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Notice of Appeal.

(Filed July 3, 1929.)

New Jersey Supreme Court

10a

ANNIE HOWARD,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW JER-
SEY, a corporation of New Jer-
sey,

Defendant-Appellees.

Action at Law.
On Appeal.

20a

To COLLINS AND CORBIN, Esqs.,
Attorneys for Defendant-Appellees.

PLEASE TAKE NOTICE that the plaintiff appeals to
the Court of Errors and Appeals of the State of
New Jersey from the judgment entered in this
cause in the above entitled matter.

30a

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

40a

Grounds of Appeal.

(Filed July 3, 1929.)

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

10b

ANNIE HOWARD,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendant-Appellees.

Action at Law.
On Appeal.

20b

The Plaintiff-Appellant states the following grounds of appeal in this cause:

1. That the Supreme Court erred in reversing the judgment of the First District Court of Jersey City.

2. That the Supreme Court erred in not affirming the judgment in favor of the plaintiff entered in the First District Court of Jersey City.

30b

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

40b

State of Demand.

(Filed December 10, 1928.)

First District Court of Jersey City 10

ANNIE HOWARD,
Plaintiff,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,
Defendants.

In Tort.

20

Plaintiff, Annie Howard, residing in Jersey City, Hudson County, New Jersey, complains of the defendants and alleges:

FIRST COUNT.

1. Upon information and belief, defendant Lehigh Valley Railroad Company is now, and was at all times hereinafter mentioned, a foreign corporation, organized and existing under the laws of the State of Pennsylvania, and the defendant Lehigh Valley Railroad Company of New Jersey is now, and was at all times hereinafter mentioned, a corporation, organized and existing under the laws of the State of New Jersey. 30

2. That on or before September 1st, 1928, the defendant Lehigh Valley Railroad Company was 40

State of Demand.

the manager and operator of a certain railroad which crosses a public highway known as County Road in the township of Manville, Somerset County, New Jersey, at grade, and was in possession of, used, maintained and controlled certain signal towers at a point where the said railroad of the said defendant company crosses said County Road, in the township of Manville, New Jersey.

10 3. That on said September 1st, 1928, plaintiff was a passenger in an automobile which was being driven by Richard Pennell along County Road in the said township of Manville, New Jersey, where said defendant company's tracks cross said highway.

20 4. That at the said time and place, said Richard Pennell ran into and collided with a signal tower owned, maintained, used and controlled by the defendant Lehigh Valley Railroad Company, by reason of the negligence of the said defendant company.

30 5. That the negligence of the defendant consisted in this: that it failed and neglected to give warning of the existence of said signal tower in the center of said County Road, to persons lawfully upon said highway; that it failed and neglected to properly equip said tower with warning lights so as to warn persons using said highway, of the existence of said tower in the center of the road; that said tower was situated in a position wherein it interfered with the safety and convenience of persons traveling upon said highway; said defendant was otherwise negligent in that it maintained a nuisance upon said highway so that it interfered
40 with the safety of persons lawfully thereon.

State of Demand.

6. That by reason of the negligence of the defendant company, plaintiff was thrown from said automobile and as a result thereof became, was and still is, sick, sore, lame and distorted and has suffered and still suffers great pain and distress.

10

SECOND COUNT.

Plaintiff repeats and reiterates all the allegations contained in the first count so far as they relate to this count and further says:

1. That the defendant Lehigh Valley Railroad Company of New Jersey was the owner and in possession of certain lands in the township of Manville, Somerset County, New Jersey, which was and still is used as a railroad and railroad-bed and on and before the date aforementioned the said railroad company consented, permitted and allowed the Lehigh Valley Railroad Company to maintain, use and operate certain signal towers at a position where the railroad and road-bed of said defendant Lehigh Valley Railroad Company of New Jersey crosses a public highway in the township of Manville, known as County Road, at grade, and said defendant allowed, permitted and consented to certain signal towers to remain in the center of said County Road where said railroad and road-bed cross said County Road.

20

30

2. That on said September 1st, 1928, the said plaintiff Annie Howard was injured by reason of a collision which occurred as described in the first count herein, which is referred to and made a part hereof.

3. That the negligence of the defendant Lehigh Valley Railroad Company of New Jersey consisted in this: that it allowed, consented to and permit-

40

State of Demand.

ted a signal tower to be erected in the center of
said County Road where said railroad and road-
bed cross, unattended and in a position where it
interfered with the safety and convenience of per-
sons lawfully upon said highway; that it failed
10 and neglected to give warning of the presence of
said tower in the center of said highway to persons
lawfully thereon; defendant was otherwise negli-
gent in that it permitted, consented to, and allowed
a nuisance to be erected upon its said land in a
manner wherein it interfered with the safety and
convenience of persons lawfully upon said high-
way.

Plaintiff claims judgment on both counts, in the
sum of \$500.00, together with interest and costs of
20 this suit.

HARRY TARTALSKY.

30

40

Notice of Appeal.

(Filed Mar. 20, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

<p style="text-align: center;">ANNIE HOWARD, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>LEHIGH VALLEY RAILROAD COM- PANY, a corporation of Penn- sylvania, and LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of New Jersey,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p style="text-align: center;">In Tort.</p>	<p>10</p> <p>20</p>
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To

HARRY TARTALSKY, Esq.,
Attorney of Plaintiff.

SIR:

TAKE NOTICE that the defendants hereby appeal to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City, rendered in the above stated action on March 5, 1929. 30

Dated March 15, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendants.

Service acknowledged March 15, 1929.

HARRY TARTALSKY,
Attorney of Plaintiff. 40

**Specification of Determinations and
Directions Appealed From.**

(Filed Mar. 25, 1929.)

NEW JERSEY SUPREME COURT.

19

ANNIE HOWARD,
Plaintiff-Respondent,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation of New
Jersey,

} In Tort.

Defendants-Appellants.

20

The defendants-appellants herein, herewith file their specification of determinations and directions of the First District Court of Jersey City, with respect to which they are dissatisfied in point of law.

1. Said Court erred in refusing to direct a verdict in favor of the defendants when thereunto moved, whereas said motion should have been granted on the ground urged in support thereof as follows:

30

(a) There was no evidence of any negligence on the part of the defendants which was the proximate cause of the accident.

2. Said Court erred in rendering judgment in favor of the plaintiff and against the defendants.

3. Said Court erred in failing to enter judgment in favor of the defendants and against the plaintiff.

40

COLLINS & CORBIN,

Attorneys of Defendants-Appellants.

Service acknowledged March 21, 1929.

HARRY TARTALSKY,

Attorney of Plaintiff-Respondent.

Transcript of Clerk's Docket.

(Filed Mar. 25, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

Before—MYRON C. ERNST, Esquire, acting for
CHARLES L. CARRICK, Esquire, Judge.

State of New Jersey, } 10
Hudson County, } ss.:
City of Jersey City, }

No—176986

ANNE HOWARD,
Plaintiff,

v.

LEHIGH VALLEY RAILROAD COM- 20
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,
Defendants.

In Tort.
Damages \$500.00.
Harry Tartalsky,
Pltff's Atty.
Collins & Corbin,
Defts' Attys.

COSTS	CITY	AL
Summons	1.60	
Service		90
Trial Fee	1.50	
	3.10	90
Bond	1.00	

30

A summons was issued tested December 10, A. D. 1928, returnable December 18, A. D. 1928, at 10 o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City. The Con-

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Transcript of Clerk's Docket.

stable returned the summons as follows, viz.: I served the within summons December 10, 1928, on Clement K. Corbin, agent of the defendant company by reading the same to him and delivering to him a copy thereof.

10

ROBERT J. LIVINGSTON,
Constable.

Plaintiff's demand was filed December 10, 1928.

January 29, A. D. 1929, the plaintiff appearing and the defendant appearing the cause was by consent tried with case No. 175813.

20

WHEREUPON, it is on this fifth day of March, A. D. 1929, by this Court considered and adjudged that Anne Howard, plaintiff, recover against Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania and Lehigh Valley Railroad Company of New Jersey, a corporation the sum of One Hundred and Fifty Dollars, damages, and Eleven Dollars and Fifty Cents, costs of suit.

March 20, 1929, Notice of Appeal and Bond filed by defendant.

30

40

Notice of Appeal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

GEORGE PENNELL,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendant-Appellees.

Action at Law.
On Appeal.

10a

To COLLINS AND CORBIN, Esqs.,
Attorneys for Defendant-Appellees.

20a

PLEASE TAKE NOTICE that the plaintiff appeals to
the Court of Errors and Appeals of the State of
New Jersey from the judgment entered in this
cause in the above entitled matter.

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

30a

40a

Grounds of Appeal.

(Filed July 3, 1929.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10b

GEORGE PENNELL,
*Plaintiff-Appellant,**v.*LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
*Defendant-Appellees.*Action at Law.
On Appeal.

20b

The Plaintiff-Appellant states the following grounds of appeal in this cause:

1. That the Supreme Court erred in reversing the judgment of the First District Court of Jersey City.
2. That the Supreme Court erred in not affirming the judgment in favor of the plaintiff entered in the First District Court of Jersey City.

30b

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

40b

State of Demand.

(Filed Dec. 10, 1928.)

FIRST DISTRICT COURT OF JERSEY CITY.

GEORGE PENNELL,
Plaintiff,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,
Defendants.

In Tort.

10

Plaintiff, George Pennell, residing in Jersey City,
Hudson County, New Jersey, complains of the de-
fendants and alleges:

20

FIRST COUNT.

1. Upon information and belief, defendant Le-
high Valley Railroad Company is now, and was
at all times hereinafter mentioned, a foreign cor-
poration, organized and existing under the laws
of the State of Pennsylvania, and the defendant
Lehigh Valley Railroad Company of New Jersey is
now, and was at all times hereinafter mentioned,
a corporation, organized and existing under the
laws of the State of New Jersey.

30

2. That on or before September 1st, 1928, the
defendant Lehigh Valley Railroad Company was
the manager and operator of a certain railroad
which crosses a public highway known as County
Road in the Township of Manville, Somerset

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State of Demand.

County, New Jersey, at grade, and was in possession of, used, maintained and controlled certain signal towers at a point where the said railroad of the said defendant company crosses said County Road, in the township of Manville, New Jersey.

10 3. That on said September 1st, 1928, plaintiff was a passenger in an automobile which was being driven by Richard Pennell along County Road in the said township of Manville, New Jersey, where said defendant company's tracks cross said highway.

20 4. That at the said time and place, said Richard Pennell ran into and collided with a signal tower owned, maintained, used and controlled by the defendant Lehigh Valley Railroad Company, by reason of the negligence of the said defendant company.

30 5. That the negligence of the defendant consisted in this: that it failed and neglected to give warning of the existence of said signal tower in the center of said County Road, to persons lawfully upon said highway; that it failed and neglected to properly equip said tower with warning lights so as to warn persons using said highway, of the existence of said tower in the center of the road; that said tower was situated in a position wherein it interfered with the safety and convenience of persons traveling upon said highway; said defendant was otherwise negligent in that it maintained a nuisance upon said highway so that it interfered with the safety of persons lawfully thereon.

40 6. That by reason of the negligence of the defendant company, plaintiff was thrown from said

State of Demand.

automobile and as a result thereof became, was and still is, sick, sore, lame and distorted and has suffered and still suffers great pain and distress.

SECOND COUNT.

Plaintiff repeats and reiterates all the allegations contained in the first count so far as they relate to this count and further says: 10

1. That the defendant Lehigh Valley Railroad Company of New Jersey was the owner and in possession of certain lands in the township of Manville, Somerset County, New Jersey, which was and still is used as a railroad and railroad-bed and on and before the date aforementioned the said railroad company consented, permitted and allowed the Lehigh Valley Railroad Company to maintain, use and operate certain signal towers at a position where the railroad and road-bed of said defendant Lehigh Valley Railroad Company of New Jersey crosses a public highway in the township of Manville, known as County Road, at grade and said defendant allowed, permitted and consented to certain signal towers to remain in the center of said County Road where said railroad and railroad-bed cross said County Road. 20 30

2. That on said September 1st, 1928, the said plaintiff, George Pennell, was injured by reason of a collision which occurred as described in the first count herein, which is referred to and made a part hereof.

3. That the negligence of the defendant Lehigh Valley Railroad Company of New Jersey consisted in this: that it allowed, consented to and permitted a signal tower to be erected in the center 40

State of Demand.

of said County Road where said railroad and road-bed cross, unattended and in a position where it interfered with the safety and convenience of persons lawfully upon said highway; that it failed and neglected to give warning of the presence of said tower in the center of said highway to persons lawfully thereon; defendant was otherwise negligent in that it permitted, consented to, and allowed a nuisance to be erected upon its said land in a manner wherein it interfered with the safety and convenience of persons lawfully upon said highway.

10

20

Plaintiff claims judgment on both counts, in the sum of \$500.00 together with interest and costs of this suit.

HARRY TARTALSKY.

30

40

Notice of Appeal.

(Filed Mar. 20, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

GEORGE PENNELL,
Plaintiff,

10

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation of New
Jersey,

In Tort.

Defendants.

20

To

HARRY TARTALSKY, Esq.,
Attorney of Plaintiff.

SIR:

TAKE NOTICE that the defendants hereby appeal
to the New Jersey Supreme Court from the judg-
ment of the First District Court of Jersey City, ren-
dered in the above stated action on March 5, 1929.

30

Dated March 15, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendants.

Service acknowledged Mar. 15, 1929.

HARRY TARTALSKY,
Attorney of Plaintiff.

40

**Specification of Determinations and
Directions Appealed From.**

(Filed Mar. 25, 1929.)

NEW JERSEY SUPREME COURT.

10

GEORGE PENNELL,
Plaintiff-Respondent,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation of New
Jersey,

} In Tort.

Defendants-Appellants.

20

The defendants-appellants herein, herewith file their specification of determinations and directions of the First District Court of Jersey City, with respect to which they are dissatisfied in point of law.

30

1. Said Court erred in refusing to direct a verdict in favor of the defendants when thereunto moved, whereas said motion should have been granted on the ground urged in support thereof as follows:

(a) There was no evidence of any negligence on the part of the defendants which was the proximate cause of the accident.

2. Said Court erred in rendering judgment in favor of the plaintiff and against the defendants.

40

3. Said Court erred in failing to enter judgment in favor of the defendants and against the plaintiff.

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

Service acknowledged Mar. 21, 1929.

HARRY TARTALSKY,
Attorney of Plaintiff-Respondent.

Transcript of Clerk's Docket.

(Filed Mar. 25, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY

Before—MYRON C. ERNST, Esquire, acting for
CHARLES L. CARRICK, Esquire, Judge.

State of New Jersey, }
Hudson County, } ss.:
City of Jersey City, }

10

Case No—

GEORGE PENNELL,
Plaintiff,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,
Defendants.

20

In Tort.
Damages \$500.00.
Harry Tartalsky,
Plff's Atty.
Collins & Corbin,
Defts' Attys.

COSTS	CITY	AL
Summons	1.60	
Service		.90
Trial Fee	1.50	
	3.10	.90
Bond	1.00	

30

A summons was issued tested December, A. D. 1928, returnable December 18, A. D. 1928, at 10 o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City. The Constable returned the summons as follows, viz.: I

40

Transcript of Clerk's Docket.

served the within summons December 10, 1928 on Clement K. Corbin, agent of the defendant company, by leaving the same with him and reading same to him.

ROBERT J. LIVINGSTON,
Constable.

10

Plaintiff's demand was filed December 10, 1928.

January 29, A. D. 1929, the plaintiff appearing and the defendant appearing, the trial of the cause was proceeded with as follows: by consent tried with case No. 175813.

20

WHEREUPON it is on this fifth day of March A. D. 1929, by this Court considered and adjudged that George Pennell, Plaintiff recover against said Lehigh Valley Railroad Company, a corporation of Pennsylvania, and Lehigh Valley Railroad Company of New Jersey, a corporation, defendant, the sum of Two hundred dollars damages and fourteen dollars costs of suit.

March 20, A. D. 1929, Notice of appeal and Bond filed by defendant.

30

40

Notice of Appeal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

EMILY LASTER, by her next friend,
ROSE LASTER, and ROSE LASTER,
individually,

Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,

Defendant-Appellees.

10a

Action at Law.
On Appeal.

