, its switches and so forth, but so far as building or maintaining the surface of the highway by a duty imposed upon them by statute or by ordinance or by contract, you must disregard what you may have heard or anything else in that respect. That is out of the case. That is not an element in this case at all. The only thing here is whether or not because of the operation or construction or maintenance of this track, the trolley company created a condition there which would become dangerous, under the rules given you, and whether or not it exercised reasonable care in 40

Further Instructions to Jury.

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Further Instructions to Jury.

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The Foreman: There seems to be a thought among these gentlemen that there was a law at that time and owing to the fact that here in the last Legislature it was repealed—

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40

Further Instructions to Jury.

view of that situation; but with respect to a duty created by statute or by ordinance or by contract imposing upon this trolley company to maintain that pavement aside from anything that it may have done with respect to its own railway, or failed to do with respect to its own roadbed, there is nothing in this case to show any such thing at all; therefore, of course, under the instructions I previously gave you—you will remember what I said on that subject and everything I said on that subject—I told you you were not concerned with that situation at all.

Does that cover what you want? What I am trying to say to you gentlemen is this, and I think I know what is in your mind: You are saying to yourselves: "Leaving out the question of the rail, the switch, the trackage of this company, does this company have to maintain this pavement, anyhow?" That is what you are trying to say, aren't you?

The Foreman: That seems to be it.

The Court: And whether there is any duty created by statute or by ordinance or by contract requiring them to do it? No. If you find this company at all liable, you will have to have recourse to that liability and only to that liability, arising out of the duty I told you about in the charge, and you must not rely upon any statute or any ordinance or any contract to base your verdict of liability upon or non-liability upon.

(The jury then retired.)

EXHIBIT P. 2.
Interrogatories.

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

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THOMAS HURLEY,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY, a corporation,

Defendant.

*Action
at Law.*

Interrogatories.

SIRS:

20

PLEASE TAKE NOTICE that the plaintiff herein demands that within ten days from the date of service hereof you cause answers to the following interrogatories to be made under oath of the defendant and that you cause the same to be served upon the plaintiff's attorney within the said time:

FIRST INTERROGATORY.

Did any trolley cars owned by defendant corporation run along Pavonia avenue in the City of Jersey City, N. J., in the month of September, 1926?

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SECOND INTERROGATORY.

If so state what car lines.

THIRD INTERROGATORY.

What is route of Pavonia car line?

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Exhibit P. 2.

FOURTH INTERROGATORY.

What car line has its terminus at the Erie Railroad depot, Pavonia avenue, Jersey City, N. J., and who owns said car line?

10 FIFTH INTERROGATORY.

Did the Public Service Railway Company lay the trolley tracks and switches used by the trolley cars along Pavonia avenue, Jersey City, N. J.?

SIXTH INTERROGATORY.

Does the Public Service Railway Company own the trolley tracks and switches used by the trolley cars on Pavonia avenue, Jersey City, N. J.?

20 Yours respectfully,

GEORGE E. CUTLEY,
Attorney of Plaintiff.

(Endorsed) "Service of a copy of the within interrogatories is hereby acknowledged this 13th day of December, 1927.

30 HENRY H. FRYLING,
Attorney of Defendant."

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EXHIBIT P. 2.

Answers to Interrogatories.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

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THOMAS HURLEY, vs. PUBLIC SERVICE RAILWAY Co., a corporation,	} Plaintiff, } Defendant.	} Action at Law. } Answers to Interrogatories.
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The following are the answers by the defendant corporation, the Public Service Railway Company, to the interrogatories propounded by the plaintiff:

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First: Yes.

Fifth: Yes.

Sixth: Yes.

HENRY H. FRYLING,
Attorney of Defendant.

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

BURDETTE C. ORSOR, of full age, being duly sworn according to law, on his oath says, that he is the chief investigator, employed by the Public Service Railway Company, and is the agent most familiar with the case, and that the answers to

40

EW D-1
2/15/19
EXHIBIT D-1



Exhibit D- 4



New Jersey Court of Errors and Appeals

THOMAS HURLEY, <i>Plaintiff-Appellee,</i>	} <i>On Appeal from New Jersey Su- preme Court.</i>
<i>vs.</i>	
PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i>	

BRIEF OF DEFENDANT-APPELLANT.

This is defendant's appeal from a judgment for \$10,000 damages obtained by the plaintiff in the New Jersey Supreme Court, Hudson County Circuit, on January 24, 1928.

The judgment was based on injuries sustained by the plaintiff September 6, 1926, at about 7 P. M., while driving a horse drawn vehicle in an easterly direction along Pavonia avenue near the Erie depot and ferry slip, in the City of Jersey City.

Pavonia avenue, at the place involved, is a very wide thoroughfare, paved with Belgian block, and on the extreme northerly side thereof the defendant operated trolley cars on rails consisting of two sets of tracks. Due to the nature of the soil the pavement over the entire width of the thoroughfare was exceedingly rough, being full of depressions and holes due to the irregular sinking of the Belgian blocks and excessive heavy traffic thereover, particularly in that part of the thoroughfare to the south of the street railway tracks.

The paving along the tracks was so much better and smoother than in the rest of the

thoroughfare that the plaintiff while driving easterly drove on the extreme northerly side, or on the left side of the road. During a severe storm, thunder, lightning and a heavy downpour of rain, when most of the thoroughfare was covered with water, the wheel of plaintiff's truck went into a hole throwing him from the seat to the ground.

In his complaint he alleges (printed case, p. 4) that he "struck an open trolley switch or frog and a large rut or hole causing plaintiff to be hurled to the ground, and underneath the wheels of his truck, due to the negligence and carelessness of the defendant corporation."

"The negligence of the defendant consists in this: that it negligently and carelessly maintained its frogs, roadbed, rails and switches; that there existed at that place at that time and for a long time previous a large rut or hole in said roadbed, and defective and improperly laid rails, tracks and switches, causing said highway to be in a dangerous and unsafe condition; that the defendant negligently and carelessly failed to keep said highway at that place in a reasonably safe condition as it was under a duty to keep for the plaintiff and others lawfully using said highway."

Defendant-appellant urges two grounds why the judgment should be set aside and reversed (p. 2):

1. Because the Court, at the close of the plaintiff's case, although moved so to do by the attorney for the defendant on the ground that no negligence on the part of the defendant had been shown and on the ground that there was contributory negligence on the part of the plaintiff, refused to non-suit the plaintiff.

2. Because the Court, at the close of the whole case, although moved so to do by at-

torney for the defendant on the ground that no negligence had been shown on the part of the defendant and on the ground that there was contributory negligence on the part of the plaintiff, refused to direct a verdict in favor of the defendant.

The third ground is abandoned and the first and second will be argued together.

A motion for non-suit was made by the attorney for the defendant (p. 97) which was denied and an exception allowed.

A motion for a direction of a verdict in favor of the defendant was made by the attorney for the defendant (p. 111) which was denied and an exception allowed.

The plaintiff (p. 15) testified in his own behalf that (p. 16, l. 25) he was driving toward the ferry and was thrown from his truck on account of the forward wheel hitting a hole alongside the switch; that (p. 17, l. 15) it was about half-past seven; that he could not tell the exact time; that it was raining, it was quite a storm; that there was a hole or rut running parallel with the switch; that (top of p. 19) there are two sets of tracks on the road alongside of them and it is all rutted; that after being thrown from his wagon he laid there and sort of glanced at the situation and had a faint idea that there was a hole filled with water and the forward wheel hit it and went in; that (top of p. 21) the hole was at the third rail from the sidewalk; that (p. 27) he worked in New York on the afternoon in question until 3 or 4 o'clock and then drove to the Erie Railroad freight yard on Pavonia avenue and (p. 28, l. 20) between 7 and half-past seven he left the freight yard; that (p. 29, l. 15) there was a very severe storm, thunder and lightning and heavy rain and there was water on the road at the place where

he met with the accident extending over the street; that (p. 30, l. 16) there was water covering the whole street; there may have been three or four inches of water; that (p. 31, l. 20) he drove for about fifty feet in the water before the accident happened; that (p. 36, l. 30) he was traveling toward the ferry; that the trolley tracks laid toward the left side of the roadway and there was a great big wide roadway over to the freight depot to the right about 75 feet wide; that (p. 43) he drove easterly on Pavonia avenue on the car tracks on the left side of the road; that he did not drive on the right side of the roadway because it was worse there; that that part of the roadway was all ruts and holes and as he was traveling on the car tracks he was traveling on the best part of the road and he selected the car tracks to ride on because they were better than the roadway to the right.

Joseph W. Obreiter (p. 45) a civil engineer called by the plaintiff, testified that he made a survey of Pavonia avenue and map thereof (copy of which is attached to the printed case); that (p. 47) he found a depression on the south side of the south rail at the switch three and one-half to four inches below the top of the rail that runs about six feet along the rail. He also found a depression opposite the frog an inch and a half below the rail running along the south rail about three feet and a depression at the frog at the east end of the frog toward the north rail of the east-bound track to the cross-over, a depression about two inches and the pavement in there was very rough.

The depression which he described as six feet long is marked on Exhibit as "A" (see Exhibit D. 1 attached to the printed case); and the other depressions spoken of are marked "B" and

"C"; that (top of p. 48) on the westbound track the pavement is very rough where the settlement in the pavement took place; that (p. 50) in the vicinity of the switch the roadway is forty-six feet wide from the south rail to the freight platform on the south; that the depression at the third rail from the sidewalk is four feet along the rail and two inches deep below the top of the rail where the paving block has just dropped down where it is all filled ground; that (p. 51) where the other depressions existed the Belgian blocks had dropped down or sunk; that (p. 52) the condition of the pavement is very poor and had holes in it and that there were not only depressions and holes alongside the rails but the entire vicinity was full of depression and holes due to the sinking and settling of the Belgian blocks; that the soil is very soft and the depressions particularly described were not the only ones but (p. 53) there were others that were not noted and there were worse holes in the roadway than those marked near the rails; that (p. 53, l. 35) he is familiar with that section of Jersey City and the roadway and that the ground underneath is soft and the sinking of the Belgian blocks and the holes that exist therein was due to the soft earth underneath; that (p. 54, l. 30) the photographs (p. 56, l. 15) (attached to the printed case), show the condition of the pavement throughout the street.

Anthony Bonaventure (p. 57) produced by the plaintiff, testified that (p. 63) at the time of the accident there were depressions all the way across the street; that (p. 65) as plaintiff was driving easterly along Pavonia avenue the night of the accident he was driving with his left wheel on the third rail from the sidewalk and his right wheel on the right side of the rail and drove that

way all the way from the freight yard; that (p. 70, l. 30) he drove along the track because it was in good condition and in better shape than the rest of the roadway.

Cornelius S. Cassidy (p. 73) a police patrolman, called by the plaintiff, testified that (p. 75) in and around that particular section the road was in bad condition; that (p. 76) the roadway was in bad condition, the cobblestones may have sunk or there are cavities in the road anyhow and that is the condition where wagons travel when they are not on the track; that (p. 77, l. 22) on occasions, when there have been very severe storms and severe winds, water comes up on Pavonia avenue and covers the whole roadway as far as the tube station and that has been going on for years.

Bernard J. Farmer (p. 78) a witness called by plaintiff, testified (p. 80) that at the time of the accident the cobblestones were lower than the rails of the crossover because of depressions in blocks there and that condition existed in other places along the roadway.

Frank E. Leonard, a witness (p. 83) called by the plaintiff, testified that (p. 84, l. 20) Pavonia avenue down as far as the station was all ruts; that the pavement was in bad condition to the track.

Joseph W. Obreiter, recalled by the plaintiff (p. 85) testified that he has been engaged in laying block and asphalt pavements; that (p. 86, l. 40) the cause of the depressions in the roadway other than those at the switch was due to the foundation under it and the heavy traffic over it; that it would not sustain the roadway at the switch as well as throughout the roadway; that

(p. 87) it is worse on the track on account of the trolley cars running in there; there is always a certain jar of the track given when the trolley car makes the switch and tends to loosen up the pavement alongside of it. It has always been a problem to hold pavement alongside of a track and that, in his opinion, the condition alongside the third rail at or near the switch was that the switch loosened up the blocks and the heavy traffic going over it drove them down still more on account of the soft soil underneath. It did not have a proper foundation. It is all filled ground there and the witness did not know whether a proper foundation could be obtained.

The Trial Court then asked:

“Was it due to the laying of the kind of pavement upon the ground where it was, or was it in any way due to the construction or the manner of construction of the switch and the rail itself?”

To which the witness replied:

“Well, the rails are standard construction, there is no question about that, but it is due to the pavement that is put in alongside of it. As I said before, it is always a problem to hold the pavement alongside of a trolley track, even on good (p. 88) subsoil, especially on a switch or a curve where the trolley car comes along and always gives the rail a certain jar when it is making the turn.”

The witness further testified (p. 88, l. 12) that there was nothing wrong in the construction or in the maintenance of the track; that the track is all right, the rails standard and the switch standard. The Trial Court asked the following questions and the witness testified in answer thereto:

“What I am trying to ascertain is this: Whether you on your examination saw any evidence, from your experience as an en-

gineer, of an improper laying or maintenance of the rail or the switch which caused this hole, or tended in any way to make that particular depression?

The Witness: As I said before, the maintenance of it.

The Court: What do you mean by that?

(p. 89) The Witness: I mean that the pavement was laid in there and the trolleys continually going over it and the trucking and the soil in which it was laid, all—

The Court: What did the trucking have to do ~~have to do with~~ that is what I want to know.

The Witness: Well, when the trolleys come along and hit the rail it loosens the blocks and the trucks come along and drive them down, and that is continuous where you have heavy traffic that way.

The Court: That may be a theory, but I want to know what you found on that occasion as the producing cause of the hole that you have testified to along this third rail.

The Witness: That is from experience. I found in all manner of pavement. I simply applied it to this. I didn't go underneath to find out—I didn't take up the streets to find out.

The Court: You have mentioned about trucks and so forth going along at the point of this rail, and that that in some manner would cause some difference there. Now, in what way? What caused that in your opinion? You examined it. I am referring now to the rail or the switch.