20a

To COLLINS AND CORBIN, Esqs.,

Attorneys for Defendant-Appellees.

PLEASE TAKE NOTICE that the plaintiff appeals
to the Court of Errors and Appeals of the State
of New Jersey from the judgment entered in this
cause in the above entitled matter.

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

30a

40a

State of Demand.

(Filed Dec. 10, 1928.)

FIRST DISTRICT COURT OF JERSEY CITY.

EMILY LASTER, by her next friend,
ROSE LASTER, and ROSE LASTER,
individually,

*Plaintiffs,**v.*

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,

Defendants.

10

In Tort.

20

Plaintiff Emily Laster, by her next friend, Rose Laster, complains of the defendants and alleges:

FIRST COUNT.

1. Upon information and belief, defendant Lehigh Valley Railroad Company is now, and was at all times hereinafter mentioned, a foreign corporation, organized and existing under the laws of the State of Pennsylvania, and the defendant Lehigh Valley Railroad Company of New Jersey is now, and was at all times hereinafter mentioned, a corporation, organized and existing under the laws of the State of New Jersey.

30

2. That on or before September 1st, 1928, the defendant Lehigh Valley Railroad Company was the manager and operator of a certain railroad which crosses a public highway known as County

40

State of Demand.

Road in the township of Manville, Somerset County, New Jersey, at grade, and was in possession of, used, maintained and controlled certain signal towers at a point where the said railroad of the said defendant company crosses said County Road, in the township of Manville, New Jersey.

10 3. That on said September 1st, 1928, plaintiff was a passenger in an automobile which was being driven by Richard Pennell along County Road in the said township of Manville, New Jersey, where said defendant company's tracks cross said highway.

20 4. That at the said time and place, said Richard Pennell ran into and collided with a signal tower owned, maintained, used and controlled by the defendant Lehigh Valley Railroad Company, by reason of the negligence of the said defendant company.

30 5. That the negligence of the defendant consisted in this: that it failed and neglected to give warning of the existence of said signal tower in the center of said County Road, to persons lawfully upon said highway; that it failed and neglected to properly equip said tower with warning lights so as to warn persons using said highway, of the existence of said tower in the center of the road; that said tower was situated in a position wherein it interfered with the safety and convenience of persons traveling upon said highway; said defendant was otherwise negligent in that it maintained a nuisance upon said highway so that it interfered with the safety of persons lawfully thereon.

40 6. That by reason of the negligence of the defendant company, plaintiff was thrown from said

State of Demand.

automobile and as a result thereof became, was and still is, sick, sore, lame and distorted and has suffered and still suffers great pain and distress.

SECOND COUNT.

Plaintiff, by her next friend, repeats and reiterates all the allegations contained in the first count so far as they relate to this count and further says: 10

1. That the defendant Lehigh Valley Railroad Company of New Jersey was the owner and in possession of certain lands in the township of Manville, Somerset County, New Jersey, which was and still is used as a railroad and railroad-bed and on and before the date aforementioned the said railroad company consented, permitted and allowed the Lehigh Valley Railroad Company to maintain, use and operate certain signal towers at a position where the railroad and road-bed of said defendant Lehigh Valley Railroad Company of New Jersey crosses a public highway in the township of Manville, known as County Road, at grade and said defendant allowed, permitted and consented to certain signal towers to remain in the center of said County Road where said railroad and road-bed cross said County Road. 20 30

2. That on said September 1st, 1928, the said plaintiff Emily Laster was injured by reason of a collision which occurred as described in the first count herein, which is referred to and made a part hereof.

3. That the negligence of the defendant Lehigh Valley Railroad Company of New Jersey consisted in this: that it allowed, consented to and permitted a signal tower to be erected in the center of said County Road where said railroad and road- 40

State of Demand.

10 bed cross, unattended and in a position where it interfered with the safety and convenience of persons lawfully upon said highway; that it failed and neglected to give warning of the presence of said tower in the center of said highway to persons lawfully thereon; defendant was otherwise negligent in that it permitted, consented to, and allowed a nuisance to be erected upon its said land in a manner wherein it interfered with the safety and convenience of persons lawfully upon said highway.

Plaintiff, by her next friend, claims judgment on both counts, in the sum of \$400.00 together with interest and costs of this suit.

20

THIRD COUNT.

Plaintiff, Rose Laster, repeats and reiterates all the allegations contained in the first and second counts so far as they relate to this count and further says:

30 1. That by reason of the negligence of the defendants as described in the first and second counts herein, which is referred to and made a part hereof, said plaintiff was compelled to and did expend large sums of money for medical service and medicines in an endeavor to cure the said Emily Laster of the injuries sustained.

Wherefore plaintiff claims judgment in the sum of \$100.00 together with interest and costs of suit.

HARRY TARTALSKY.

40

Notice of Appeal.

(Filed Mar. 20, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

EMILY LASTER, by her next friend,
ROSE LASTER, and ROSE LASTER,
individually,

*Plaintiffs,**v.*

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania; and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation of New
Jersey,

Defendants.

In Tort.

10

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To

HARRY TARTALSKY, Esq.,
Attorney of Plaintiffs.

SIR:

TAKE NOTICE that the defendants hereby appeal
to the New Jersey Supreme Court from the judg-
ment of the First District Court of Jersey City,
rendered in the above stated action on March 5,
1929.

30

Dated March 15, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendants.

Service acknowledged March 15, 1929.

40

HARRY TARTALSKY,
Attorney of Plaintiffs.

**Specification of Determinations and
Directions Appealed From.**

(Filed Mar. 25, 1929.)

NEW JERSEY SUPREME COURT.

10 EMILY LASTER, by her next friend,
 ROSE LASTER, and ROSE LASTER,
 individually,
 Plaintiffs-Respondents,

v.

20 LEHIGH VALLEY RAILROAD COM- } In Tort.
 PANY, a corporation of Penn-
 sylvania, and LEHIGH VALLEY
 RAILROAD COMPANY OF NEW
 JERSEY, a corporation of New
 Jersey,
 Defendants-Appellants.

The defendants-appellants herein, herewith file their specification of determinations and directions of the First District Court of Jersey City, with respect to which they are dissatisfied in point of law.

30 1. Said Court erred in refusing to direct a verdict in favor of the defendants when thereunto moved, whereas said motion should have been granted on the ground urged in support thereof as follows:

(a) There was no evidence of any negligence on the part of the defendants which was the proximate cause of the accident.

2. Said Court erred in rendering judgment in favor of the plaintiffs and against the defendants.

40 3. Said Court erred in failing to enter judgment in favor of the defendants and against the plaintiffs.

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

Service acknowledged Mar. 21, 1929.

HARRY TARTALSKY,
Attorney of Plaintiffs-Respondents.

Transcript of Clerk's Docket.

(Filed Mar. 25, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

Before—MYRON C. ERNST, Esquire, acting for
CHARLES L. CARRICK, Esquire, Judge.

State of New Jersey, } 10
Hudson County, } ss.:
City of Jersey City, }

No—176987

EMILY LASTER, by her next friend,
ROSE LASTER, and ROSE LASTER,
individually,

Plaintiffs,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of the State
of Pennsylvania, and LEHIGH
VALLEY RAILROAD COMPANY OF
NEW JERSEY, a corporation,

Defendants.

In Tort.
Damages \$500.00.
Harry Tartalsky,
Pltffs' Atty.
Collins & Corbin,
Defts' Attys.

COSTS	CITY	AL	
Summons	1.60		
Service		.90	30
Trial Fee	1.50		
<hr/>			
	3.10	.90	
Bond	1.00		

A summons was issued tested December 10, A. D.
1928, returnable December 18, A. D. 1928, at 10

Transcript of Clerk's Docket.

o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City.

10 The Constable returned the summons as follows, viz.: I served the within summons December 10, 1928, on Clement K. Corbin, agent of the defendant company, by reading the same to him and delivering to him a copy thereof.

ROBERT J. LIVINGSTON,
Constable.

Plaintiff's demand was filed December 10, 1928.

20 January 29, A. D. 1929, the plaintiff appeared and the defendant appearing the trial of the cause was proceeded with as follows, viz.: by consent tried with case No. 175813.

WHEREUPON it is on this fifth day of March, A. D. 1929, by this Court considered and adjudged that Emily Laster, plaintiff, recover against said Lehigh Valley Railroad Company, a corporation of Pennsylvania and Lehigh Valley Railroad Company of New Jersey, a corporation, the sum of Two Hundred Dollars, damages, and Fifteen dollars costs of suit.

30 March 20, 1929, Notice of appeal and Appeal Bond filed by defendant.

Notice of Appeal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

SADIE TEMPLE, by her next friend,
HELEN JONES,
Plaintiff-Appellant,

10a

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendant-Appellees.

Action at Law.
On Appeal.

20a

To COLLINS AND CORBIN, Esqs.,
Attorneys for Defendant-Appellees.

PLEASE TAKE NOTICE that the plaintiff appeals
to the Court of Errors and Appeals of the State
of New Jersey from the judgment entered in this
cause in the above entitled matter.

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

30a

40a

Grounds of Appeal.

(Filed July 3, 1929.)

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

10b SADIE TEMPLE, by her next friend,
HELEN JONES,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendant-Appellees.

Action at Law.
On Appeal.

20b

The Plaintiff-Appellant states the following grounds of appeal in this cause:

1. That the Supreme Court erred in reversing the judgment of the First District Court of Jersey City.

2. That the Supreme Court erred in not affirming the judgment in favor of the plaintiff entered in the First District Court of Jersey City.

30b

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

40b

State of Demand.

(Filed Dec. 10, 1928.)

FIRST DISTRICT COURT OF JERSEY CITY.

SADIE TEMPLE, by her next friend,
HELEN JONES,
Plaintiff,

10

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,
Defendants.

In Tort.

20

Plaintiff Sadie Temple, by her next friend, Helen Jones, complains of the defendants and alleges:

FIRST COUNT.

1. Upon information and belief, defendant Lehigh Valley Railroad Company is now, and was at all times hereinafter mentioned, a foreign corporation, organized and existing under the laws of the State of Pennsylvania, and the defendant Lehigh Valley Railroad Company of New Jersey is now, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of New Jersey.

30

2. That on or before September 1st, 1928, the defendant Lehigh Valley Railroad Company was the manager and operator of a certain railroad which crosses a public highway known as County Road in the township of Manville, Somerset Coun-

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State of Demand.

ty, New Jersey, at grade, and was in possession of, used, maintained and controlled certain signal towers at a point where the said railroad of the said defendant company crossed said County Road in the township of Manville, New Jersey.

10 3. That on said September 1st, 1928, plaintiff was a passenger in an automobile which was being driven by Richard Pennell along County Road in the said township of Manville, New Jersey, where the said defendant company's tracks cross said highway.

20 4. That at the said time and place, said Richard Pennell ran into and collided with a signal tower owned, maintained, used and controlled by the defendant Lehigh Valley Railroad Company, by reason of the negligence of the said defendant company.

30 5. That the negligence of the defendant consisted in this: that it failed and neglected to give warning of the existence of said signal tower in the center of said County Road, to persons lawfully upon said highway; that it failed and neglected to properly equip said tower with warning lights so as to warn persons lawfully upon said highway, of the existence of said tower in the center of the road; that said tower was situated in a position wherein it interfered with the safety and convenience of persons traveling upon said highway; said defendant was otherwise negligent in that it maintained a nuisance upon said highway so that it interfered with the safety of persons lawfully thereon.

40 6. That by reason of the negligence of the defendant company, plaintiff was thrown from said

State of Demand.

automobile and as a result thereof became, was and still is, sick, sore, and lame and has suffered and still suffers great pain and distress.

SECOND COUNT.

Plaintiff, by her next friend, repeats and reiterates all the allegations contained in the first count so far as they relate to this count and further says: 10

1. That the defendant Lehigh Valley Railroad Company of New Jersey was the owner and in possession of certain lands in the township of Manville, Somerset County, New Jersey, which was and still is used as a railroad and railroad-bed and on and before the date aforementioned the said railroad company consented, permitted and allowed the Lehigh Valley Railroad Company to maintain, use and operate certain signal towers at a position where the railroad and road-bed of the said defendant company crosses a public highway in the township of Manville, Somerset County, New Jersey, known as County Road, at grade and said defendant consented, permitted and allowed said signal towers to remain in the center of said County Road where the railroad and road-bed cross said highway. 20 30

2. That on said September 1st, 1928, the said plaintiff Sadie Temple was injured by reason of a collision which occurred as described in the first count herein, which is referred to and made a part hereof.

3. That the negligence of the defendant Lehigh Valley Railroad Company of New Jersey consisted in this: that it allowed, consented and permitted a signal tower to be erected in the 40

State of Demand.

center of said County Road where said railroad
and road-bed cross, unattended and in a position
where it interfered with the safety and conveni-
ence of persons upon said highway; that it failed
and neglected to give any warning of the presence
10 of said tower in the center of said highway, to
persons lawfully thereon; defendant was other-
wise negligent in that it permitted, consented and
allowed a nuisance to be erected upon its said
lands in a manner wherein it interfered with the
safety and convenience of persons lawfully upon
said highway.

Plaintiff, by her next friend, claims judgment in
the sum of \$500.00 on both counts, together with
interest and costs of suit against either or both
20 defendants.

HARRY TARTALSKY.

30

40

Notice of Appeal.

(Filed Mar. 20, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

SADIE TEMPLE, by her next friend,
HELEN JONES,
Plaintiff,

10

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation of New
Jersey,
Defendants.

In Tort.

20

To—HARRY TARTALSKY, Esq.,
Attorney of Plaintiff.

SIR:

TAKE NOTICE that the defendants hereby appeal to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City, rendered in the above stated action on March 5, 1929.

30

Dated March 15, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendants.

Service acknowledged Mar. 15, 1929.

HARRY TARTALSKY,
Attorney of Plaintiff.

40

**Specification of Determinations and
Directions Appealed From.**

(Filed Mar. 25, 1929.)

NEW JERSEY SUPREME COURT.

10	<p>SADIE TEMPLE, by her next friend, HELEN JONES, <i>Plaintiff-Respondent,</i></p>	}	In Tort.
	<p><i>v.</i></p>		
20	<p>LEHIGH VALLEY RAILROAD COM- PANY, a corporation of Penn- sylvania, and LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of New Jersey, <i>Defendants-Appellants.</i></p>		

The defendants-appellants herein, herewith file their specification of determinations and directions of the First District Court of Jersey City, with respect to which they are dissatisfied in point of law.

30 1. Said Court erred in refusing to direct a verdict in favor of the defendants when thereunto moved, whereas said motion should have been granted on the ground urged in support thereof as follows:

(a) There was no evidence of any negligence on the part of the defendants which was the proximate cause of the accident.

2. Said Court erred in rendering judgment in favor of the plaintiff and against the defendants.

40 3. Said Court erred in failing to enter judgment in favor of the defendants and against the plaintiff.

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

Service acknowledged Mar. 21, 1929.

HARRY TARTALSKY,
Attorney of Plaintiff-Respondent.

Transcript of Clerk's Docket.

(Filed Mar. 25, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

Before—MYRON C. ERNST, Esquire, acting for
CHARLES L. CARRICK, Esquire, Judge.

State of New Jersey, } 10
Hudson County, } ss.:
City of Jersey City, }

Case No—176988

SADIE TEMPLE, by her next friend,
HELEN JONES,
Plaintiff,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,
Defendants.

In Tort.
Damages \$500.00.
Harry Tartalsky,
Pliff's Atty.
Collins & Corbin,
Defts' Attys.

COSTS	CITY	AL
Summons	1.60	
Service		.90
Trial Fee	1.50	
	3.10	.90
Bond	1.00	

A summons was issued tested December 10, A. D. 1928, returnable December 18, A. D. 1928, at 10 o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City. The Con-

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Transcript of Clerk's Docket.

stable returned the summons as follows, viz.: I served the within summons December 10, 1928 on Clement K. Corbin, agent of the defendant company, by leaving the same with him and reading same to him.

10

ROBERT J. LIVINGSTON,
Constable.

Plaintiff's demand was filed December 10, 1928.

January 29, A. D. 1929, the plaintiff appearing and the defendant appearing, the trial of the cause was proceeded with as follows: by consent tried with case No. 175813.