The Witness: At that particular point?

The Court: Yes.

The Witness: Well, it is only a theory, that is all and which I will have to apply to this case."

Under cross examination the witness testified (p. 90) that the paving condition from the switch

to the ferry and from a point west of the switch all over the road there are ruts, all due to the soil and the heavy traffic over it; that the ordinary traffic going over the pavement depresses the blocks due to the condition of the soil.

Again, in response to a question by the Court the witness testified that from his examination in the immediate vicinity of the switch and at the third rail from the curb on the side of the road where the tracks were laid there was nothing about the construction of the switch or the rail or the maintenance of it or the operation over it that in any manner affected the depression and that it was standard construction; that he did not think this particular rail affected this pavement any more than any other rail would affect a pavement laid somewhere else would affect the pavement; that (p. 91, l. 35) he did not think the particular hole would have existed there if the trolley track was not there; it might have been a different kind of a hole there, but not that kind of a hole; that one had a sharp edge on it on account (p. 92) of the track building up a wall on one side of it. The other holes throughout the rest of the pavement were rounded out; that he did not know what the effect of traffic at that point was on that depression. Traffic always is quiet a large factor in the settling of pavement.

The witness testified (p. 95) that one of the paving blocks was out but he did not know what caused it to be knocked out; that the rail was standard construction; that (p. 95, l. 30) he did not investigate whether there was any vibration at the particular point when trolley cars passed over it but in his opinion there must be vibration on account of the soil that the track was laid on and (p. 96) there has been no more wear

or tear around those tracks than any other tracks and that even if the rails were not there at all on account of the condition of the soil ordinary traffic of trucks and automobiles might cause the sinking of the pavement there because of the condition of the soil and (p. 96, l. 35) if the track had not been there the hole might have extended to where the track was.

Charles Jewett, a witness (p. 97) called by the defendant, testified that he was a civil engineer connected with the New York Railways Corporation; that (p. 98) he was familiar with the methods of paving streets and laying trolley tracks and had examined the tracks and pavement on Pavonia avenue; that (p. 99, l. 20) the switch and rails are standard and in first-class condition and that he found no bulging of the rail and pavement at the crossover switch (p. 100); that the tracks, with respect to vibration, are as good as tracks can be made and the condition of the earth on which they are built there are firm and in good condition, and that the sinking of the pavement at the points marked "A," "B" and "C" on the photograph is due to the use of the pavement by vehicular traffic and that the nature of the soil underneath would lessen the life of its resistance to vehicular traffic; (p. 101) the track itself has nothing to do with the depressions other than keeping the vehicles in a straight line along the tracks, and they follow one after another in that same line or rut; that it is a common thing for a truck to have one wheel inside the rail and the other wheel is allowed to go over the outside of the track. The average width of wagon wheels in New York is about 6 feet, 1 inch, and when they ride the rail with one wheel the other projects over the rail 14 inches and that wears out the pavement at that point and that is

where the pavement is continually being repaired; that the scraping of the wheel alongside the railroad track would have nothing whatever to do with it.

Harry L. Newby (p. 107) called by the defendant, testified that (p. 108) he has been familiar with the condition of Pavonia avenue for a great many years and that every time there is a heavy wind storm the tide backs up on Pavonia avenue so that the water covers the pavement.

The Trial Court charged the jury (p. 113, l. 8) that this defendant could only be chargeable in the event that it was negligent and that such negligence was the proximate cause of this accident and of the injury to the plaintiff; that (p. 114, l. 12) the fact that the defendant had its tracks in this street, standing alone, casts no duty upon the defendant to maintain and repair the pavement of that street; that duty, so far as it appears in this case was the duty of the city; at least, it was not the general duty of this defendant. In other words, in the absence of anything to connect this hole or depression where the plaintiff claims to have fallen with the construction, maintenance or operation of the defendant's tracks or roadbed, as distinguished from the pavement in the street, there would be no liability on the defendant's part; sometimes charters provided that railway companies must maintain a portion of the highway in view of the franchise that is given them to lay their tracks in public streets. You are not concerned with what may be in other cases. There is no such evidence of that here, and even if it were here the situation may be such as to make that immaterial in view of certain decisions that have been handed down in this State. So, it follows that any depression or defect in the pavement of this street, discon-

nected with the maintenance, operation and use of this railway, would impose no liability on this railway company, even though that hole or depression might be between or alongside of the rails (p. 115) of its tracks. It is undoubtedly, gentlemen, the general rule that a street railway company which has the right to lay its tracks in a public street must use reasonable care to lay them in a proper manner and keep them in a state of proper repair, referring now to the rails and the sleepers and what may be called the trackage of the company; but the question of the liability of such a company for failing to keep the surface of the street in repair is quite a different one, and insofar as this case is concerned, there is nothing to cast the duty of street repairs on this defendant company.

After retiring the jury returned for further instructions and the following colloquy took place between the foreman thereof and the Court (p. 120)—

“The Foreman: We would like to know whether at the time of this accident there was a law existing at that time that required he trolley company to keep the roadbed in repair?”

The Court: All you can take is the evidence in this case. Even if there were a statute, it would have to be shown to apply to this particular company (p. 121). In other words, the statute might be one under which this company was not organized, so that so far as this case is concerned you may take it as a fact that there is no statute, no ordinance or anything of the kind that requires this trolley company to either lay the pavement on the outside of its tracks nor between the rails.

The Foreman: There seems to be a thought among these gentlemen that there was a law at that time and owing to the fact

that here in the last Legislature it was repealed—

The Court: I know your thought and I might say that regardless of that law you are not concerned in this case with any statute either upholding that duty or relieving them from that duty. So far as this case is concerned, you may take it as flat that you are not concerned with any ordinance, any contract or any statute requiring this trolley company to keep the pavements in repair—disassociated from any duty to maintain and operate its tracks and its roadbed, and when I say roadbed I am referring to the sleepers, the rails and so forth that go to make up a trolley company's trackage, its switches and so forth, but so far as building or maintaining the surface of the highway by a duty imposed upon them by statute or by ordinance or by contract, you must disregard what you may have heard or anything else in that respect. That is out of the case. That is not an element in this case at all. The only thing here is whether or not because of the operation or construction or maintenance of this track, the trolley company created a condition there which would become dangerous, under the rules given you, and whether or not it exercised reasonable care in (p. 122) view of that situation; but with respect to a duty created by statute or by ordinance or by contract imposing upon this trolley company to maintain that pavement aside from anything that it may have done with respect to its own railway, or failed to do with respect to its own roadbed, there is nothing in this case to show any such thing at all; therefore, of course, under the instructions I previously gave you—you will remember what I said on that subject and everything I said on that subject—I told you you were not concerned with that situation at all.

Does that cover what you want? What I am trying to say to you gentlemen is this, and I think I know what is in your mind:

You are saying to yourselves: 'Leaving out the question of the rail, the switch, the trackage of this company, does this company have to maintain this pavement, anyhow?' That is what you are trying to say, aren't you?

The Foreman: That seems to be it.

The Court: And whether there is any duty created by statute or by ordinance or by contract requiring them to do it? No. If you find this company at all liable, you will have to have recourse to that liability, and only to that liability, arising out of the duty I told you about in the charge, and you must not rely upon any statute or any ordinance or any contract to base your verdict of liability upon or non-liability upon."

The foregoing extracts from the testimony and judge's charge covers practically everything in the record concerning the issues involved.

In the case of *Fielders v. No. Jersey St. Ry. Co.*, 68 N. J. Law 343, it was held that the liability of a railway company to maintain the pavement of a public street on which its tracks are laid does not result from the mere fact that the corporation has been vested with a franchise or license to use the street; that such liability, if it exists, must either rest upon some valid statute or ordinance imposing such duty or must arise out of contractual obligations.

The question of municipal ordinance, statutory requirements or contractual duty is entirely eliminated from the case at bar as is evidenced by the recited extracts from the Court's charge.

In the case of *Johnson v. Public Service Ry. Co.*, 83 N. J. Law 647, decided by this Court, the propriety of the judgment of non-suit was brought up for review on writ of error. The action was one for injury by plaintiff while walking across Courtland street at its intersection

with Central avenue, Jersey City. At the point in question a flagstone on the street crossing had become depressed and the plaintiff caught her foot in the north rail of the defendant company's trolley track and fell with such force that both her arms were broken.

The street at the point in question had been in the same condition about a year and a half. A non-suit was ordered upon the ground that no negligence had been shown on the part of the defendant, and this, in turn, was rested upon the ground that the defendant company owed no duty to the traveling public for the condition of the highway at the *locus in quo*.

The Court said:

"The case of *Fielders v. North Jersey Street Railway Co.*, 39 Vroom 343, is controlling. Counsel for both plaintiff and defendant seem to concede this. It is the only case but one, in our own courts, cited by counsel for the plaintiff-in-error, and is the only case cited by counsel for the defendant-in-error. In that case (*Fielders v. North Jersey Street Railway Co.*) it was held that the liability of a railway company to maintain the pavement of a public street on which its tracks are laid does not result from the mere fact that the corporation has been vested with a franchise or license to use the street; that such liability, if it exists, must either rest upon some valid statute or ordinance imposing such duty or must arise out of contractual obligations. *Id.* (at p. 346).

The case at bar is barren of evidence showing any municipal ordinance requiring the defendant company to repair the street or maintain it at grade, nor have we been pointed to any act of the legislature making such a requirement of the defendant company.

As actionable negligence includes the notion that a legal duty has been violated, and as no legal duty by the defendant to repair the street is shown to exist in this case in virtue of a statute or an ordinance, that duty, if any, must arise out of the common law.

The general principles of the common law require a street railway company which is authorized to lay its tracks in the public street to lay them in a proper manner and keep them in a state of proper repair. *Ibid.* 346. This doctrine, however, does not come in aid of the plaintiff's case, because the proofs fail to disclose improper laying of, or want of repair in, the tracks of the defendant company. The injury to the plaintiff happened solely from the fact that one of the stones or flags forming a crosswalk had sunk, leaving a depression of two and one-half feet in length and one and one-half feet in width and about two and one-half inches in depth, running up to the northerly side of the north rail of the track and extending northerly between the rail and the curbstone.

Counsel for the plaintiff-in-error seeks to avoid the effect of *Fielding v. North Jersey Street Railway Co.* by saying that this language in the opinion of this Court in that case; 'Nor is there anything to connect the defect with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance or operation of the railway produced the defect,' meant in that case that if the injury to the plaintiff had been the result of falling over a rail or sleeper which the company had allowed to extend above the adjacent pavement (as in the case at bar), it would have been liable. In our opinion, the language quoted from the *Fielders* case is no authority for the position of the plaintiff-in-error, but, on the contrary, affords ground upon which to rest the judgment of non-suit. There is nothing in this case to connect the defect (the sunken flag-

stone) with the defendant's rails or other construction, or to show that anything was done or omitted in the construction, maintenance or operation of the railway which produced the defect. The municipal authorities having charge of the highway appear to have been responsible for its condition at the time of the accident.

There must be an affirmance of the judgment of the Court below."

In the case at bar there is nothing to connect the hole into which the plaintiff's wagon wheel went with the condition of the rails or other construction, nor to show that anything was done by the defendant or omitted in the construction maintenance or operation of the railway company which produced the hole.

In the case of *Geise v. Mercer Bottling Company and Trenton & Mercer County Traction Corporation*, 87 N. J. Law 224, decided by this Court, a non-suit directed by the Trial Court as to both defendants was reversed. This suit was for personal injuries arising from the plaintiff being run over by an automobile truck of the defendant bottling company, at or near the intersection of Market and South Broad streets in Trenton. The defendant traction company had car tracks in both streets, connected by a switch in Broad street. The street was paved with asphalt, and on each side of the tongue of the switch was a deep rut or depression, worn by wagon wheels. Defendant's employe, driving his truck along Broad street, failed to notice the rut, and one of the front wheels entered it, wrenching the steering gear out of his hands or otherwise causing him to lose control of the truck. As against the bottling company the plaintiff counted on the negligence of the driver generally; and as against the traction company he charged that it

carelessly and negligently maintained its tracks, roadbed, &c., in a dangerous and unsafe condition, and by reason of such condition, to wit, a large rut or hole in said roadbed, and defective and improperly laid rails, track and switches, the truck in question became unmanageable and ran into the plaintiff.

The Court said—

“The evidence for the plaintiff would amply have supported a finding that the rut was four feet long and six inches deep, and was on both sides of the rail. As one of the witnesses expressed it, ‘the track laid in the hole’; ‘the whole switch * * * looked as if it was right in the hole.’”

After dealing with the subject of the propriety of the non-suit as to the bottling company, the Court said—

“There was error also in the granting of a non-suit as to the traction company. The trial judge deemed the case to be controlled by our decision in *Fielders v. North Jersey Street Railway Co.*, 68 N. J. L. 343. But an essential element was absent from the *Fielders* case which the jury might have found existent in the case at bar. We said in that case (pp. 345, 346): ‘There is nothing in the case to show that * * * the defect resulted from any act of commission on the defendant’s part. Nor is there anything to connect the defect with the defendant’s rails or sleepers, or to show that anything done or omitted in the construction, maintenance or operation of the railway produced the defect. The location of the hole between the rails is a mere circumstance without causative significance.’”

An examination of the evidence now before us indicates a clear jury question on the very situation declared in the above quotation to be non-existent in the other case. Some extracts from the testimony of the city engineer are sufficient to elucidate this

point. He said there was a rut or depression in the asphalt about twice as wide as the rail, and that the rail was immediately in the depression of the asphalt; that it had been there about two years, and had been caused by wearing away of the asphalt due to continuous traffic; that the rails offered more resistance than the asphalt, and the wagons turning in and out and crossing it would wear it out. *The rail was a grooved rail and likely to wrench wagon wheels, being more prominent than a flat rail*; that in view of the construction adjacent to the switch, it would undoubtedly have a tendency to throw wheels off. The pavement had been worn away from the steel work of the switch, for a distance of three to six inches * * * *the head of the rail was exposed unnaturally*, and the hole was about the depth of the asphalt and wearing right down into the concrete.