20

WHEREUPON it is on this fifth day of March A. D. 1929, by this Court considered and adjudged that Sadie Temple, plaintiff, recover against said Lehigh Valley Railroad Company, a corporation of Pennsylvania, and Lehigh Valley Railroad Company of New Jersey, a corporation, defendant, the sum of One hundred dollars, damages, and Nine dollars, costs of suit.

March 20, 1929, Notice of appeal and Bond on appeal filed by defendant.

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Notice of Appeal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

RICHARD PENNELL,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendant-Appellees.

Action at Law.
On Appeal.

10a

To COLLINS AND CORBIN, Esqs.,

Attorneys for Defendant-Appellees.

20a

PLEASE TAKE NOTICE that the plaintiff appeals to
the Court of Errors and Appeals of the State of
New Jersey from the judgment entered in this
cause in the above entitled matter.

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

30a

40a

Grounds of Appeal.

(Filed July 3, 1929.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10b

RICHARD PENNELL,
*Plaintiff-Appellant,**v.*LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
*Defendant-Appellees.*Action at Law.
On Appeal.

20b

The Plaintiff-Appellant states the following grounds of appeal in this cause:

1. That the Supreme Court erred in reversing the judgment of the First District Court of Jersey City.

2. That the Supreme Court erred in not affirming the judgment in favor of the plaintiff entered in the First District Court of Jersey City.

30b

SAMUEL TARTALSKY,
Of Counsel with Plaintiff-Appellant.

40b

State of Demand.

(Filed Oct. 18, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

RICHARD PENNELL,
Plaintiff,

v.

LEHIGH VALLEY RAILROAD COMPANY, a corporation of Pennsylvania, and LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of New Jersey,
Defendants.

In Tort.

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20

Plaintiff residing in Jersey City, Hudson County, New Jersey, complains of the defendants and alleges:

FIRST COUNT.

1. Upon information and belief, defendant Lehigh Valley Railroad Company is now, and was at all times hereinafter mentioned, a foreign corporation, organized and existing under the Laws of the State of Pennsylvania, and the Lehigh Valley Railroad Company of New Jersey is now, and was at all times hereinafter mentioned, a corporation, organized and existing under the laws of the State of New Jersey.

30

2. That on or before September 1st, 1928, the defendant Lehigh Valley Railroad Company was the manager and operator of a certain railroad which crosses a public highway, known as County

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State of Demand.

10 Road in the township of Manville, in the County of Somerset, New Jersey, at grade and was in possession of, used, maintained and controlled certain signal towers at a point where the said railroad of the said defendant company crosses said County Road in the said township of Manville, N. J.

3. That on said September 1st, 1928, plaintiff was the owner and operator of a certain Dodge touring car which was being operated on said County Road in the Township of Manville, at a point where the railroad of said defendant Lehigh Valley Railroad Company crosses said County Road.

20 4. That at the said time and place, said plaintiff ran into and collided with a signal tower owned, maintained, and controlled by the defendant Lehigh Valley Railroad Company, by reason of the negligence of the said defendant company.

30 5. That the negligence of the defendant consisted in this: that it failed and neglected to give warning of the existence of said signal tower in the center of the said County Road, to persons lawfully using said highway; that it failed and neglected to properly equip said tower with warning lights so as to warn persons using said highway, of the existence of said signal tower, that said signal tower was situated in a position wherein it interfered with the safety and convenience of persons traveling upon said highway; said defendant was otherwise negligent in that it maintained a nuisance upon said highway so as to interfere with the safety of persons lawfully upon said highway.

40 6. That by reason of the negligence of the de-

State of Demand.

fendant Lehigh Valley Railroad Company, plaintiff became, was and still is, sick, sore, lame and distorted and has suffered and still suffers great pain and distress.

SECOND COUNT.

10

Plaintiff repeats and reiterates all the allegations contained in the First Count so far as they relate to this count and further says:

1. That the defendant Lehigh Valley Railroad Company of New Jersey was the owner and in possession of certain lands in the township of Manville, Somerset County, New Jersey, which was and still is used as a railroad and railroad-bed and on and before the date aforementioned the said defendant consented, permitted and allowed the Lehigh Valley Railroad Company to maintain, use and operate certain signal towers at a position where the railroad and road-bed of said defendant Lehigh Valley Railroad Company of New Jersey crosses a public highway in the township of Manville, known as County Road, at grade and said defendant allowed, permitted, and consented to certain signal towers to remain in the center of said County Road where said railroad and road-bed cross said County Road.

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2. That on said September 1st, 1928, the said plaintiff was injured by reason of a collision which occurred as described in the First Count herein, which is referred to and made a part hereof.

3. That the negligence and carelessness of the defendant Lehigh Valley Railroad Company of New Jersey consisted in this: that it allowed, consented to and permitted a signal tower to be erected in the center of said County Road where

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State of Demand.

10 said railroad and road-bed cross, unattended, and in a position where it interfered with the safety and convenience of persons lawfully using said highway; that it failed and neglected to give warn-
ing of the presence of said tower in the center of the highway to persons lawfully thereon; defend-
ant was otherwise negligent in that it permitted, consented to, and allowed a nuisance to be erected upon its said lands in a manner wherein it interfered with the safety and convenience of persons lawfully upon said highway.

THIRD COUNT.

20 Plaintiff repeats and reiterates all the allegations contained in the First and Second Counts with the same force and effect as if they were made a part of this count and further says:

1. That by reason of the negligence of the defendants, plaintiff's automobile was so seriously damaged that the same cannot be repaired.

Plaintiff claims judgment on this count in the sum of \$200.00 together with interest and costs of suit.

30 Plaintiff claims judgment against either or both of the defendants in the sum of \$500.00 on all the counts herein mentioned.

HARRY TARTALSKY,
Attorney of Plaintiff.

Notice of Appeal.

(Filed Mar. 20, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

<p style="text-align: center;">RICHARD PENNELL, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>LEHIGH VALLEY RAILROAD COMPANY, a corporation of Pennsylvania, and LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of New Jersey,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	In Tort.	10
			20

To—RICHARD PENNELL, Esq., or
HARRY TARTALSKY, Esq., his attorney.

Sirs:

TAKE NOTICE that the defendants hereby appeal to the New Jersey Supreme Court from the judgment of the First District Court of Jersey City, rendered in the above stated action on March 5, 1929.

Dated March 15, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendants.

Service acknowledged Mar. 15, 1929.

HARRY TARTALSKY,
Attorney of Plaintiff.

40

**Specification of Determinations and
Directions Appealed From.**

(Filed Mar. 25, 1929.)

NEW JERSEY SUPREME COURT.

10

RICHARD PENNELL,
Plaintiff-Respondent,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation of New
Jersey,

} In Tort.

Defendants-Appellants.

20

The defendants-appellants herein, herewith file their specification of determinations and directions of the First District Court of Jersey City, with respect to which they are dissatisfied in point of law.

30

1. Said Court erred in refusing to direct a verdict in favor of the defendants when thereunto moved, whereas said motion should have been granted on the ground urged in support thereof as follows:

(a) There was no evidence of any negligence on the part of the defendants which was the proximate cause of the accident.

2. Said Court erred in rendering judgment in favor of the plaintiff and against the defendants.

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3. Said Court erred in failing to enter judgment in favor of the defendants and against the plaintiff.

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

Service acknowledged Mar. 21, 1929.

HARRY TARTALSKY,
Attorney of Plaintiff-Respondent.

Transcript of Clerk's Docket.

(Filed Mar. 25, 1929.)

FIRST DISTRICT COURT OF JERSEY CITY.

Before—MYRON C. ERNST, Esquire, acting for
CHARLES L. CARRICK, Esquire, Judge.

State of New Jersey, }
Hudson County, } ss.:
City of Jersey City, }

10

No.—175813

RICHARD PENNELL,
Plaintiff,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Penn-
sylvania, and LEHIGH VALLEY
RAILROAD COMPANY OF NEW
JERSEY, a corporation,
Defendants.

20

In Tort.
Damages \$500.00.
Harry Tartalsky,
Pltff's Atty.
Collins & Corbin,
Defts' Attys.

COSTS	CITY	AL
Summons	1.60	
Service		.90
Trial Fee	1.50	
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	3.10	.90
Bond	1.00	

30

A summons was issued tested October 18, A. D. 1928, returnable October 25, A. D. 1928, at 10 o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City. The Constable returned the summons as follows, viz.: I served the within summons October 18, 1928, on

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Transcript of Clerk's Docket.

Clement K. Corbin, agent of the defendant company, by reading the same to him and delivering to him a copy thereof.

ROBERT J. LIVINGSTON,
Constable.

10

Plaintiff's demand was filed October 18, 1928.

January 29, A. D. 1929, the plaintiff appearing and the defendant appearing the trial of the cause was proceeded with as follows:

Upon application of defendant—Harry Schirmer was appointed and sworn as stenographer.

By consent cases Nos. 176986, 176987, 176988 and 176989 were tried in conjunction with this case.

20

On the part of the plaintiff, Robert Pennell, James Craft, Emily Laster, Sadie Temple, George Pennell, Anna Howard and Dr. Domenick A. Introcasso were sworn and testified.

On the part of the defendant—Chester Van Tine, James Donovan, John Trombadore and Anthony Esposito were sworn and testified. One blue print was offered and received in evidence.

The Court reserved decision.

30

Whereupon it is on this fifth day of March, A. D. 1929, by this Court considered and adjudged that Richard Pennell, plaintiff, recover against said Lehigh Valley Railroad Company, a corporation of Pennsylvania, and the Lehigh Valley Railroad Company of New Jersey, a corporation, the sum of Two Hundred and Eighty-Four Dollars, damages, and Eighteen Dollars and Twenty cents, costs of suit.

40

March 20, 1929, Notice of Appeal and Bond on Appeal filed by defendant.

Case.

FIRST DISTRICT COURT OF JERSEY CITY.

<p>ANNIE HOWARD, <i>Plaintiff,</i></p> <p><i>v.</i></p> <p>LEHIGH VALLEY RAILROAD COMPANY, <i>Defendant.</i></p>	<p>In Tort.</p>	<p>10</p>
<p>GEORGE PENNELL, <i>Plaintiff,</i></p> <p><i>v.</i></p> <p>LEHIGH VALLEY RAILROAD COMPANY, <i>Defendant.</i></p>	<p>In Tort.</p>	<p>20</p>
<p>EMILY LASTER, by next friend, and ROSE LASTER, <i>Plaintiff,</i></p> <p><i>v.</i></p> <p>LEHIGH VALLEY RAILROAD COMPANY, <i>Defendant.</i></p>	<p>In Tort.</p>	<p>30</p>

Case.

10

SADIE TEMPLE, by next friend, <i>Plaintiff,</i> <i>v.</i> LEHIGH VALLEY RAILROAD COMPANY, <i>Defendant.</i>	}	In Tort.
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RICHARD PENNELL, <i>Plaintiff,</i> <i>v.</i> LEHIGH VALLEY RAILROAD COMPANY, <i>Defendant.</i>	}	In Tort.
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Jersey City, N. J., January 29, 1929.

Before—Honorable MYRON C. ERNST, Acting Judge.

APPEARANCES:

30 HARRY TARTALSKY, Esquire, Attorney of
 Plaintiffs;

MESSRS. COLLINS & CORBIN (Mr. BROAD-
 HURST), Attorney of Defendant.

40 Mr. Tartalsky: This is an action brought by five
 plaintiffs against the Lehigh Valley Railroad Com-
 pany, a corporation of Pennsylvania, and Lehigh
 Valley Railroad Company, a corporation of the
 State of New Jersey. On September 1st, at about
 2 A. M., one of the plaintiffs, Richard Pennell, was
 driving an automobile along the County Highway

Case.

known as County Road, in the outskirts of Manville, New Jersey, where the Lehigh Valley Railroad Company tracks pass at grade. The Lehigh Valley Railroad Company maintained a signal tower in the center of the highway, which is approximately, I would say, about 25 feet wide. They maintained this signal tower in the center of the road with no lights on it at the time this accident occurred; in fact, I think the defendants, on their case, will tell you it contains no lights unless a train is coming about 1,000 feet away, and then the signal starts working. This was a dark, misty night, no moon, and the car driven by the plaintiff Richard Pennell and in which were the other five passengers, collided with this, and they were all injured; therefore this action.

Mr. Broadhurst: If your Honor please, the defense in these actions is that the crossing signal, located in the center of the highway, with which the plaintiff's automobile collided, was erected there by permission and authority of the Board of Chosen Freeholders of the County of Somerset—this road was a county road of Somerset County—and that under the decisions in this State, such authorization and consent exempted this defendant from any responsibility to persons colliding with it while using the highway; and I refer your Honor to the two cases which I think are exactly in point, one of which was the obstruction of Central Avenue, where the pillars of the Public Service trolley line are in the center of the street, erected by the consent of the City of Jersey City. There is no dispute about several of the items in this action. There is no dispute about the fact that the Lehigh Valley Railroad Company erected this signal.

Case.

Mr. Tartalsky: They are the owners and maintained it?

Mr. Broadhurst: They are the owners and erected it and maintained it.

10 The Court: Under the consent of a proper resolution of the County Board of Chosen Freeholders to the use of that part of the street on which to put these shafts or pillars, whatever they are.

Mr. Broadhurst: That is my contention. Of course, Mr. Tartalsky may dispute that we had any authority.

Mr. Tartalsky: We say they had authority to erect them, but not to erect them in the manner they did. That is the case.

20 The Court: You can shorten your case by simply agreeing to those facts, whatever the thing is, they had the right to have them there. Whether that in itself contributed to the accident, that is a matter of proof.

Mr. Broadhurst: We also will concede that at the time this device had no light which would illuminate it except when a train was approaching, that then it would flash red; alternately flash red.

30 The Court: From the time the train approached to a distance of how many feet?

Mr. Broadhurst: Approximately 2,000 feet; until the train would pass over the crossing, it would flash. And there is no dispute that the plaintiffs in the automobile collided with it on this night.

The Court: The question is whether there was any negligence on the part of the railroad company in maintaining a nuisance, or whatever it might be called.

40 Mr. Broadhurst: And the contributory negligence attributable to the driver and the passengers.

Richard Pennell, direct.

Mr. Tartalsky: It is consented that these two pictures may go in evidence.

(Two photographs admitted in evidence and marked Exhibits P-1 and P-2.)

RICHARD PENNELL, sworn.

10

Direct examination by Mr. Tartalsky:

Q. Do you remember the night of this accident?

A. I do.

Q. Was it a clear or misty night? A. A little misty night; an awful bad night.

Q. Was there a moon out? A. No; no moon at all.

Q. How fast were you traveling? A. Well, from 15 to 18 miles an hour.

20

Q. Then what occurred when you approached this place? A. Well, it was very misty, I couldn't see good at all before me, I had on the bright lights, but it was a very misty night and bad for driving; I tried to keep in the center of the road to give me a chance to see people on the road; I didn't know the road up there, that was the first time I ever was through that road.

Q. And you collided with this post? A. Right in the center, yes; this post had no lights on it.

30

Q. Who was in the car with you at that time?
A. Some friends of mine were there.

Mr. Broadhurst: We will concede that they were the other plaintiffs and James Craft.

Q. As a result of this accident, what happened to you? A. Well, when I came to myself, I was knocked out of the car, my left shoulder and my right eye were hurt; that is all as I remember.

40

Richard Pennell, direct.

Q. Were you able to go to work after that?
A. No; I didn't work for about a week after that.

Q. Whom were you employed by? A. General Scrap Iron & Metal Company.

10 Q. How much were you getting a week? A. \$34.

Q. What happened to the car? A. Well, the car was no good, just the motor smashed all to pieces.

Q. Did you have the car repaired? A. Never; never moved it.

Q. How much did you pay for the car?

Mr. Broadhurst: I object to that.

20 Q. How long did you have that car? A. About six months.

The Court: I think it is perfectly proper to ask him how much he paid for it.

Q. When did you buy the car? A. I bought the car off a fellow on Grand Street.

Q. When? A. About six months I had the car.

Q. How much did you pay at that time?

Mr. Broadhurst: That is objected to as not being the proper way to prove damage.

30 The Court: I will allow it.

Mr. Broadhurst: I ask an exception.

Q. How much did you pay for the car? A. The car cost me about \$300.

Q. You say you didn't have the car repaired; did you attempt to have it repaired? Did you try? A. I never tried, because it was no use. I have been driving long enough to know it was no use to try to repair the car; with a car like that, it was no use.

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*Richard Pennell, cross.**Cross examination by Mr. Broadhurst:*

Q. Richard, what kind of automobile was that?
A. A Dodge.

Q. What year? A. 1923.

Q. This accident happened in 1928? A. Yes. 10

Q. How much did you pay for the car?

Mr. Tartalsky: He said \$300.

Mr. Broadhurst: No; he said it cost \$300.

A. How much I paid for the car?

Q. Yes. A. When I first bought the car, I bought the car with no shoes and no battery.

Q. How much did you pay for it? A. I gave only fifty dollars to this fellow; then I bought new shoes and a new battery and everything. 20

Q. You paid fifty dollars for the car? A. Just for the motor standing alone.

Q. Then you say it had no tires or no battery?
A. No tires and no battery at all.

Q. You had the car about six months? A. About six months.

Q. What else did you buy for it besides tires?
A. I bought four new shoes and the battery, and had it painted.

Q. A paint job. A. I took it to the paint shop. 30

Q. After the accident happened you went back to the scene of this accident and took the tires off, didn't you? A. I took the tires off?

Q. Yes; didn't you? A. Sure, I took the tires off.

Q. Did you take the tires off? A. I got two tires; the two back tires.

Q. What did you do with the two front tires?

A. The two front tires, somebody got them before I could get them; I got the battery. 40

Richard Pennell, cross.

Q. Did you take the battery? A. I got the battery and two back tires.

Q. Did you get the headlights? A. No; that is all.

10 Q. What else did you take off the car? A. Nothing else at all.

Q. That is all? A. That is all, absolutely.

Q. Did this car have a speedometer on it? A. It did, sir.

Q. About how many thousand miles had it gone in that five years? A. Well, I couldn't tell you; I never counted it up.

Q. Didn't you see the speedometer? A. I didn't pay no attention to it.

20 Q. How long after the accident was it that you went back to take the tires off? A. How long?

Q. Yes; how many days? A. Well, I guess it was about; that was September 1st; it was the next Sunday, about a week.

Q. About a week later? A. About a week later.

Q. What kind of work did you do for the General Scrap Iron & Metal Company? A. Truck driver.

30 Q. When did you go back to work for them? A. I went back on the next Monday.

Q. The following day? A. No; a week after; I went down on Sunday to my car and I went back on Monday.

Q. Did you have any doctor? A. I did, sir.

Q. What doctor did you have? A. Doctor Introcaso.

Q. Did you have any doctor right after the accident? A. We couldn't get nothing at all; there was nobody there.

40 Q. Did you have one? A. I did not.

Richard Pennell, cross.

Q. Were you paid your week's wages of \$35 while you were out? A. I was not.

Q. Did you go to a hospital after the accident? A. I did not.

Q. You stayed in the station right at the crossing, didn't you, until the following morning at seven o'clock? A. That is what we did. 10

Q. And took the train home; all of you? A. All of us.

Q. Now where had you been before this? A. I had been in to New Brunswick and was guessing my way out to Somerville, New Jersey.

Q. Coming in to Jersey City? A. Coming in to Jersey City.

Q. You and your friends had had a party out in New Brunswick? A. No party at all; just only out driving. 20

Q. What was it you were to; a funeral? A. We wasn't to no party; we were driving back, in that direction.

Q. Had you been to visit somebody? A. No.

Q. You hadn't stopped anywhere? A. No; only taking a ride for three or four hours.

Q. When did you leave Jersey City? A. Left Jersey City around half past eight or nine o'clock; I don't remember. 30

Q. That night? A. Yes, sir.

Q. This accident happened about two o'clock in the morning? A. Somewhere along there.

Q. Did you have headlights on your car? A. I did.

Q. How far ahead of your car could you see? A. Oh, you couldn't see very far at all.

Q. Well, how far is it? A. Well, I couldn't say exactly; you see, it was a very misty night; it was hazy and misty like. 40

Richard Pennell, redirect.

Q. Could you see ten feet ahead of your car?
 A. I couldn't say; I didn't measure at all; it was very misty that night and hard to travel.

10 Q. How far were you from that signal post when you first saw it? A. I don't know; the signal was in the center of the street and before I knew it I was up on it.

Q. How fast were you traveling? A. Around fifteen or eighteen miles an hour.

Q. Were the brakes in good condition on your car? A. Good brakes.

Q. How quickly could you stop your car, going at fifteen or eighteen miles an hour? A. I could stop anyway the distance to that post (indicating).

20 Q. From here to this post (indicating)? A. Sure.

Q. About eight or ten feet? A. That is what I could.

Q. How far could you see ahead of you in the road? A. I couldn't tell you; I couldn't see anything at all, even with my bright lights.

Q. Were you using your bright lights, did you say? A. That is what I was.

Redirect examination by Mr. Tartalsky:

30 Q. Did you invite these people to ride with you?
 A. I did, sir.

Q. Did anyone else drive this car besides yourself? A. Only myself.

Q. Were there any lights on the highway on which you were traveling at that time? A. No lights at all.

Q. No lights at all? A. No lights.

40 Q. And no lights on this signal tower? A. No lights on the signal tower at all.

James Craft, direct.

JAMES CRAFT, sworn:

Direct examination by Mr. Tartalsky:

Q. Were you an occupant of this car on the night of the accident? A. Yes.

Q. Can you tell whether there were any lights on the highway on which you were traveling? A. If there were, I never saw any. 10

Q. Can you tell us about how fast this car traveled? A. Well, now, that would be pretty hard for me to tell.

Q. Was he traveling fast or slow? A. Very slow, to my idea.

Q. Where were you seated? A. I was sitting in the back seat on the right-hand side.

Q. Were you looking ahead, or talking, or what were you doing at the time? A. I just couldn't tell you exactly at the present time what I was doing; I was just in there riding. 20

Q. Then what happened? A. What happened, when I knowed anything the car was up on the post and I was out there in front of the car and they were trying to get it off from the post; what I done out there or how I got out, I don't know.

Q. Did you see any lights ahead of you? A. No lights I saw at all. 30

(No Cross Examination.)

EMILY LASTER, sworn:

Direct examination by Mr. Tartalsky:

Q. Emily, do you remember the night of this accident? A. Yes, sir.

Q. Do you remember whether or not there were 40

Emily Laster, direct.

any lights on the highway that you were riding on?
A. Yes, sir; there weren't any lights.

Q. Where were you sitting, Emily? A. I was sitting in the front seat.

Q. Next to the driver? A. Yes, sir.

10 Q. Did Mr. Pennell ask you to ride with him that night? A. Yes, sir.

Q. Were you looking ahead at the time? A. I was.

Q. Then tell us what happened. A. Well, I was riding along, it was very dark, I didn't see anything, I heard a crash, and I didn't remember anything at all, I flew out of the car.

Q. What happened to you, Emily? A. Well, I have a scar over my left eye, my right arm bruised
20 and my right thigh and my right knee.

Q. Do you know whether or not you were unconscious?

Mr. Broadhurst: That is objected to as a medical conclusion.

Q. Were you treated at the station where they took you into after the accident? A. Well, I got a patch over my eye, that is all.

Q. Who did that? A. Miss Howard.

30 Q. Did any of the railroad employees that you know of do anything for you in any way?

Mr. Broadhurst: I object to that as immaterial.

Mr. Tartalsky: I will withdraw the question.

Q. You visited Doctor Introcaso last night? A. Yes, sir; I did.

40 Q. You say you have a scar over the left eye?
A. Yes, sir.

Sadie Temple, direct.

Q. You also visited Doctor Arlitz in Hoboken, didn't you? A. Yes, sir.

Q. What do you do? A. I go to school.

Q. Was there any school at this time? A. No; this happened on the first of September and school didn't open until after Labor Day.

10

Q. How long were you home as a result of this accident? A. Well, around three or four days.

Q. How long were you confined to bed as a result of this accident? A. Well, around two days.

Cross examination by Mr. Broadhurst:

Q. Did you see any doctor because of these injuries before you saw Doctor Introcaso? A. No, I didn't.

Q. Where had you been that night, Emily? A. I was just riding around; of course I don't know the different places.

20

Q. Do you know where you stopped? A. No; we didn't stop anywhere.

Q. You didn't stop anywhere? A. No.

SADIE TEMPLE, sworn:

Direct examination by Mr. Tartalsky:

30

Q. Miss Temple, do you remember the night of this accident? A. Yes.

Q. Where were you sitting? A. I was sitting in the back seat, in back of the driver.

Q. Do you remember whether or not there were any lights on the highway that night? A. I didn't see any.

Q. Was it a clear or misty night? A. It was rather misty.

40

Sadie Temple, direct.

Q. Did you look ahead of you at any time? A. Well, every now and then I would look, but I was talking and I didn't keep looking around.

Q. Were you talking to the driver? A. No; I was talking to George Pennell.

10 Q. What happened, if anything? A. Well, we were driving along and just of a sudden there was a jerk and we were all thrown out of the car.

Q. This was an open car, wasn't it? A. Yes.

Q. Were you invited to ride that evening? A. We all suggested to go out and we just got in the car.

Q. What happened to you as a result of this accident? A. Well, I got thrown out and I got hit on my left eye and my left knee.

20 Q. Were you examined by a doctor shortly after the accident? A. Saturday; the same day.

Q. This was the very same morning? A. Yes.

Q. Doctor whom? A. Doctor Introcaso.

Q. Did you pay Doctor Introcaso? A. Yes.

Q. How much? A. Two dollars a visit; and I had to get my medicine.

Q. How much did you spend for your medicine? A. It was about three dollars.

30 Q. What did you do? A. General housework; light housework.

Q. By whom were you employed? A. Mrs. Levy.

Q. How much were you earning a week? A. Ten a week.

Q. Ten dollars a week? A. Yes, sir.

Q. How long were you compelled to stay out of work as a result of this accident? A. I was home a week.

40 Q. Were you paid for the time that you stayed out? A. No.

George Pennell, direct.

Cross examination by Mr. Broadhurst:

Q. How many times did Dr. Introcaso treat you; only once? A. Once.

GEORGE PENNELL, sworn:

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Direct examination by Mr. Tartalsky:

Q. George, do you remember the night of this accident? A. Yes, sir.

Q. Where were you seated? A. I was sitting in the back seat on the left-hand side.

Q. The left-hand side? A. Yes, sir.

Q. Were you looking ahead of you at any time? A. Well, sometimes; I didn't look out then; most of the time I wasn't.

20

Q. What kind of night was it? A. It was a real dark, drizzly night.

Q. Do you remember whether or not there were any lights on the highway? A. There were no lights.

Q. Did you look to see? A. I looked to see and there were no lights around there; you couldn't see nothing.

Q. Tell us what happened. A. Well, we was going along the highway and all I know is we run into the signal post, because there were no lights on the signal post and there were no lights on the road; if there was—

30

Q. Don't tell us that. A. I was starting to say like it was. After we went into this post, there was one fellow came out a couple of minutes after we had gone into this post, the car was nearly over on the railroad, it was near the rail, there was a train coming they said, and they said, "Let us push

40

George Pennell, direct.

10 it off"; when the train came the lights didn't flash; the man brought me a hammer and he said we got to get it out of there; when we moved the car we had to cut the wires; he brought me a little steel hammer with an iron handle, and if the wires had been alive or anything I couldn't have taken them off, therefore the lights wouldn't have flashed anyway.

Q. What happened to you? A. Why, it threw me out of the car on my left side on my hand, it bruised my hand all over and smashed my finger.

Q. Smashed your finger, you say? A. Smashed my finger.

20 Q. What happened to your finger; can you straighten that? A. No; this is the finger (indicating).

Q. You visited the doctor, didn't you? A. Yes, sir.

By Mr. Broadhurst:

Q. What finger is that; the left index finger?
A. The left index finger.

By Mr. Tartalsky:

30 Q. You say you can't straighten that finger? A. Yes.

Q. You visited Dr. Arlitz in Hoboken, didn't you, at my request? A. Yes, sir.

Q. Or rather at the request of the railroad company. Did you visit any other doctor? A. Dr. Introcaso.

Q. That was last evening, at my request? A. Yes, sir.

Q. What did you work at? A. I worked at the Boynton Company.

40 Q. The Boynton factory? A. Yes; the Boynton foundry.

Annie Howard, direct.

Q. How long were you out of work as a result of these injuries? A. I was out of work about a week.

Q. How much were you earning a week? A. \$36.

Cross examination by Mr. Broadhurst:

10

Q. Did you go to bed while you were out of work? A. I didn't.

Q. Did you have any doctor treat you before Dr. Introcaso saw you a couple of days ago? A. I didn't.

Redirect examination by Mr. Tartalsky:

Q. Did you understand that question? Did you have any other doctor treat you besides Dr. Introcaso and Dr. Arlitz? A. No more than the company doctor that I went to.

20

Q. Did you pay him? A. I didn't have to pay him, because he belonged to the company.

Q. What company doctor is that? A. The company doctor where I work.

Q. At the Boynton Furnace Company? A. Yes.

Q. Did he examine you? A. He examined my hand.

Recross examination by Mr. Broadhurst:

30

Q. What was his name, do you know that? A. I really don't know.

Q. How many times did you see him? A. Just the once I seen him.

ANNIE HOWARD, sworn.

Direct examination by Mr. Tartalsky:

Q. Miss Howard, do you remember the night of this accident? A. Sure.

40

Annie Howard, direct.

Q. Where were you sitting? A. I was sitting in the middle; in between.

Q. Where; in the front or in the rear? A. In the rear.

10 Q. Did you look to see whether or not there were any lights on the highway this evening? A. No; there wasn't any.

Q. Was it a clear or misty night? A. Misty; very dark.

Q. Did you look ahead of you at any time? A. Occasionally.

Q. What did you see, if anything? A. I didn't see anything; I felt it when we ran into this post.

20 Q. Then what happened when you ran into it? A. Well, when I came to myself I was getting up out of the floor of the car, that is all I know.

Q. What happened to you as a result of this accident? A. I got my left ankle sprained and my back.

Q. Did you visit a doctor? A. Yes.

Q. When? A. On September 1st.

Q. That same morning? A. Yes.

Q. Who was the doctor? A. Dr. Introcaso.

Q. What do you do? A. General housekeeping.

30 Q. Housekeeper? A. Yes, sir.

Q. Do you keep boarders, or just keep house? A. Boarders.

Q. You keep roomers? A. Yes, sir.

Q. As a result of this accident, for how long a period were you compelled to remain in the house?

A. Two weeks.

Q. Two weeks? A. Yes.

Q. For how long a period were you confined to your bed? A. One week.

40 Q. During this time did you employ anyone to take care of your housework? A. Sure.

Dominick A. Introcaso, direct.

- Q. Who was she? A. Mrs. Weed.
- Q. How much did you pay her? A. \$18 a week.
- Q. For how long? A. Two weeks.
- Q. You say you paid Dr. Introcaso? A. Yes.
- Q. How much did you pay him? A. I paid him
three—six visits—I mean three visits, six dollars. 10
- Q. You visited him last night, too, didn't you?
- A. Yes.
- Q. You visited Dr. Arlitz in Hoboken at my request? A. Yes.
- Q. Were you invited to ride in the car that evening? A. No, we wasn't invited; they just merely says to Mr. Pennell, we sat in the car and we says, "Suppose we go out for a little ride."

Cross examination by Mr. Broadhurst: 20

- Q. How long had it been misty that night; all evening? A. Sure.
- Q. By misty you mean it was a drizzling rain, or something of that kind? A. No, it wasn't raining; but it was dark and misty, you know, kind of foggy like.
- Q. What? A. It was a little bit foggy.
- Q. You say it was a little bit foggy? A. Yes.
- Q. And it had been that way for a couple of hours before this accident happened? A. Yes; in the early evening. 30

 DOMINICK A. INTROCASO, sworn:
Direct examination by Mr. Tartalsky:

- Q. Dr. Introcaso, did you examine Miss Laster?
- A. I did.
- Q. When, Doctor? A. Last night; January 28th.
- Q. As a result of the examination, what did you find? A. If there is no objection on the part of 40

Dominick A. Introcaso, direct.