Apart, then, from the obligation of the company to maintain this part of the pavement pursuant to the franchise ordinance proved in the case, and apart from any question whether the ordinance was intended for the benefit of the traveling public or only as requiring a contribution to the public expense of maintaining the roadway (which was the crux of the *Fielders* case), *the jury had a basis for finding that as a result of the character of the construction of the traction company’s track and switch at that point, there had been an unusual and excessive wear to the surface of the street, to which the hole or rut in question was due.*

It has been held elsewhere that as a matter of common law a street railway company is liable for injury caused by projection of its rails above the street surface resulting from the ordinary wearing away of the surface under general traffic. *Groves v. Louisville Railway Co.*, 109 Ky. 76; 52 R. A. 448. *We are not ready to declare so stringent a rule, and indeed, the recent case of Johnson v. Public Service Railway Co.*, 83 N. J. L. 647,

is generally to the contrary. But in that case, as in the *Fielders* case, the question of liability for a condition due to 'construction, maintenance or operation of a railway' was expressly reserved, with a rather plain implication that in such case liability would exist. Such is the posture of the case at bar. We need not go at length into the decisions, most of which will be found in the note to *Groves v. Louisville Railway Co.*, *supra*, as well as in 27 *Encycl. L.* (2d ed.) 93, 94, and many of which embrace the element of obligation by statute, ordinance, or contract, to keep the street surface in repair. Apart from this, we consider that when a street railway company adopts such a construction of its roadbed, rails, or switches as will normally cause an excessive wear on adjoining parts of the highway, it is under a duty of reasonable care to guard against such excessive wear creating a dangerous condition in such highway, and if such care be not used and an accident result which might reasonably have been anticipated, the company is *prima facie* liable therefor.

In the case at bar the jury might lawfully have found that the rut in question was due to the effect of the structure of defendant's railway on ordinary traffic; that it had been there so long as to charge defendant with notice of its existence, and that a heavy auto truck whose front wheel should run into the rut would be likely to swerve or slew out of its course and do damage. In this aspect, therefore, there was a case for the jury. It is true that the evidence indicates that the switch and track were of standard design and construction. Assuming this, it was not the appliances themselves, but the condition of the roadway due to their presence and cumulative influence through an extended period of time, that caused the injury." (Italics ours.)

In sub division III to the note to *Groves v. Louisville Railway Co.*, cited in the foregoing decision, it is stated:

"It is apparent from the cases cited in this subdivision that the doctrine of the principal case, holding the company liable, even in the absence of a statutory or contractual duty in the premises, for defects not in the track itself and not attributable in the first instance to any fault or defect on the company's part, does not have the unanimous support of the cases."

The case at bar comes clearly within the facts in *Johnson v. Public Service Ry. Co.*, *supra*. The defendant company owed no duty to the traveling public for the condition of the highway at the *locus in quo*. It must be assumed that the defendant company had a right to lay its tracks there. While in the *Johnson* case the Court said that the general principles of common law required a street railway company which is authorized to lay its tracks in a public street to lay them in a manner and keep them in a state of proper repair, it held that the doctrine did not come in aid of the plaintiff's case, because the proofs failed to disclose improper laying of, or want of repair in, the tracks of the defendant company, and in that respect the situation is exactly the same as in the case at bar.

In the case at bar there is nothing to connect the defects, that is, the holes in the pavement, "with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance or operation of the railway produced the defect." There is nothing in this case to connect the defect (the sunken paving blocks) with the defendant's rails or other construction or to show that anything was done or omitted in the construction, maintenance or operation of the railway which produced the defect.

The facts in the case at bar are sharply distinguished from the facts in the case of *Geise v. Mercer Bottling Company et al, supra*. In that case the rail was a grooved rail and likely to wrench wagon wheels, being more prominent than a flat rail. This Court said:

“The jury had a basis for finding that as a result of the character of the construction of the traction company’s track and switch at that point, there has been an unusual and excessive wear to the surface of the street, to which the hole or rut in question was due.”

In the case at bar the plaintiff relies in his complaint on an allegation of negligence on the part of the defendant. The evidence is undisputed that the ground underneath the entire roadway is soft soil and that the sinking of the Belgian blocks and the holes that existed therein is due entirely to the soft soil underneath and the heavy vehicular traffic thereover.

The plaintiff’s uncontradicted proof is that the rails are standard construction and that the holes alongside the rails are due to the pavement that was laid alongside thereof; that there is nothing wrong in the construction or in the maintenance of the track; that the track is all right, the rails and switch standard and that the pavement all over the road near the rails, as well as away from them, is sunken, all due to the nature of the soil and the heavy vehicular traffic. There was nothing about the construction of the switch or the rail, or the maintenance thereof, or the operation over it, that effected the depressions. Indeed, the plaintiff’s own proof is that even if the rails were not there, because of the condition of the soil ordinary traffic of trucks and automobiles might cause the sinking of the pavement, and if the track had not been there the

particular hole in question might have extended to where the track was.

In the case of *Geise v. Trenton Bottling Company, supra*, this Court said:

“It has been held elsewhere that as a matter of common law the street railway company is liable for injury caused by projecting of its rails above the street surface resulting from the ordinary wearing away of the surface under general traffic.”

Groves v. Louisville Ry. Co., 109 Ky. 76; 55 R. A. 448.

“We are not ready to declare so stringent a rule, and indeed, the recent case of *Johnson v. Public Service Ry. Co.*, is generally to the contrary.”

The burden of proof was on the plaintiff to prove negligence on the part of the defendant.

In the case of *Hummer v. Lehigh Valley R. R. Co.*, 75 N. J. L. 703, decided by this Court, the plaintiff, a milkman, about three o’clock in the morning, at an unfrequented grade crossing of the Lehigh Valley Railroad, drove off the railroad crossing and the wheel of the wagon was caught in the tracks. It was very dark and thick. He proceeded to unload his wagon between the rails. While thus engaged he saw the headlight of an approaching train about six hundred feet away, and ran up the track waving a white lantern. The train passed him about one hundred and fifty feet from the crossing. The engine ran five or six feet on to the crossing and struck the rear wheel of the wagon. Both the fireman and the engineer testified that when the plaintiff first waved his lantern the engineer immediately shut off the steam and put on the brakes. The plaintiff testified that the train did not slow down until it passed him about one hundred and fifty feet from the place of the ac-

cident. On cross examination he based this assertion upon the fact that he heard the air-brakes applied as the train passed him. The trial judge ruled that this testimony left it open to dispute whether the train was stopped with reasonable promptness after the plaintiff's warning. *Held*, that the plaintiff's testimony that the train did not slow down was a mere conjecture; that it proved nothing and made no case to go to the jury; that it did not controvert the testimony of the fireman and the engineer that the steam was shut off and the brakes applied as soon as the signal was seen, about five hundred feet from the crossing; that, therefore, the trial judge erred in not directing a verdict for the defendant.

In the same case the Court held that in an action for negligence the trial judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence, as with the existence, of negligence in the defendant.

In the case at bar, there being no statutory or contractual obligation to keep the pavement in repair, and there being no proof of negligence on the part of the defendant company in the laying or maintenance of its rails, the Trial Court should have non-suited the plaintiff, and failing that should have directed a verdict in its favor as it was requested to do.