10 the Court I would like to refer to my records, inasmuch as there were a lot that I had to examine; I will tell you in a few moments. Emily Laster, she has a very marked scar right over the left eye, apparently from some laceration, possibly months behind; I hadn't examined the girl immediately after the accident.

Q. Can you tell, Doctor, whether or not this scar is a permanent one, or temporary? A. It is a permanent scar.

Q. A permanent scar? A. Yes.

Q. Can you say, Doctor, whether or not when a person receives a laceration of that kind it is painful?

20 Mr. Broadhurst: I object to that. It seems to me that that is not a question for a medical opinion.

The Court: We don't need a doctor to know whether a laceration is painful or not.

30 Q. Did you examine Miss Howard? A. Yes, sir. If you let me state a little bit more on Miss Laster, I could tell you a few things more. She complains of a lot of pain over that scar; she tells me at times that she gets these marked pains.

Mr. Broadhurst: I object to that, if your Honor please, to the doctor giving his history. It is well settled, not being the attending physician he can not go on the stand and testify to what this patient says now.

Mr. Tartalsky: I will consent to that going out.

By the Court:

40 Q. You only examined her yesterday? A. Only last night.

Dominick A. Introcaso, direct.

By Mr. Tartalsky:

Q. You examined Miss Howard, didn't you? A. I have, yes.

Q. That was some time in September? A. I examined her on September 1st, yes; I made two calls around September 1st, and the last one was made on January 28. 10

Q. Now, Doctor, as a result of your examination, what did you find at that time? A. At that time I found that she was suffering from a severely sprained back, the lumbar muscles and the lower back were severely sprained; she had a markedly sprained ankle; she complained of marked pains over the lower abdomen, apparently from some possible internal injury that she sustained from the accident; but of course she cleared up within a week's time following that, according to her history. 20

Q. You also examined George Pennell, didn't you? A. George Pennell, yes.

Q. Did you examine him last night, or when? A. The first time I saw George Pennell was last night, January 28th.

Q. As a result of this examination, what did you find, Doctor? A. I found that he had multiple scars over the right index finger, and apparently he had a loss of motion pertinent to that finger, he has an inability to extend that finger properly as a result of these lacerations that he sustained. From a very thorough examination it strikes me as though there was a tendon cut in that finger and not properly healed, giving rise to an inability to proper extension; that is a permanent injury. 30

Q. Miss Sadie Temple, did you examine her? A. Yes, I have examined her. 40

Chester Van Tine, direct.

Q. When did you examine her? A. I examined her on September 1st; and I examined her again on January 28th.

10 Q. And as a result of your examination on September 1st, what did you find, if anything? A. She had at that time a marked contusion of the left knee, and she had a very bad contusion about the left cheek, involving the left eye, with a marked ecchymosis—that is a black eye—and abrasions about the inner mouth.

Q. You say you examined her last night? A. Last night; she apparently felt O. K. last night; she had no ill effects as a result of the accident as I saw last night.

20 (No Cross Examination.)

Mr. Tartalsky: That is the plaintiffs' case.

CHESTER VAN TINE, sworn:

Direct examination by Mr. Broadhurst:

Q. Mr. Van Tine, you are the clerk of the Board of Chosen Freeholders of the County of Somerset? A. I am.

30 Q. Have you, at my request, produced here the original Minute Book of the Board of Chosen Freeholders covering the period from May to November or December, 1924? A. I have.

Q. Have you also produced the correspondence that is referred to in the Minute Book? A. I have.

40 Q. As you observed from what you have heard, we are talking about the signal post at Manville. Will you refer to the original Minutes of the Board of Chosen Freeholders and tell us where there is the first record of an application by the Lehigh Valley Railroad Company for permission to erect

Chester Van Tine, direct.

a signal post on the Manville Road? A. (Witness refers to Minutes of May 27th, 1924.)

Q. You are now looking at the Minutes of the meeting of May 27, 1924? A. Yes, sir.

Q. What do the Minutes of the Board of Chosen Freeholders show was received on that date from the Lehigh Valley Railroad Company? A. They show that we received a letter with regard to some signals that the company proposed placing at the Manville crossing. 10

Q. Will you just read that Minute? A. (Reading.) "Letter from the Lehigh Valley Railroad Company asking for a conference with the County Engineer regarding signs which the company proposed placing at the Manville Crossing. The County Engineer was directed to reply to same requesting that a representative of the railroad company and the H. W. Johns Manville Company meet with the Board at the Hotel Asbestos on Wednesday, June 11th, at twelve o'clock noon Daylight Saving Time." 20

Q. That refers to the letter of May 23rd? A. It doesn't give the date.

Q. Have you that letter with you? A. Yes, sir.

Q. Will you produce it? A. (Witness produces letter.) 30

Mr. Tartalsky: I object to the letter.

The Court: How is that letter offered?

Mr. Broadhurst: The Minutes show that this letter was received and referred to the County Engineer for action, and that a meeting was to be held with the representatives of the railroad company. In order to complete the record, it is necessary to show what was in the letter that the Board of Chosen 40

Chester Van Tine, direct.

Freeholders referred to their engineer for attention, and the further correspondence that took place between them pursuant to the Minutes. It is all connected up with the Minutes and is part of the permission it seems to me.

10

The Court: As I understand it, it is admitted that this thing had a right to be there by resolution of the County Board of Freeholders; then the thing that I am interested in is what right did the County give to the Lehigh Valley Railroad Company; in other words, what was the construction to be?

Mr. Broadhurst: That will appear in this chain of letters.

20

The Court: Then it is admitted that application was made for this obstruction, as you call it, and it was placed in this road through a resolution passed by the Board of Freeholders of Somerset County to the Lehigh Valley Railroad. What we want now is the resolution.

Mr. Broadhurst: Well, you have to have this correspondence, because the Minutes do not show that there is any formal resolution spread out on the Minutes on which the entire thing is included. It is the entire Minutes that show that.

30

The Court: Doesn't it show in those Minutes that a resolution was passed what they were going to allow them to do? It must show that.

Mr. Broadhurst: The correspondence coupled with the Minutes shows that.

40

The Court: There must be a resolution.

Mr. Broadhurst: If you will let me de-

Chester Van Tine, direct.

velop it; there is no jury here, and if you feel at the end that it is not sufficient, that is another point.

The Court: All right.

Mr. Broadhurst: I offer in evidence this letter of May 23rd, 1924, which is referred to in the Minutes of May 27th, 1924. 10

Mr. Tartalsky: I will withdraw my objection.

(Letter marked Exhibit D-1.)

Mr. Broadhurst: This is a letter from the Lehigh Valley Railroad Company, dated May 23, 1924, to the County Engineer, County of Somerset, Somerville, New Jersey.

"Dear Sir: 20

We have in mind the possible placing of a new type visible highway crossing signal with crossing sign attached on each side of our tracks where the public road crosses same at Manville, New Jersey. This sign will be placed in the middle of the highway according to the latest standard of grade crossing protection. We would therefore request that you meet our Division Engineer on the ground some day during the coming week to go over this matter, and I would thank you to advise me about two days in advance of a time which would be convenient for you to attend this meeting. Yours truly," and it is signed by Mr. Mulligan, General Superintendent, Lehigh Valley Railroad Company. 30

Q. The minutes which you refer to instruct him to reply requesting the company's representatives 40

Chester Van Tine, direct.

to meet there on June 11th at 12 o'clock at the crossing. A. Yes.

Q. Have you got that letter which you sent? A. No; I haven't got a copy of that letter that was sent by the County Engineer.

10

Mr. Tartalsky: I concede that the letter was sent.

Q. Do your Minutes show an adjournment of the meeting to the crossing on June 11th, at 12 o'clock?

Mr. Tartalsky: I object to that; it doesn't say that; it says to the Hotel Asbestos. Mr. Broadhurst says to the crossing.

A. To the Hotel Asbestos, June 10th, 1924.

20

Q. Yes; read it just as it is there. A. The meeting of June 10th. Upon motion the Board adjourned to meet with the officials of H. W. Johns Manville Company and the Lehigh Valley Railroad Company at the Hotel Asbestos on Tuesday, June 10th, at 12 o'clock noon; in the Court House at Somerville on June 11th, 1924, at 3:30 in the afternoon, and in the Court House at Somerville on Friday, June 13, at 10:30 o'clock in the morning.

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Q. You were not the Clerk of the Board at that particular time, were you? A. I was not.

Q. So you didn't attend at that meeting at the crossing? A. No, sir.

Q. Will you refer to the Minutes of the Board of Chosen Freeholders of July 8th, 1924? Do your Minutes of July 8th, 1924, show the receipt of a letter from the Lehigh Valley Railroad Company in furtherance of the erection of this crossing signal? A. It does.

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Q. Have you got that letter? A. I have a copy of it; I haven't got the original.

Chester Van Tine, direct.

Q. Is this the letter of June 30th, 1924 (indicating)? A. This is a copy; yes, sir.

Q. A copy that was received upon request? A. Yes, sir.

Mr. Broadhurst: I offer this in evidence.

Mr. Tartalsky: No objection.

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(Copy of letter marked Exhibit D-2.)

Mr. Broadhurst: This letter is from the Lehigh Valley Railroad Company, dated June 30, 1924, addressed to the Board of Chosen Freeholders, County of Somerset, Somerville, New Jersey. "Gentlemen: Referring to conference held at Manville on June 10th, at which time among other things consideration was given to the replacing of the two banjo type audible and visible alarms at the grade crossing there by the latest type standard flashlight signal, permission having been given us to make this change, some suggestion was made as to the necessity of illuminating this signal when not in operation, or in other words, when no train was approaching. We have received the approval of this signal from the States of Pennsylvania and New York and a number of other states; they are also satisfactory to the Public Utility Commissioners of New Jersey. On April 17, 1923, a meeting was held at Trenton by the commissioners, which was attended by a large number of public officials from various parts of the State, and all present unanimously agreed to a resolution adopting this new type of signal as standard. This is of the visible type only and does not include a bell or marker, as it is considered that where the highway is of

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Chester Van Tine, direct.

10 sufficient width to allow the placing of these signs or signals in the center of same, they being of such character that they can be easily seen for a comparatively long distance, the necessity of having a light or marker when the flashlights are not in operation has not been shown; and we would therefore ask your permission to allow us to place the standard sign, one on each side of the tracks, in the center of the roadway, this signal to be exactly as shown on the blueprints handed to you at the meeting at Manville. We are quite sure that you will find that the new signal to be installed will be a considerable improvement over any other types. Yours very truly, M. A. Mulligan, Superintendent."

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Q. You received a further letter shortly after October 16th asking you for a reply to that letter. Have you got the Minutes that show the receipt of that?

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The Court: From now on I think all this is useless. You show the County Board of Freeholders gave authority to erect this thing; the letter constitutes the resolution itself and states what is to be erected, this last letter, and that ends it. What more is there?

Mr. Broadhurst: Suppose I offer the final letter in which the Clerk instructed us to go ahead.

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Q. I show you the original letter dated November 17th, from the Board of Chosen Freeholders; do you recognize that as coming from the Clerk of the Board as of that time? A. I do.

Chester Van Tine, cross.

Q. Your records show a copy of that? A. Yes, sir.

Mr. Broadhurst: I offer this in evidence.

Mr. Tartalsky: I have no objection to that.

(Letter marked Exhibit D-3.) 10

Q. You have your record of November 14th?

A. Yes.

Q. What do the Minutes show on that date?

A. A letter was received from the Lehigh Valley Railroad Company with reference to the erection of warning signals at Manville intersection with County Road. The Clerk of the Board was directed to reply to same, stating that the company might begin work whenever convenient for them to do so. 20

Q. And that is the letter which they wrote pursuant to that resolution, D-3? A. Yes, sir.

The Court: This letter bears out what they were going to do by the letter of June 30th.

Mr. Broadhurst: That is right.

Mr. Broadhurst: I offer so much of the original Minutes of the Board of Chosen Freeholders as has been read, without the book being marked. I suppose you will not insist on the book being marked in evidence. 30

Mr. Tartalsky: No.

Cross examination by Mr. Tartalsky:

Q. In that letter of May 23rd, 1924, the letter did not state where this signal tower would be erected, did it? A. May 27th? 40

Chester Van Tine, cross.

Q. At the meeting of May 27th. A. At the meeting, no.

Q. On June 10th your Board adjourned to the Hotel Asbestos? A. No; they adjourned the meeting of June 10th to meet the next day, June 11th.

10 Q. At the Hotel Asbestos. A. At Hotel Asbestos.

Q. From your Minutes you don't know whether they visited the ground or that they ever stated where this signal would be placed, do you? A. I would have to refer to the Minutes there. No; the Minutes don't state that they had visited the grounds; but I can tell you the Hotel Asbestos is right there.

20 Q. All the letters that you received contained words to the effect that this signal would be a visible one; isn't that so?

Mr. Broadhurst: That is objected to. The letters will speak for themselves.

The Court: The letters speak for themselves.

30 Q. In one of these letters the Board of Freeholders was informed that this type of signal was approved by the Board of Public Utility Commissioners; is that so?

Mr. Broadhurst: That is objected to.

The Court: The letter speaks for itself.

Q. In this letter that you received from the Lehigh Valley Railroad Company; can you tell of your own knowledge whether or not the Board acted on that information? A. No; I don't know.

Mr. Broadhurst: That is objected to.

The Court: Objection sustained.

40 Q. Do you know, as a matter of fact, whether

James F. Donovan, direct.

or not the Board ever visited the grounds? A. I couldn't say.

Mr. Broadhurst: It wouldn't make any difference; but I will prove that; I have the engineer here to show that.

10

Redirect examination by Mr. Broadhurst:

Q. Where is the Hotel Asbestos with reference to this County Road crossing? A. It is right by the crossing.

Q. When you say right by the crossing, how close do you mean? A. The station is on the other side.

Q. Right at the crossing, is it? A. Right at the crossing.

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JAMES F. DONOVAN, sworn.

Direct examination by Mr. Broadhurst:

Q. Mr. Donovan, what is your position with the Lehigh Valley Railroad Company? A. Division Engineer.

Q. Did you have anything to do with meeting the Board of Freeholders at the Manville crossing in reference to the erection of this crossing signal in the middle of the highway?

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Mr. Tartalsky: I object to that. There is no proof that the Board met at the Manville crossing.

Q. Are you familiar with the Hotel Asbestos?
A. Yes; it is right adjacent to the railroad tracks.

Q. Is that alongside the road right near the Manville station? A. Yes.

Q. Is that Manville station shown on this picture (indicating)? A. Yes, sir.

40

James F. Donovan, direct.

Mr. Broadhurst: Do you admit that this picture shows the crossing?

Mr. Tartalsky: Yes; they are in evidence.

10 Q. Did you meet with the Board of Chosen Freeholders of the County of Somerset at the crossing indicated in the pictures P-1 and P-2?

Mr. Tartalsky: Please fix the time.

A. Yes, sir.

Q. When was that? A. On the grounds.

Q. Was it before these signals were erected? A. Yes, sir.

Q. Were the members of the Board of Chosen Freeholders there? A. Yes, sir.

20 Q. Did you go on the crossing yourself, and on the grounds adjacent to this crossing? A. Yes, sir.

Q. Did you discuss with them the proposed erection of the signal that is indicated in the pictures P-1 and P-2? A. Yes, sir; we decided on the location; the exact location.

Q. Did you at that time have the blue-prints of the signals with you just referred to in the letter of June 30, 1924? A. Yes.

30 Q. And is this the blue-print of the construction that you had (indicating)? A. Yes, sir.

Q. Does that blue-print show any means of illumination of the signal except when a train is approaching? A. No, sir; it does not.

40 Q. Was it discussed with the Board of Freeholders at the crossing at that time, in addition to the location of the signal, the question of whether or not there would be any illumination upon it when trains were not approaching? A. Yes, sir; it was explained to all of them that there would be no lights.

James F. Donovan, cross.

The Court: Were you the County Engineer?

The Witness: No, Division Engineer.

A. I went over the whole thing with them.

Q. You wrote these various letters? A. Yes; I dictated all of them. 10

Q. Was it discussed with them that there would be no illumination on this signal? A. Yes, sir.

By the Court:

Q. Why did you put in your letter "visible type" if there was to be no illumination? A. That is what they are known as.

Q. You mean they are known as the visible type in the day time; because at night they would not be visible. A. That is to distinguish between the visible and audible type. The audible type has a bell in addition to the signal. 20

Q. Don't you think that that is an improper word? A. That is what they are known as all over the country; that is the standard term.

Mr. Broadhurst: I offer this blue-print in evidence.

The Court: I will accept it for what it is worth. 30

(Marked Exhibit D-4.)

Cross examination by Mr. Tartalsky:

Q. You wrote all these letters to the Board of Freeholders? A. I dictated them; yes, sir.

Q. Who were the members at that time? A. I don't remember their exact names.

Q. You went with them to the Hotel Asbestos? A. Yes, sir. 40

James F. Donovan, cross.

Q. You had numerous conferences with them?

A. We had that one conference on the ground.

Q. Just one? A. Yes, sir.

10 Q. You say in one of your letters that you received permission from the Board of Public Utility Commissioners; when did you ever receive that permission? A. I don't believe it says that.

Mr. Broadhurst: As I understood it, he says they are satisfactory to them. He refers to this particular type as receiving the approval of the Board.

The Witness: That is right.

20 Q. When was the last time you visited this crossing? A. I would like to add another sentence right there. I do know that the Secretary of the Public Utility Commission has approved this signal.

Mr. Tartalsky: I object to that.

Mr. Broadhurst: I will consent to striking that out.

Q. Have you been to Manville since this accident? A. Yes, sir.

30 Q. You put lights on it now that flash on the base, didn't you?

Mr. Broadhurst: I object to that as immaterial whether or not the defendant put lights there or any other thing there since the accident; it has no bearing on its negligence as of the time of the accident.

The Court: Certainly. The only question to be decided is the question of negligence at the time of this accident.

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John Trombadore, direct.

JOHN TROMBADORE, sworn:

Direct examination by Mr. Broadhurst:

Q. John, you live near this crossing shown in P-1 and P-2? A. Yes, sir; right there.

Q. Right at the corner? A. Right on this corner (indicating). 10

Q. Did you hear the crash this night? A. Yes, sir.

Q. Did you come out and see? A. Yes, sir.

Mr. Tartalsky: I object to all this unless he fixes the time.

Q. Did you hear the crash on the night that the Dodge automobile of 1923 was being driven by Mr. Pennell with a number of other colored people in the car? A. Yes, sir. 20

Mr. Tartalsky: What year was that?

Q. Do you remember the date of it, John? A. Yes, sir.

Q. What night was it? A. It was coming on Saturday, September 1st, after midnight.

Q. Did you get dressed and go down? A. Yes, I was in bed; I got dressed and went down. 30

Q. How were the weather conditions? A. Why, it was clear as it could be.

Q. Was it misty? A. No, sir.

Q. Foggy? A. No, sir.

Q. Did you have any trouble in seeing the people in the car and talking to them about the signals? A. No; absolutely not.

Cross examination by Mr. Tartalsky:

Q. By whom were you employed? A. The Lehigh Valley Railroad. 40

John Trombadore, cross.

Q. You are employed by the Lehigh Valley, aren't you? A. Yes, sir.

Q. You were asleep when this accident occurred, weren't you? A. Yes, sir.

10 Q. Tell us why you took particular notice of the weather conditions? A. Why, because I have to make a report of such things.

Q. You have to make a report? A. Yes, sir.

Q. And you made a report that there was a full moon that night? A. Yes, sir.

Q. A full moon? A. Yes, sir.

Q. Clear? A. Yes, sir.

Q. Many stars out that night? A. Yes, sir.

Q. Did you see these people? A. Yes, sir.

Q. Did you speak to them? A. Yes.

20 Q. Did you offer them any medical aid?

Mr. Broadhurst: What do you mean; as an employee?

Mr. Tartalsky: No.

Q. Did you try to get a doctor for them? A. I did.

Q. Did you get a doctor for them? A. They didn't want any.

30 Q. They didn't want any? A. No.

Mr. Tartalsky: Stand up, Mr. Craft.

Q. Did you think that man needed a doctor at the time?

Mr. Broadhurst: I object to that as immaterial whether he thinks he needed a doctor or not.

The Court: Yes.

40 Q. You are supposed at this place to report accidents, aren't you? A. Yes.

Anthony Esposito, direct.

Q. What is your work; what do you do? A. Section foreman.

Q. You say you had to make a report of this accident. A. Why, I live right there.

Q. Why did you have to make a report of the accident? A. Because it was my duty there. 10

Q. You make reports of all accidents that occur, don't you? A. Whatever I see.

Q. How many accidents occurred there within seven months before this one occurred?

Mr. Broadhurst: I object to that as immaterial. I am not prepared to meet the question of the responsibility of the parties in other accidents at this time. That is immaterial. 20

The Court: I will sustain the objection.

Q. What did you do to help these people after the accident occurred? A. Well, I tried to get an ambulance for them but they refused, they said they didn't need it; so I seen one guy was injured and I told him to come in my house and I did what I could, what anybody would do.

Q. What else did you do with reference to these people; what did you do to the car? A. I helped them take it out. 30

Q. Did you do anything to the signal tower? A. Why, I took the auto out of the road; it was in the way.

ANTHONY ESPOSITO, sworn.

Direct examination by Mr. Broadhurst:

Q. Anthony, did you come up to this crossing shown on P-1 and P-2 on the night when the Dodge car had run into that signal there, which car con- 40

Anthony Esposito, cross.

tained these colored people that were here? A. Yes, sir.

Mr. Tartalsky: I object to this form of examination.

10 Q. Do you recognize any of those people that were at the crossing? A. Yes; I seen that fellow (indicating); I seen them all.

Q. How were you traveling on the road; were you walking, or riding, or what? A. I was riding with the car.

Q. Driving? A. Yes.

Q. Which way were you going; were you going north or south on this road? A. I was going north.

20 Q. What kind of night was it; what were the weather conditions? A. It was a clear night.

Q. Did you have any trouble in seeing? A. No, sir.

Q. Did you have any trouble in seeing these signals as you came along? A. No, sir.

Q. You are employed by the company, aren't you? A. No.

Q. Did you help these people; I mean help get the car off the post, and so on? A. Yes, sir.

30 Q. You are sure; you are not mistaken; it wasn't misty that night? A. It was clear.

Cross examination by Mr. Tartalsky:

Q. Where do you work? A. I run a restaurant on the avenue.

Q. What avenue? A. Union Avenue.

Q. Union Avenue where? A. Between Bound Brook and Somerville.

Q. In what township? A. Somerset.

40 Q. In what town? A. Bridgewater Township.

Anthony Esposito, cross.

Q. About what time was this? A. I couldn't tell you the exact time; it was around two o'clock.

Q. About two o'clock? A. Yes, sir.

By the Court:

Q. In the morning? A. In the morning. 10

By Mr. Tartalsky:

Q. What time do you close your restaurant? A. Well, according to when I am through.

Q. About what time? A. Well, I closed up that time, it was about quarter to two.

Q. How far is Bridgewater from Manville? A. Why, it is about three-quarters of a mile.

Q. It took you fifteen minutes to go down to the scene of this accident? A. It takes it three minutes to get down there. 20

Q. But this night it took you fifteen minutes? A. It didn't take me fifteen.

Q. You say you closed about quarter to two? A. Yes; I said about two o'clock; I said I got up there about two o'clock; I don't know what the exact time was; it might be ten to two.

Q. You took particular notice of the evening? A. Why, yes.

Q. What kind of night was it? A. It was a clear night. 30

Q. Very clear? A. A very clear night.

Q. A full moon out, or half a moon? A. I didn't look at the moon; it was a clear night.

Q. Do you know whether there was any moon out that night? A. I didn't take notice of that.

Q. Did you notice whether there were any stars out? A. There were stars out.

Q. You saw these people? A. Yes, sir. 40

Anthony Esposito, cross.

Q. Did you see the accident occur? A. I came after the accident.

Q. You came after the accident? A. After the accident.

10 Q. By whom are you employed now? A. By whom?

Q. Yes; the Lehigh Valley Railroad Company; aren't you? A. Why, I am working for my own self.

Q. Where is your place; do you still have this place? A. Yes, still have it.

Q. You say it is in Bridgewater? A. Yes.

Q. What is your name? A. Anthony Esposito.

Q. Is that the name of the restaurant? A. No. La Tosca Restaurant.

20 Q. Did you speak to anybody about this accident? A. Did I speak to anybody?

Q. Yes. A. No.

Q. How did you get here? A. I met a fellow over there, he told me about it.

Q. Have you got a subpoena? A. No.

Q. No subpoena; you came voluntarily? A. Came voluntarily?

Q. You just came to testify to see that all parties got justice; isn't that so? A. It is voluntary.

30 Q. I mean, were you handed a subpoena? A. Somebody came up there and told me about it.

Q. You said of course you will, and you closed your restaurant, isn't that so? A. No; I didn't close the restaurant.

Q. You put somebody else in your place? A. I put somebody else in my place.

Q. Is this your day off? A. No.

40 Q. You took off to come here? A. I put a man in my place; I took off to testify.

Q. Quite a few men from the railroad eat at your place, don't they? A. I don't know.

Motion for Direction of Verdict.

Mr. Broadhurst: The defendant rests.

The Court: I will allow both of you to submit a chart of the Government to show what kind of night that was.

Mr. Broadhurst: I desire to make a motion for a direction of verdict in favor of the defendant separately in each one of these five cases, on the ground, first, that there is no evidence of any negligence on the part of the defendant which was the proximate cause of this accident; and second, on the ground, as to the plaintiff driver, that he was guilty of contributory negligence as a matter of law, regardless of what negligence there may have been on the part of the defendant. I might say that the basis of my motion on the first ground is on the theory or facts that this signal having been erected on the road pursuant to the authority of the Board of Freeholders of the County of Somerset, that it was legally there, and that being legally there, anyone who came into collision with it would have no redress, because it would be what would be considered as a licensed nuisance. I can see that if it was illegally there it would be a nuisance, but if it was legally there, as I contend the record shows then under *Lawrence v. Public Service Traction Co.* and the other case which I gave Your Honor there would be no liability on the part of the defendant. I do not care to sum up the facts at all; you have heard them; if Your Honor desires to take the matter under advisement.

(The Court announced that his decision would be reserved.)

Certifications.

10 I, HARRY SCHIRMER, the stenographer designated by the Court and sworn, do certify that the foregoing is a true and accurate transcript of the minutes and proceedings of the trial of the case of Annie Howard, plaintiff, against Lehigh Valley Railroad Company (and four other actions by separate plaintiffs against the same defendant), at the First District Court of Jersey City.

HARRY SCHIRMER,
Stenographer.

To the Chief Justice of the Supreme Court of New Jersey:

20 I do certify the foregoing transcript, made by the stenographer designated by me and sworn, as the minutes and proceedings of the trial of the case of Annie Howard, plaintiff, against Lehigh Valley Railroad Company, defendant (and four other actions by separate plaintiffs against the same defendant, which actions were consolidated by order of the court), to be used on the appeal herein.

Dated March 15, 1929.

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MYRON C. ERNST,
Judge.

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Opinion of Supreme Court.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

Nos. 411, 412, 413, 414, 415, MAY TERM, 1929.

<p>ANNIE HOWARD, and others, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>LEHIGH VALLEY RAILROAD COMPANY, a corporation of Pennsylvania, and LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of New Jersey, <i>Defendants-Appellants.</i></p>	<p>On Appeal from First District Court of Jersey City.</p>	<p>10</p> <p>20</p>
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Submitted May 8th.

Decided

For defendants-appellants, COLLINS & CORBIN.

For plaintiffs-respondents, HARRY TARTALSKY.

Before Justices PARKER, BLACK and BODINE.

Per Curiam:

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In these cases the plaintiffs were injured by driving their automobiles into a railroad crossing signal located in the center of the public highway. The crossing signal was placed in the highway by the permission of the Board of Freeholders of Somerset County, and conformed to the usual cross arm type.

The case is ruled by Justice Parker's opinion in *Lorenz v. Public Service Railway Co.*, 103 N. J. L.

40

Opinion of Supreme Court.

104. It appears that the structure was a lawful structure, erected pursuant to lawful public authority and similar to many such structures. Such a structure facilitates and makes safe public travel, and although it is an obstruction in the street it is not a nuisance and the traveling public must take notice of it. The point is made that no sign was set up under section 35 of the Railroad Act, but none seems to have been required.

There being no evidence to justify a recovery under the circumstance the Court should have found in favor of the defendant.

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Judgment of Reversal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

ANNIE HOWARD,
Plaintiff-Respondent,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendants-Appellants.

10

Action at Law.

On Appeal from
First District
Court of Jersey
City.

The appeal in the above entitled action having
been duly argued at the May Term 1929 of this
Court, and briefs having been submitted and the
appeal having been duly considered by the Court,
and the Court being of the opinion that the judg-
ment below should be reversed;

20

It is on this 26th day of June, 1929, ORDERED and
ADJUDGED that the judgment of the First District
Court of Jersey City be and the same hereby is in
all things reversed and set aside and for nothing
holden, and that a venire de novo be and the same
hereby is granted, and the record remitted to the
Court below to be proceeded with according to
law and the practice of said Court.

30

Rule actually entered this 28th day of June, 1929,
On Motion of

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

A true copy.

40

FRED L. BLOODGOOD,
Clerk.

Judgment of Reversal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

10

GEORGE PENNELL,
Plaintiff-Respondent,

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendants-Appellants.

Action at Law.
On Appeal from
First District
Court of Jersey
City.

20

The appeal in the above entitled action having been duly argued at the May Term 1929 of this Court, and briefs having been submitted and the appeal having been duly considered by the Court, and the Court being of the opinion that the judgment below should be reversed;

30

It is on this 26th day of June, 1929, ORDERED and ADJUDGED that the judgment of the First District Court of Jersey City be and the same hereby is in all things reversed and set aside and for nothing holden, and that a venire de novo be and the same hereby is granted, and the record remitted to the Court below to be proceeded with according to law and the practice of said Court.

Rule actually entered this 28th day of June, 1929,
On Motion of

COLLINS & CORBIN.

Attorneys of Defendants-Appellants.

40

A true copy.

FRED L. BLOODGOOD,
Clerk.

Judgment of Reversal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

EMILY LASTER, by her next friend,
ROSE LASTER, and ROSE LASTER,
individually,

*Plaintiffs-Respondents,**v.*

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,

Defendants-Appellants.

10

Action at Law.

On Appeal from
First District
Court of Jersey
City.

20

The appeal in the above entitled action having been duly argued at the May Term, 1929, of this Court, and briefs having been submitted and the appeal having been duly considered by the Court, and the Court being of the opinion that the judgment below should be reversed;

It is on this 26th day of June, 1929, ORDERED and ADJUDGED that the judgment of the First District Court of Jersey City be and the same hereby is in all things reversed and set aside and for nothing holden, and that a venire de novo be and the same hereby is granted, and the record remitted to the Court below to be proceeded with according to law and the practice of said Court.

30

Rule actually entered this 28th day of June, 1929.
On Motion of

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

40

A true copy.

FRED L. BLOODGOOD,
Clerk.

Judgment of Reversal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

10 SADIE TEMPLE, by her next friend,
 HELEN JONES,
 Plaintiff-Respondent,

v.

LEHIGH VALLEY RAILROAD COM-
 PANY, a corporation of Pennsyl-
 vania, and LEHIGH VALLEY RAIL-
 ROAD COMPANY OF NEW JERSEY,
 a corporation of New Jersey,
 Defendants-Appellants.

Action at Law.

On Appeal from
First District
Court of Jersey
City.

20

The appeal in the above entitled action having been duly argued at the May Term, 1929, of this Court, and briefs having been submitted and the appeal having been duly considered by the Court, and the Court being of the opinion that the judgment below should be reversed;

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It is on this 26th day of June, 1929, ORDERED and ADJUDGED that the judgment of the First District Court of Jersey City be and the same hereby is in all things reversed and set aside and for nothing holden, and that a venire de novo be and the same hereby is granted, and the record remitted to the Court below to be proceeded with according to law and the practice of said Court.

Rule actually entered this 28th day of June, 1929.
 On Motion of

COLLINS & CORBIN,
 Attorneys of Defendants-Appellants.

40

A true copy.

FRED L. BLOODGOOD,
 Clerk.