Upon the grounds urged, it is respectfully submitted that the judgment for the plaintiff should be reversed.

Respectfully submitted,

HENRY H. FRYLING,
Attorney for and of Counsel
with Defendant-Appellant.

WILLIAM H. SPEER,
Of Counsel.

New Jersey Court of Errors and Appeals

THOMAS HURLEY, Plaintiff-Appellee, vs. PUBLIC SERVICE RAILWAY COMPANY, Defendant-Appellant.	}	On Appeal from New Jersey Supreme Court.
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BRIEF OF PLAINTIFF-APPELLEE

This is a negligence case and was tried before Judge Henry E. Ackerson, Jr., in the Hudson County Circuit of the Supreme Court, and resulted in a verdict for the plaintiff, Thomas Hurley, in the sum of Ten Thousand (\$10,000.00) Dollars damages, and it is from this judgment that the defendant now appeals.

Statements of Facts

Hurley testified that on September 6, 1926, he was driving a one horse truck in an easterly direction along Pavonia Avenue (p. 16, l. 10-12), that it was raining that night, that it was between half past seven and eight o'clock at night, that he was going towards the ferry and was thrown from the truck on account of the forward wheel hitting a hole alongside of the switch (p. 16, l. 25-30), that the hole was right alongside of the switch, and the

front wheel sunk into it when it hit (p. 17, ll. 28-30), that the front of the truck swerved that way and the tail of the truck swerved this way (p. 18, ll. 1-5) and that his ankle was crushed underneath the hind wheel, that he laid right on the switch and he could not have moved from the switch (p. 18, ll. 20-24) and laid there until a man came and picked him up. That he saw this hole filled with water (p. 19, ll. 20-22), that it was about two feet, and that it is on both sides of it, and the rail, you might say, is just lying over this hole (p. 19, ll. 30-40). That he was taken to the hospital and was not out of the hospital until November 12, 1926, when his leg was amputated about six inches below the knee (p. 22, ll. 1-30) by Doctor Coley, who testified that it was a necessary operation.

Anthony Bonaventure testified that on this night he was driving a truck about 15 or 20 feet back of Hurley's truck (p. 58, ll. 30-40) that he had come over to Jersey City for a period of seven years and had occasion to use Pavonia Avenue on an average of two or three times a night, depending on how busy he was (p. 58, ll. 10-25) that he knew the switch or crossover at the end of Pavonia Avenue and that on September 6, 1926, he was right in back of Hurley, about 15 or 20 feet. He saw the truck swerve, the front part of the truck, then the truck went down again and swung. He saw Hurley on the ground and got off his truck and went over to him and picked him up (p. 59, ll. 29-30) right where the switch is (p. 60, ll. 1-3), that where Hurley was lying there is a hole about three and a half or four inches below the car tracks (p. 62, ll. 26-32), that there were several holes around this point and they run from two inches, two and a half inches, three inches deep, inside the rail and outside the rail between the third and fourth rails (p. 63, ll. 20-30).

Cornelius S. Cassidy, a police patrolman, testi-

fied that he had occasion to use Pavonia Avenue daily for a period of over six years (p. 74, ll. 20-32) that in the month of September, 1926, he rode up and down there, and that the conditions of the pavement there was bad (p. 75, ll. 1-15) the condition of the roadbed there, he doesn't know whether the stones had been sunk or what has happened, but it is in very bad condition, that it existed for quite a length of time, to his knowledge for about a year (p. 75, ll. 20-40), and that is the condition of the cross-switch west of and leading to the crossover (p. 76, ll. 15-19).

Joseph Farmer, a police patrolman, testified that he was detailed to the scene of the accident right after the accident (p. 78, ll. 35-40), that he was familiar with the locality there, and that he knew the switch in question, and that the street at that point is in very bad condition (p. 80, ll. 15-19), that the cobblestones are three or four inches lower than the rail at the crossover, and this condition existed, to his knowledge, for over a period of two years (p. 81, ll. 25-40).

Frank E. Leonard testified that he was a chauffeur and had occasion to use Pavonia Avenue many times and that he noticed the condition of the switch near the ferry house (p. 84, ll. 1-18) and that down as far as where the milk comes in it is bad, it is all ruts, and that you have to slow down to about five miles an hour unless you can hold the track (p. 84, ll. 20-28).

Joseph W. Obreiter, a civil engineer, testified that on September 25, 1926, he made a survey of these tracks on lower Pavonia Avenue (p. 45), that he found a depression on the south side of the south rail at the switch of three and one-half to four inches below the top of the rail, and that runs about six feet along the rail. He also found a depression opposite the frog. The depression there was an inch and a half below the top of the rail.

That runs along the south rail about three feet. He also found a depression at the frog at the east end of the frog between the north rail of the east-bound track and the crossover, a depression of two inches and the pavement in there is very rough (p. 47, ll. 15-28) that it is right up against the frog (p. 50, l. 38) that the paving between the tracks about 30 feet west of the switch is in very good shape, fine shape (p. 57, ll. 1-9).

Joseph Obreiter, recalled, testified that he had been engaged in laying block and asphalt pavements (p. 85), that there is a certain jar that the track is given when the trolley makes the switch and it tends to loosen up the pavement alongside of it (p. 87, ll. 10-15), that when the trolleys come along and hit the rail it loosens the blocks and the trucks come along and drive them down, and that is continuous when you have heavy traffic that way (p. 89, ll. 10-15), that he did not think the hole would have existed if the trolley track was not there, it might have been a different kind of a hole, but not this kind of a hole (p. 91, ll. 35-40), he didn't think traffic disassociated with the rail along there had anything to do with it (p. 92, ll. 18-20), that the producing cause of the depression was due to the track that was laid there (p. 92, ll. 20-25).

(At page 94, ll. 8-40.)

"The Witness: No. The operation of cars over it, not the construction, but the operation of cars over the switch.

"The Court: Now, what did that do, in your opinion, towards causing this depression?

"The Witness: The operation of cars over these tracks caused the blocks to be loosened.

"The Court: All right. Now, did you find that condition to have existed and that

the blocks were loosened?

"The Witness: Yes. I found one block entirely out.

"The Court: And you think that was due to the operation of the trolley cars?

"The Witness: I think it got so loose that something must have knocked it out; I don't know if the trolley did or not.

"The Court: Is it your opinion that the operation of cars over this rail at this point and the switch loosened the cobblestones so that it made them more susceptible to a depression than they otherwise would have been at that point?

"The Witness: Absolutely.

"The Court: No doubt about it? That is your judgment as an engineer?

"The Witness: Yes, sir.

"The Court: And from your examination?

"The Witness: Yes, sir."

At page 96 witness testified that he didn't believe the hole would be there in the same shape if the tracks were not there, that if the tracks was not there you would have a dish shaped hole (p. 96, ll. 26-30).

Charles Jewett, a civil engineer, testified for the defendant that on January 6, 1927, he made an examination of the switches at this point (p. 99, ll. 20-29), that they were standard and in first class condition, but that he only made a customary examination of the pavement in the vicinity of that track (p. 99, ll. 10-20). At p. 101, l. 30, he testified as follows:

"Q. Is there more resistance at this rail at this point than at the Belgian blocks?