Judgment of Reversal.

(Filed July 3, 1929.)

NEW JERSEY SUPREME COURT.

RICHARD PENNELL,
Plaintiff-Respondent,

10

v.

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY,
a corporation of New Jersey,
Defendants-Appellants.

Action at Law.

On Appeal from
First District
Court of Jersey
City.

The appeal in the above entitled action having
been duly argued at the May Term, 1929, of this
Court, and briefs having been submitted and the
appeal having been duly considered by the Court,
and the Court being of the opinion that the judg-
ment below should be reversed;

20

It is on this 26th day of June, 1929, ORDERED and
ADJUDGED that the judgment of the First District
Court of Jersey City be and the same hereby is in
all things reversed and set aside and for nothing
holden, and that a venire de novo be and the same
hereby is granted, and the record remitted to the
Court below to be proceeded with according to law
and the practice of said Court.

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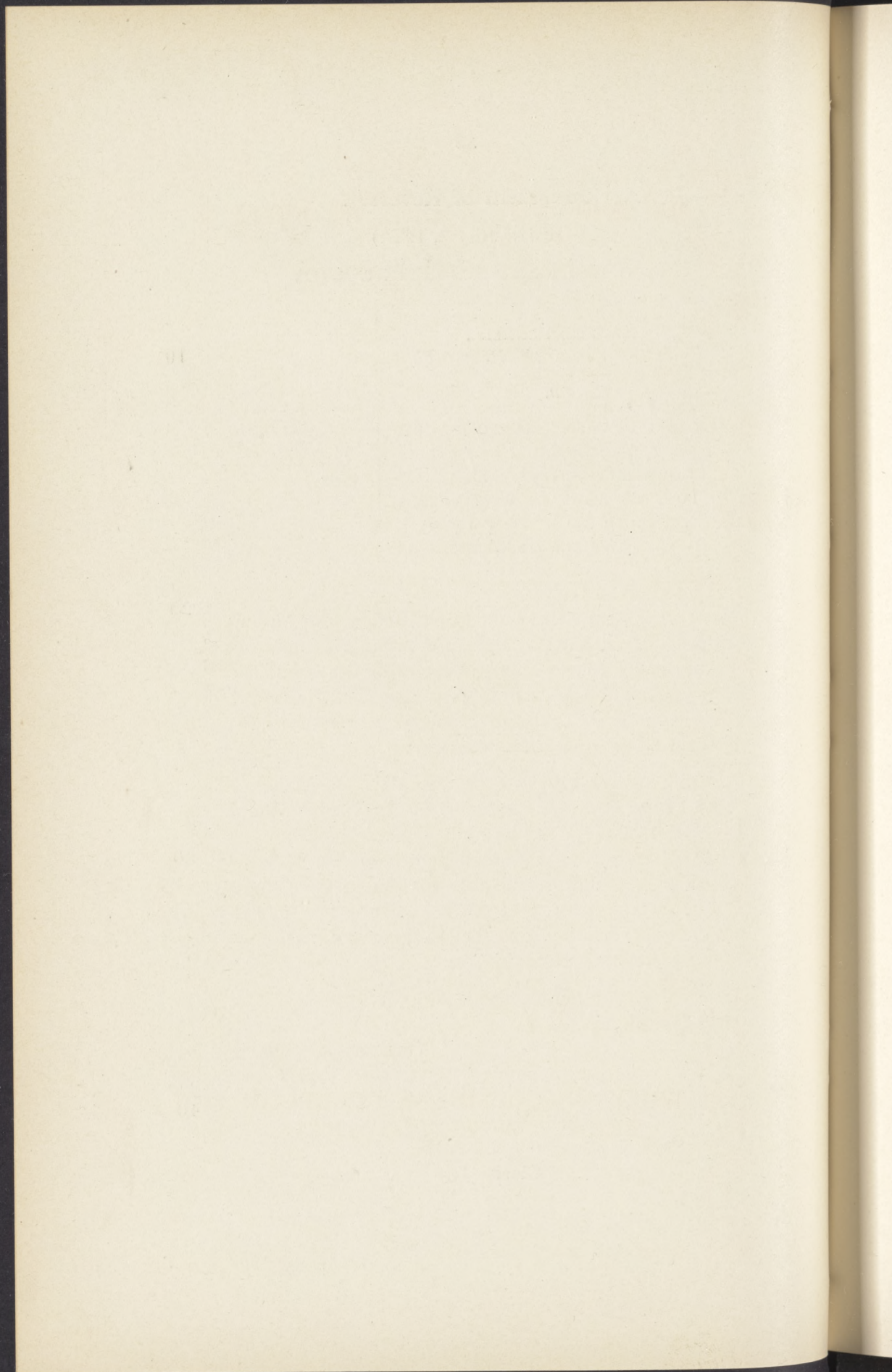
Rule actually entered this 28th day of June, 1929,
On Motion of

COLLINS & CORBIN,
Attorneys of Defendants-Appellants.

A true copy.

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FRED L. BLOODGOOD,
Clerk.



New Jersey Court of Errors and Appeals

ANNIE HOWARD,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY,
a corporation of Pennsylvania, and LEHIGH
VALLEY RAILROAD COMPANY OF NEW
JERSEY, a corporation of New Jersey,
Defendants-Respondents.

GEORGE PENNELL,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY,
a corporation of Pennsylvania, and LEHIGH
VALLEY RAILROAD COMPANY OF NEW
JERSEY, a corporation of New Jersey,
Defendants-Respondents.

EMILY LASTER, by her next friend, Rose
Laster, and ROSE LASTER, individually,
Plaintiffs-Appellants,

v.

LEHIGH VALLEY RAILROAD COMPANY,
a corporation of Pennsylvania, and LEHIGH
VALLEY RAILROAD COMPANY OF NEW
JERSEY, a corporation of New Jersey,
Defendants-Respondents.

On Appeal from
Supreme Court.

SADIE TEMPLE, by her next friend, Helen
Jones,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY,
a corporation of Pennsylvania, and LEHIGH
VALLEY RAILROAD COMPANY OF NEW
JERSEY, a corporation of New Jersey,
Defendants-Respondents.

RICHARD PENNELL,
Plaintiff-Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY,
a corporation of Pennsylvania, and LEHIGH
VALLEY RAILROAD COMPANY OF NEW
JERSEY, a corporation of New Jersey,
Defendants-Respondents.

**BRIEF OF COLLINS & CORBIN IN
BEHALF OF RESPONDENTS.**

(1)

Statement of the Case.

This appeal brings before this Court for review, a judgment of the Supreme Court reversing judgments entered in the First District Court of Jersey City in five actions wherein the appellants (hereinafter referred to as the plaintiff) recovered verdicts against the respondents (hereinafter referred to as the defendant) for personal injuries and property damage.

The cases were consolidated for trial and tried by Honorable MYRON C. ERNST, Acting Judge, on January 29, 1929, with the consent of the attorneys for both sides because they involved common questions of law and facts, and arose out of the same transaction.

It appeared from the testimony that about two A. M. on the morning of September 1, 1928, Richard Pennell was driving a 1923 Dodge touring car in which the other plaintiffs were riding, along a county road in the Township of Manville, Somerset County, New Jersey. While proceeding along the center of this road at a speed of from 15 to 18 miles an hour, the said automobile was driven against and upon a railroad crossing signal which was located in the center of the public highway. This signal did not have any means of illumination except when a train was approaching when it would alternately flash red while the train was within 2,000 feet of the crossing. The above facts were undisputed and it was admitted that the crossing signal was constructed and maintained by the defendants. The suits were brought to recover damages sustained by the plaintiffs because of injuries received as a result of the collision. The defense was that the construction and mainte-

nance of the structure with which the plaintiffs collided, had been authorized by the Board of Chosen Freeholders of Somerset County and was, therefore, legally in the road, so that no liability attached to the defendants because of the plaintiffs colliding with it.

The record of the trial was taken stenographically by an appointee of the Court, and was certified by the Trial Judge for use on this appeal.

At the conclusion of the entire case, counsel for the defendants moved for a direction of a verdict in favor of the defendants separately in each of the five cases. The Court reserved decision and later, on March 5, 1929, entered judgment in favor of the plaintiffs and against the defendants in each of the cases. The Court did not file any opinion expressing his views as to the reasons for the liability of the defendants.

The defendant appealed to the Supreme Court from these judgments, which appeal was heard by consent of the parties as one case. The Supreme Court reversed the judgment of the First District Court on the ground, as indicated by the opinion, that the Trial Court should have granted the defendant's motion for a direction of a verdict in its favor because:

"It appears that the structure was a lawful structure, erected pursuant to lawful public authority and similar to many such structures. Such a structure facilitates and makes safe public travel, and although it is an obstruction in the street it is not a nuisance and the traveling public must take notice of it. The point is made that no sign was set up under Section 35 of the Railroad Act, but none seems to have been required" (pp. 83 and 84).

It is from the judgment of the Supreme Court that the plaintiff appeals to this Court.

(2)

Grounds of Appeal.

The only ground of appeal urged by the plaintiff is that the Supreme Court erred in reversing and not affirming the judgment of the District Court.

(3)

BRIEF OF THE ARGUMENT.**I.****The Supreme Court did not err in reversing the judgment of the District Court.**

The complaints, which are similar in each case, allege that on and before September 1, 1928, the defendants managed and operated a railroad which crossed a public highway known as County Road in the Township of Manville, in the County of Somerset, New Jersey, at grade and was in possession of, used, maintained and controlled certain signal towers at a point where the said railroad crossed the County Road in that township (p. 33, line 35, to p. 34, line 10); that on September 1, 1928, an automobile driven by Richard Pennell, in which the other plaintiffs were occupants, was being operated along said County Road and collided with the signal tower owned, maintained and controlled by the defendants at the grade crossing aforesaid (p. 34, lines 1-20). The negligence charged in the complaints is as follows:

“5. That the negligence of the defendant consisted in this: that it failed and neglected to give warning of the existence of said signal tower in the center of the said County Road, to persons lawfully using said highway; that it failed and neglected to properly equip said

tower with warning lights so as to warn persons using said highway, of the existence of said signal tower; that said signal tower was situated in a position wherein it interfered with the safety and convenience of persons traveling upon said highway; said defendant was otherwise negligent in that it maintained a nuisance upon said highway so as to interfere with the safety of persons lawfully upon said highway."

It was conceded by the defendants that they operated the railroad in question which crossed the public highway at grade and had constructed and maintained the signal device. It was also conceded that the signal device did not have any means of illumination upon it except when a train was within 2,000 feet of the crossing, at which time it would flash red alternately (p. 44, lines 1-40).

The defendants, to prove that the structure was legally authorized by the Board of Chosen Freeholders, produced Chester Van Tine, Clerk of the Board of Chosen Freeholders of the County of Somerset, together with the original minute book of the Board of Freeholders and the correspondence between the defendants and the Board of Freeholders referred to, and incorporated in the said Minutes. Mr. Van Tine, testifying from the *original minute book* of the Board of Chosen Freeholders, said that the first record of the Board relative to the construction of the crossing signal was contained in *the Minutes* of the meeting dated May 27, 1924, and read as follows (p. 62, line 30, to p. 63, line 25) :

"Letter from the Lehigh Valley Railroad Company asking for a conference with the County Engineer regarding signs which the company proposed placing at the Manville Crossing. The County Engineer was directed to reply to same requesting that a representative of the railroad company and the

H. W. Johns Manville Company meet with the Board at the Hotel Asbestos on Wednesday, June 11th, at twelve o'clock noon Daylight Saving Time."

The letter referred to in the Minutes was offered in evidence, Exhibit D-1, and was dated May 23, 1924. It was addressed to the County Engineer of Somerset County, signed by the superintendent of the defendants, and read as follows (p. 65, lines 10-40):

"Dear Sir:

We have in mind the possible placing of a new type visible highway crossing signal with crossing sign attached on each side of our tracks where the public road crosses same at Manville, New Jersey. This sign will be placed in the middle of the highway according to the latest standard of grade crossing protection. We would therefore request that you meet our Division Engineer on the ground some day during the coming week to go over this matter, and I would thank you to advise me about two days in advance of a time which would be convenient for you to attend this meeting. Yours truly,"

It was conceded that pursuant to the direction of the Board of Freeholders, the County Engineer did reply to the defendants and arranged a conference for June 10, 1924, at the Hotel Asbestos in Manville (p. 66, lines 1-20). The Minutes of the Board of Freeholders show under the meeting of June 10, 1924, as follows:

"Upon motion the Board adjourned to meet with the officials of the H. W. Johns Manville Company and the Lehigh Valley Railroad Company at the Hotel Asbestos on Tuesday, June 10th, at 12 o'clock noon;" (p. 66, lines 20-30).

The Minutes of the Board of July 8, 1924, show the receipt of a letter from the Lehigh Valley Railroad Company in furtherance of the erection of this crossing signal, which letter was dated June 30, 1924, signed by the superintendent of the defendants and addressed to the Board of Freeholders. It was offered in evidence, Exhibit D-2, and read as follows (p. 66, line 30, to p. 68, line 20) :

“Gentlemen: Referring to conference held at Manville on June 10th, at which time among other things consideration was given to the replacing of the two banjo type audible and visible alarms at the grade crossing there by the latest type standard flashlight signal, permission having been given us to make this change, some suggestion was made as to the necessity of illuminating this signal when not in operation, or in other words, when no train was approaching. We have received the approval of this signal from the States of Pennsylvania and New York and a number of other states; they are also satisfactory to the Public Utility Commissioners of New Jersey. On April 17, 1923, a meeting was held at Trenton by the commissioners, which was attended by a large number of public officials from various parts of the State, and all present unanimously agreed to a resolution adopting this new type of signal as standard. This is of the visible type only and does not include a bell or marker, as it is considered that where the highway is of sufficient width to allow the placing of these signs or signals in the center of same, they being of such character that they can be easily seen for a comparatively long distance, the necessity of having a light or marker when the flashlights are not in operation has not been shown: and we would therefore ask your permission to allow us to place the standard sign, one on each side of the tracks, in the center of the roadway, this signal to be exactly as shown on the blueprints handed to you at the meeting at Manville. We

are quite sure that you will find that the new signal to be installed will be a considerable improvement over any other types. Yours very truly,"

No action was taken by the Board of Freeholders upon this letter until November 14, 1924. At a meeting under this date, the *Minutes* read as follows:

"A letter was received from the Lehigh Valley Railroad Company with reference to the erection of warning signals at Manville intersection with County Road. *The Clerk of the Board was directed to reply to same, stating that the company might begin work whenever convenient for them to do so*" (p. 68, line 30, to p. 69, line 20).

In pursuance of the authority contained in the Minutes of the Board of Freeholders above quoted, the Clerk on November 17, 1924, wrote the defendants a letter which was marked in evidence, Exhibit D-3, and which will be found typed at the end of the state of case, it having been inadvertently omitted from the printing (p. 69, lines 20-30). That letter, sent by the Clerk of the Board of Freeholders, addressed to the superintendent of the defendants, read as follows:

"Dear Sir: Your letter of November 11 enclosing copy of letter of June 30 was brought to the attention of the Board of Freeholders at their meeting Friday last and I have been instructed to write stating that you may commence work on the alarm signals at the Manville crossing whenever it is convenient for you to do so. Regretting that there has been any delay in forwarding this permission and thanking you for again bringing it to our attention, I remain, Yours very truly,"

It appeared from the testimony of Mr. Van Tine, the Clerk of the Board, that the Hotel Asbestos,

where the Minutes disclosed the meeting was held between the Board of Freeholders and the defendants' engineers, is located adjacent to the crossing (p. 70, lines 1-20).

Mr. Donovan, Division Engineer of the defendants, testified that he was the representative of the defendants that conferred with the Board of Chosen Freeholders and their engineer, on June 10, 1924 (p. 71, lines 20-40). He discussed with them on the highway, the exact location of the signal, and they decided that location. He had with him at the time, the blue-prints for the construction of the signal, which blue-prints are referred to in the letter of June 30, 1924, that the company sent to the Board. The blue-prints showed clearly that no means of illumination was provided on the signal except when a train was approaching, and it was explained to the Board of Freeholders by him at the time, that there would be no lights upon this signal when trains were not approaching (p. 72, lines 1-40). He wrote the letters of June 30th and subsequent to receiving the permission in the letter of November 17th, he had the signal erected pursuant to the plans (p. 73, lines 1-30).