"The Witness: Yes, sir.

"The Court: Considerably more?"

"The Witness: Considerable more."

"The Court: What effect, if any, would that have on wagons crossing over the rails at the points heretofore indicated?"

"The Witness: From my experience there is no difference so long as the pavement is capable of sustaining the vehicular loads."

"The Court: And the rail would have no effect in retarding a wheel going over under the condition as you found them?"

"The Witness: Yes, it would retard it."

Harry L. Newby testified for the defendant that on the night Hurley was injured he saw Hurley's truck out in the street just about ten feet east of the switch (p. 107, ll. 30-40), that it was raining, that there was an inch or two of rain in the street.

Argument

The defendant alleges two grounds.

First:—The refusal of the Trial Court to nonsuit.

Second:—The refusal of the Trial Court to direct a verdict.

Both of these grounds are argued together. The defendant in its brief contends that this case is controlled by the case of *Johnson vs. Public Service Ro. Co.*, 83 N. J. Law 647, and endeavors to differentiate it from the case of *Geiss vs. Mercer Bottling Company* and *Trenton & Mercer County Traction Corporation*, 87 N. J. Law, 224. The plaintiff contends that the case clearly presented a jury question on the negligence of the defendant.

The Trial Court said in its opinion on motion to nonsuit (p. 97):—

"In view of the testimony that has just been offered there is sufficient in the case for the court to shift the responsibility to the jury, and while it has a great many of the aspects of the case of *Johnson* against the *Public Service Railway*, nevertheless it also has some of the aspects of the case of *Geise* against the *Mercer Bottling Company*, and it is not for the court to pass upon the weight or the sufficiency of the proof it is only as to whether or not there is such proof as requires the court to send the case to the jury, so I will deny your motion and allow you an exception."

The Court rightfully refused to nonsuit or direct a verdict.

In *Jones vs. Public Service*, 86 N. J. Law, 646, a nonsuit or the direction of a verdict cannot be granted when the facts and the inferences to be drawn therefrom are in dispute. At p. 647, "It is an elementary principle of law, illustrated in many cases that a motion for a nonsuit or to direct a verdict for the defendant based upon the insufficiency of the evidence to establish a cause of action admits the truth of plaintiff's evidence and every influence of fact which can be legitimately drawn therefrom but denies its sufficiency in law." *Fox vs. Atlantic, &c. Co.*, 84 N. J. L. 726; *Dallas vs. Sea Isle City*, Id. 729.

In *Bahr vs. Lombard Ayres & Co.*, 53 N. J. L. 233, at page 236:

"If from the facts in evidence two inferences as to defendant's conduct may be legitimately drawn, one favorable and one unfavorable to its negligence, a question is presented which calls for the opinion of the

jury."

See also *Holmes vs. Pelegrino*, 133 Atl. 194.

In the case at bar there was evidence connecting defendant with negligence in the operation of the trolleys and maintenance of this point. The case clearly presented a jury question on the cause of the depressions at the point where plaintiff was injured.

Obreiter, civil engineer, testified that the producing cause of the depressions was due to the track that was laid there (p. 92, ll. 20-25), that when the trolleys came along and hit the rail it loosens the blocks and the trucks come along and drive them down and that is continuous where you have heavy traffic (p. 98, ll. 10-15), that he found one block out, and that, in his opinion, the operation of cars over this rail at this point loosened the cobblestones so that it made them more susceptible to a depression than they otherwise would have been at that point. Hurley said that the hole was about two feet and that it is on both sides of it, and the rail, you might say, is just lying over this hole (p. 19, ll. 30-40). Bonaventure testified the holes run from two inches to three inches inside the rail and outside the rail between the third and fourth rails (p. 63 ll. 20-30). Cassidy said the roadbed there is in very bad condition and existed for over a year (p. 75, ll. 20-40). Farmer testified that the cobblestones are three or four inches lower than the rail at the crossover, and this condition existed for over a period of two years (p. 81, ll. 25-40).

Plaintiff's case was strengthened by defendant's witness Charles Jewett, who testified that there was considerably more resistance at this rail than at Belgian blocks (p. 101, l. 30) and that the rail would retard wheels going over it (p. 102, l. 10).

This case differs from the case of *Johnson vs. Public Service Ry. Co.* supra in this, that the defendant owed a duty to the plaintiff and the public at large to keep the pavement and roadbed adjoining this switch in good repair.

There is some testimony in the case the pavement between the tracks up to about this twitch is in good condition, as the pictures offered in evidence discloses, and if that is so then surely it was a question for the jury to decide whether or not this switch is an added burden on the land there and would be such as to naturally cause an excessive wear or create a dangerous condition in the adjoining parts of the highway.

In *Brady vs. Public Service Ry. Co.*, 80 N. J. L. 473, the court said:

"Every person having occasion to use the public highways of the State is entitled to feel that he is absolutely safe while using ordinary care against all incidents arising from obstructions therein and no one has a right, without specific authority, to obstruct a public highway or render its ordinary use dangerous. If he do so he thereby creates a public nuisance and for injuries directly resulting therefrom to travelers upon the highway he is legally answerable."

Citing case *Temperence Hall vs. Giles*, 4 Vroom 260; *Driscoll vs. Carlin*, 21 Vroom 28.

In the case of *Piver vs. P. R. R. Co.*, 76 N. J. L. 713, the plaintiff, while driving on Fourth Street in Camden, New Jersey, was thrown from his wagon while crossing the track of the P. R. R., where they intersect the street, and was thereby

injured. The plaintiff based his right to recover upon the allegation that the accident was due to the failure of the railroad company to keep in proper repair the passage way (which is its paving). Court held that the railroad was liable for an injury resulting to a traveller from the failure to keep in repair the passageway over its tracks, maintained by it at a street intersection.

The case at bar comes clearly within the case of *Geise vs. Mercer Bottling Co.*, 87 N. J. L. 224, wherein the Court said:

“The suit was for personal injuries arising from the plaintiff being run over by an automobile truck of the defendant bottling company, at or near the intersection of Market and South Broad Streets in Trenton. The defendant traction company had car tracks in both streets, connected by a switch on Broad Street. The street was paved with asphalt, and on each side of the tongue of the switch was a deep rut or depression, worn by wagon wheels. Defendant's employe, driving the truck along Broad Street, failed to notice the rut, and one of the front wheels entered it, wrenching the steering gear out of his hands or otherwise causing him to lose control of the truck, which at once swerved from its former course and turned uncontrolled into Market Street in time to strike and run over the legs of plaintiff, who was crossing Market Street on foot. The testimony indicates that the truck ran wild for about a hundred feet and stopped on the sidewalk. As against the bottling company the plaintiff counted on negligence of its driver generally; as against the traction company he charged

that it carelessly and negligently maintained its tracks, roadbed, etc., in a dangerous and unsafe condition, and by reason of such condition, to wit, a large rut or hole in said roadbed, and defective and improperly laid rails, tracks and switches, the truck in question became unmanageable and ran into plaintiff.

“The evidence for plaintiff would amply have supported a finding that the rut was four feet long and six inches deep, and was on both sides of the rail. As one of the witnesses expressed it, ‘the track laid in the hole’; ‘the whole switch * * * looked as if it was right in the hole.’”

At page 228 the Court said:

“There was error also in the granting of a nonsuit as to the traction company. The trial judge deemed the case to be controlled by our decision in *Fielders vs. North Jersey Street Railway Co.*, 68 N. J. L. 343. But an essential element was absent from the *Fielders* case, which the jury might have found existent in the case at the bar. We said in that case (pp. 345, 346): ‘There is nothing in the case to show that * * * the defect resulted from any act of omission on the defendant's part. Nor is there anything to connect the defect with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance or operation of the railway produced the defect. The location of the hole between the rails is a mere circumstance without causative significance.’”

“An examination of the evidence now before us indicates a clear jury question on

the very situation declared in the above quotation to be non-existent in the other case. Some extracts from the testimony of the city engineer are sufficient to elucidate this point. He said there was a rut or depression on the asphalt about twice as wide as the rail, and that the rail was immediately in the depression of the asphalt; that it had been there about two years, and had been caused by wearing away of the asphalt due to continuous traffic; that the rails offered more resistance than the asphalt, and the wagons turning in and out and crossing it would wear it out. The rail was a grooved rail and likely to wrench wagon wheels, being more prominent than a flat rail; that in view of the construction adjacent to the switch, it would undoubtedly have a tendency to throw wheels off. The pavement had been worn away from the steel work of the switch, for a distance of three to six inches * * * the head of the rail was exposed unnaturally, and the hole was about the depth of the asphalt and wearing right down into the concrete.

"Apart, then, from the obligation of the company to maintain this part of the pavement pursuant to the franchise ordinance proved in the case, and apart from any question whether the ordinance was intended for the benefit of the traveling public or only as requiring a contribution to the public expense of maintaining the roadway (which was the crux of the *Fielders* case), the jury had a basis for finding that as a result of the character of the construction of the traction company's track and switch at that point, there had been an unusual and excessive wear to the surface of the

street, to which the hole or rut in question was due.

"It has been held elsewhere that as a matter of common law a street railway company is liable for injury caused by projection of its rails above the street surface resulting from the ordinary wearing away of the surface under general traffic. *Groves vs. Louisville Railway Co.*, 109 Ky. 76; 52 L. R. A. 448. We are not ready to declare so stringent a rule, and indeed, the recent case of *Johnson vs. Public Service Railway Co.*, 83 N. J. L. 647, is generally to the contrary. But in that case, as in the *Fielders* case, the question of liability for a condition due to 'construction, maintenance or operation of the railway' was expressly reserved, with a rather plain implication that in such case liability would exist. Such is the posture of the case at bar. We need not go at length into the decisions, most of which will be found in the note to *Groves vs. Louisville Railway Co.*, supra, as well as in 27 Encycl. L. (2d ed.) 93, 94, and many of which embrace the element of obligation by statute, ordinance or contract, to keep the street surface in repair. Apart from this, we consider that when a street railway company adopts such a construction of its roadbed, rails, or switches as will normally cause an excessive wear on adjoining parts of the highway, it is under a duty of reasonable care to guard against such excessive wear creating a dangerous condition in such highway, and if such care be not used and an accident result which might reasonably have been anticipated, the company is prima facie liable therefor.

"In the case at bar the jury might law-

fully have found that the rut in question was due to the effect of the structure of defendant's railway on ordinary traffic; that it had been there so long as to charge defendant with notice of its existence, and that a heavy auto truck, whose front wheel should run into the rut, would be likely to swerve or slew out of its course and do damage. In this aspect, therefore, there was a case for the jury. It is true that the evidence indicates that the switch and track were of standard design and construction. Assuming this, it was not the appliances themselves, but the condition of the roadway due to their presence and cumulative influence through an extended period of time, that caused the injury."

In the case of *Central Ry. Co. of Baltimore vs. State* to use of *Buck et al.* 33 Atl. 265—case directly in point—wherein an action against a street railway company to recover for injuries suffered by being thrown out of a carriage as resulting from the improper construction of a switch in the street, the evidence tends to simply show that the switch had been skillfully constructed under the supervision of a competent engineer and had been frequently inspected and kept in repair, while the evidence of the plaintiff tends to show the rails were so far elevated above the surface of the street as to be obviously dangerous, the jury might well conclude that the company must have been aware of such a condition of the tracks.

Whether or not the accident, in which the plaintiff's intestate was injured, was due to defendant's negligence in the maintenance of its tracks at an elevation over the level of the street is a question for the jury.

In the case of *Van Clik vs. Hackensack Water Co.*, 126 Atl. Rep. 634 at 635, Court said:

"The defendants argue that the court should have directed a verdict for the defendants on the ground that there was no negligence shown. The plaintiff and two passengers testified that while the car was going at a moderate speed on Anderson Avenue, there was a terrific bump, which threw the occupants of the car against the top of the car. There was also evidence of a depression in the roadway of approximately 5½ inches in depth and 6 feet in width at the place where the pipe had been laid. This testimony, in our opinion, entitles the plaintiff to have submitted to the jury the question of defendant's negligence."

In the case at bar defendant did not produce evidence to show any repairing or any evidence showing inspection of this place but went under the bald theory that it was under no duty, either statutory or contractual, to keep that point in reasonable repair, but that it could place and did place this switch there and not think any more of it.

The defendant contends that there is nothing to connect the holes in the pavement with the defendant's rails or sleepers or to show that anything was done or omitted in the construction, maintenance or operation of the railway produced the defect. The plaintiff contends that the case at bar comes clearly within the Geise case, where the Court said:

"It is true the evidence indicates that the switch and track were of standard design and construction. Assuming this, it was not

the appliances themselves but the condition of the roadway due to their presence and cumulative influence through an extended period of time that caused the injury."

The Trial Court, in its charge (p. 115) not one word of which does appellant take exception to, rightfully left it to the jury to decide whether or not the construction, maintenance and operation of the switch and cars over the point caused an excessive wear or created dangerous condition in the adjoining parts of the highway.

The plaintiff's proof in the case as to the holes alongside the rails were not, as argued in appellant's brief, due to the pavement laid alongside thereof, but as was testified to by Obreiter witness for plaintiff, due to the operation of the cars over this rail at this point and the switch loosening the cobblestones, making them more susceptible to a depression than they otherwise would have been at this point. Cassidy also testified that the roadbed was in bad condition. The case, on behalf of the plaintiff, was replete with negligence and was strengthened by defendant's own witness Jewett; when he testified (p. 101, l. 30) that there was considerably more resistance at this rail than at the Belgian blocks, and that the rail would retard wheels going over it (p. 102, l. 10).

While it is true plaintiff did not claim the defendant was under a statutory obligation to keep the pavement in repair, nevertheless plaintiff contended that defendant, having placed this switch there, it was under a duty to maintain and repair the same and operate its cars over the same as would not cause an excessive wear, or create a dangerous condition in the adjoining parts of the highway, and whether or not they did this, was clearly a question for the jury to decide, and the Trial Court rightfully refused to nonsuit or direct

a verdict under the evidence that was presented. For these reasons it is respectfully submitted that the judgment for the plaintiff be affirmed.

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