The case was in this posture when counsel for the defendants made a motion for a direction of a verdict in favor of the defendants (p. 81, lines 1-40). The Court reserved decision so that no exception could be noted on the record at the time. The Court entered its judgment without notice to the attorneys for the defendants, so that no exception could be noted at that time. This does not prevent the defendants from arguing the legal questions before this Court, however, for the reason that it is not necessary in cases tried in the District Court without a jury, to note exceptions to the Court's rulings.

Schadel v. Honig, 131 Atl. 624; affirmed
134 Atl. 919 (not officially reported);
Pavonia Building & Loan Association v.
Westside Trust Co., 93 N. J. L. 377.

The legal question here involved has, we contend, been decided by this Court, in the case of *Lorentz v. Public Service Ry. Co.*, 103 N. J. L. 104; 134 Atl. 818. In that case, the plaintiff, while riding as a passenger in an automobile driven by her father, was injured due to its collision with one of the columns of an elevated structure maintained by the defendant on Central Avenue, Jersey City. The complaint charged, and it was admitted, that the defendant was in possession of and using the elevated structure which was supported by columns set in the roadway of Central Avenue in such wise as to interfere with and impede free public passage; that the defendant failed to have a suitable light at the point where the accident occurred, and by reason of these features, the structure was a nuisance, dangerous to travelers on the highway. It appeared that the structure had been erected pursuant to permission of the authorities of Jersey City, under the terms of an ordinance and that the ordinance did not require the company to light the structure at night. Justice PARKER in writing the opinion said, after reciting the facts substantially as narrated above (p. 106):

“From what has been said, it should be sufficiently obvious that the structure in question was a lawful one, sanctioned by legislative and municipal authority. It is elementary, of course, that any unlawful obstruction of the highway is *prima facie* a nuisance, and that the party responsible for it is liable in damages to one injured thereby. This was the theory of the leading case of *Durant v. Palmer*,

29 N. J. L. 544. But it is equally well settled that the legislature may legalize what would otherwise be a nuisance. (Citing cases.)”

After discussing the various cases in this State, Justice PARKER said as follows (p. 109):

“It seems, therefore, clear, and indeed is not denied, that this elevated structure is a lawful structure erected pursuant to lawful public authority, and essentially similar in characteristics to the elevated railroads in New York, Boston, Philadelphia, Chicago, and, perhaps, other large cities. Structures of this kind, authorized by law and used to facilitate public travel, although they are physical obstructions to drivers of ordinary vehicles, and, perhaps, to pedestrians, are, nevertheless, not nuisances, and the public must take notice of them.

“The complaint counts, however, on the failure to light the columns so that they can more readily be seen at night, and the failure to clean them when they became dirty and dingy. But both these claims imply a duty, and we find no such duty laid down in the statute or ordinance, and without some such requirement in one or the other we are unable to say that any such duty existed. The right to erect and maintain the structure was conferred, without any such qualification, and it seems reasonable to say that where neither the statute nor ordinance mentions the matter it must be assumed that the ordinary public lighting of the street was considered sufficient in the premises.

“As to the alleged failure to keep the columns clean, that is so fanciful as to be dismissed without further comment.

“We conclude that when the case was all in, and the public authority for the erection and maintenance of the structure was manifest, a verdict should have been directed for the defendant, and that it was error to refuse such direction.

“The judgment will be reversed to the end that a *venire de novo* issue.”

In *W. B. Wood Co. v. Balsam*, 100 N. J. L. 275; 126 Atl. 480, it appeared that the plaintiff brought suit to recover damages sustained by one of its trucks in coming into collision with a fire escape erected by the defendant on his property at the corner of Mulberry Street and Essex Court, in the City of Newark. The District Court gave judgment for the plaintiff. It appeared that Essex Court is a public street and the plaintiff is the owner of property situated thereon, using Essex Court as a means of shipping its things. It further appeared that the Department of Labor had ordered the defendant to place the fire escape on the defendant's building, where it was located at the time of the collision. The truck of the Wood Company, due to its height, was higher than the point where the fire escape was attached to the building. The plaintiff sought to recover upon the theory that the fire escape, though a lawful structure, constituted a private nuisance. In the opinion, Justice LLOYD said (p. 277) :

“Here, the damage which the plaintiff company sustained was through a collision on the public highway with a structure not only authorized, but required by law, and which the property owner could not avoid placing where it was. Those using the highway were obliged to take cognizance of this lawful construction, and to govern themselves accordingly. There is no vested or property right in the use of the highway which the state cannot circumscribe or curtail. Public highways are changed in their direction and even vacated without liability to the user of the highway, as such, to complain. It must be carefully observed that the claim in this case is not based upon a property right in the highway by reason of an abutting owner, but for injury to a truck which might as well have belonged to an owner in another city or state. Nor is there

here alleged any element of negligence; the sole contention being that the construction itself constituted a private nuisance for which the defendant would be liable.

“Our conclusion in the case being to the contrary, it follows that the judgment of the court below must be reversed.”

In *Denzer v. D. L. & W. R. R. Co.*, 103 N. J. L. 95, this Court had before it a case where a child was injured due to being struck by an automobile at the Greenwood Avenue underpass of the tracks of the railroad company. Action was brought against the company alleging improper maintenance of the underpass, in such a manner as to create a dangerous trap on the public highway. It appeared that the railroad ran east and west on a fill principally between retaining walls. Greenwood Avenue ran north and south and was depressed to give headroom under the tracks, which, as they crossed the avenue, were supported by three concrete piers or sets of piers, one at the east curb, one at the west curb, and one in the middle of the road. Each one of these piers was substantially a concrete wall pierced with large openings through which a man could walk. The plaintiff, who was crossing Greenwood Avenue, passed through one of these openings and emerged on the other side of the same on the road, just as an automobile came along and struck her. It appeared in the case, that the concrete piers were erected pursuant to municipal permission. This Court, following *Lorentz v. Public Service Ry. Co.*, *supra*, held that there was no liability on the part of the defendant.

We respectfully submit, therefore, that the Supreme Court did not err in reversing the judgment of the District Court.

II.

Comments on Brief of Appellants.

The appellants, under Point I of their brief, argue that the Freeholders had no authority to grant the defendant the right to erect the signal in the center of the road. This is the first time that question has been raised in this case. At the trial the point was not made and in the Supreme Court the question was not argued. It has been held that this Court, in reviewing the judgment of the Supreme Court, will not, as a general rule, consider any question not set up or argued in the Court below.

Donohue v. Campbell, 98 N. J. L. 755, 758;
Engelhard v. Schroeder, 92 N. J. Eq. 663;
Cowell v. P. R. R. Co., 2 N. J. Misc. Rep.
966, 967.

The contention, however, is without merit. The statutes of this state, dealing with the power of the Board of Freeholders over county roads, will be found collected in 4 Comp. Stat. 5403, *et seq.*, and the supplement 1911-1924, Volume 2, page 3012. The original statute was passed in 1888 (P. L. 1888, 397), and is entitled, "An Act to authorize the Board of Chosen Freeholders of any of the several counties of this State, to lay out, open, construct, improve and maintain a public road therein." We will refer briefly to a number of the sections of the statute, giving the section number and the power referred to in each section. This will illustrate the absolute and complete control vested by the statute in the Board of Freeholders.

Section 194 empowers the Board to submit to the voters of the county, the question of constructing a road and, if approved, invests the Board with all rights and power necessary to lay out, open, construct, improve and maintain such road.

Section 230 provides that the Board shall establish the width of the vehicle passages and sidewalks; determine the grade; remove obstructions or fill in the road; build bridges, sewers, culverts and receiving basins; to improve and repair the road; to provide light.

Section 208 provides that the Board shall maintain lights and keep the same in repair.

Section 224 provides that where cities desire water pipes to cross the county roads, they must notify the Board and perform all the work in accordance with the regulations prescribed by the Board and receive the approval of the Board's representatives when the work is completed.

Section 225 provides that when gas pipes of a person or corporation are desired to be laid across a county road, before ground shall be broken the Board must give permission and indicate the place and depth and otherwise prescribe regulations for doing the work.

Section 226 provides that sewer pipes, if they have to cross county roads, shall be laid in the same manner subject to the approval and control of the Board.

Section 228 provides a penalty if the regulations of the Board, of sewer, gas and water pipes are violated.

Section 229 provides that the Board has power to improve the road; connect with other roads or streets; to pave the same; to put in gutters or waterways; to build plants for lighting the same and to do all other necessary work to make and provide a good, well regulated public road.

Section 236 authorizes the Board to flag sidewalks along the road.

Section 279 provides authority to reinforce, reconstruct or rebuild the road bases.

Section 337 empowers the Board to regulate the use of the road; to prevent it from being torn or disturbed; to prevent obstructions to the road; to impose fines for violating its orders.

Section 339 provides power to widen and straighten the road.

Section 340 empowers the Board, under certain circumstances, to permit street railroads to construct their tracks and operate cars along the road.

Section 351 empowers the Board to regulate all devices and use of the road.

In Chapter 110, P. L. 1924, an act to amend an act entitled "An Act concerning Counties," every Board of Chosen Freeholders is empowered and authorized:

(a) To lay out, open public roads that the Board deems useful.

(b) To acquire rights of highways or portions thereof.

(c) To widen, alter, straighten, change the grade of any road under its control.

(d) To improve, pave, service, re-service, repair and maintain any road under its control.

(e) To protect any road under its control by construction of sewers, drains, culverts, jetties, bulkheads, seawalls, or other means and devices, either in or on said road or highway or on land adjacent thereto.

(f) To light, beautify and ornament any road or highway under its control.

(g) To vacate any road or highway under its control or any portion thereof.

(h) To authorize the continuance of any building or structure in the road for such period as the Board shall deem advisable.

If, after noting the above powers given to the Board of Chosen Freeholders relative to county

roads, one still had any doubt as to the right of the Board to authorize the erection of this particular signal, that doubt would be finally disposed of by an examination of Chapter 92, P. L. 1923, as amended by Chapter 257, P. L. 1927, where it is provided that the governing body of every municipality shall have power to establish safety zones, to erect, construct and maintain platforms, silent policemen, beacon lights, guide posts, or other structures which in its judgment may be necessary for the safety and convenience of persons and vehicles using the streets in said municipality. *The amendment of 1927 specifically provides that this power vested in municipalities shall not be exercised on any portion of any county road without the consent and approval of the Board of Chosen Freeholders of the county in which such road is situated.* The Legislature, by this act, clearly indicates that on county roads erections of beacons, traffic lights, etc., cannot be made without the permission of the Board of Freeholders. This demonstrates that that Board must have the authority to grant the permission.

Under Point II of the appellants' brief, it is contended that Section 35 of an act concerning railroads, has some application to the decision of the case at bar. Section 35 of the Railroad Act (3 Comp. Stat. 4236) was originally passed in 1903 (P. L. 1903, 663), and provided as follows:

“A bell of a weight not less than thirty pounds shall be placed on each engine and rung continuously in approaching a grade crossing of a highway, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle shall be attached to each engine and be sounded, except in cities, at least three hundred yards from the crossing and at intervals until the engine shall

have crossed the highway, under penalty of twenty dollars for every default, to be paid by the company operating such road, to be sued for by any informer within ten days after such penalty was incurred, one-half thereof to go to the informer and one-half to the county; *provided*, that nothing herein shall take away any remedy for such neglect from any person injured thereby; every railroad company shall cause a conspicuous sign, with the inscription on each side: 'Look out for the locomotive,' to be maintained at each highway crossing at grade of its railroad, so as to be easily seen by travelers, but such signs need not be maintained in any city, town, borough or village unless required by the municipal authorities."

It was amended in 1924 (P. L. 1924, 419), as follows:

"A bell of a weight not less than thirty pounds shall be placed on each engine and rung continuously in approaching a grade crossing of a highway, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle shall be attached to each engine and be sounded, except in cities, at least three hundred yards from the crossing, and at intervals until the engine shall have crossed the highway, under penalty of twenty dollars for every default, to be paid by the company operating such road, to be sued for by any informer within ten days after such penalty was incurred, one-half thereof to go to the informer and one-half to the county; *provided*, that nothing herein shall take away any remedy for such neglect from any person injured thereby; every railroad company shall cause a conspicuous sign with such inscription and of such standard and design as shall be approved by the Board of Public Utility Commissioners of this State, its successors, or other governmental body having charge and control of public utilities in this

State, to be maintained at each highway crossing at grade of its railroad, so as to be easily seen by travelers, but such signs need not be maintained in any city, town, borough or village unless required by the municipal authorities, or by the Board of Public Utility Commissioners of this State, its successors, or other governmental body having charge and control of public utilities in this State."

It will be noticed that the change made by the amendment is that whereas under the act of 1903 it provided "every railroad company shall cause a conspicuous sign, *with the inscription on each side: 'Look out for the locomotive'* to be maintained at each highway crossing at grade of its railroad, so as to be easily seen by travelers"; the amendment provided that the conspicuous sign should have "*such inscription and of such standard and design as shall be approved by the Board of Public Utility Commissioners of this State.*" In other words, under the original act the sign had to say "Look out for the locomotive." Under the amendment, the inscription and design is subject to the approval of the Utility Board. There is no question raised in this case as to whether the inscription on these signs which reads "Railroad Crossing" was or was not approved by the Board of Public Utility Commissioners. Furthermore, what difference does it make what the inscription on the sign said, to the plaintiffs' right to recover? In neither the original act of 1903 nor the amendment does it provide that this sign has to be on the sides of the road because the statute says "it shall be maintained at each highway crossing at grade of its railroad, so as to be easily seen by travelers." Under this language, certainly a sign erected in the center of the road would be in a place so as to be easily seen by travelers. In fact, that is why it was put there.

The appellants argue that there is no formal resolution of the Board of Freeholders granting permission to the defendant to erect the obstruction. Under this head they assert that the permission was merely obtained by means of correspondence and that the correspondence is the only thing that is in evidence. Van Tine, Clerk of the Board of Chosen Freeholders, testified from the original minutes of the Board and the minutes themselves indicated receipt of the communications and the authority given by the Board to erect the signal.

At the end of the appellants' brief, Section 35 of the General Railroad Law (referred to *supra*) is again relied on, and this time to the effect that as the statute states the sign maintained should be easily seen by travelers, that language requires the defendant to put upon it a light. The appellants reason from this language that even if the Board of Public Utility Commissioners approves its inscription and design, or the Board of Freeholders approves its location and erection, nevertheless, such approval is beyond their authority in face of the language of the statute that the sign should be maintained so as to be easily seen by travelers. This is indeed a novel contention, and we have been unable to find a single case in this state where any attempt has been made to hold a railroad company liable because the "Look out for the locomotive" signs were not illuminated at night. It seems clear that the language of the statute means that the *place where the sign is erected* shall be such that the sign can be easily seen by travelers and not that it should be illuminated.

The case of *Coan v. Hilliard*, 6 N. J. Misc. Rep. 743, is referred to by the plaintiffs. In that case the plaintiff ran into a telegraph pole. Chief Justice GUMMERE, in deciding the case, points out that

section one of "an act relating to electric light, heat and power companies", P. L. 1896, page 322, requires companies having the right to erect telegraph poles in any street, even though they obtain municipal authority to do so, to so locate the poles as in no way to interfere with the safety or convenience of persons traveling on the said roads or highways. In other words, there is a state statute which specifically makes it a court question or a jury question to decide as to whether the telegraph pole is so located as in any way to interfere with the safety or convenience of persons traveling over the road. It is distinguishable from the *Lorentz* case clearly, for it is hard to imagine that Chief Justice GUMMERE should set in the decision of the *Lorentz* case in October of 1926, and not even mention in the *Coan* case that decision in January, 1928, if it was in anywise applicable.

In trying to distinguish the case of *Wood v. Balsam*, 100 N. J. L. 275, the plaintiff points out that part of the language of the Court which states that the fire escape was required to be erected by law, and that, therefore, being thus required to be erected, he could not be held responsible. This contention nullifies his previous argument that such a structure would require lights, etc. It is well settled that even though you are compelled by law to do an act it does not relieve you from the duty of doing it properly. The reasoning leads to an absurdity. According to it the plaintiffs' contention would be that if the State law required the defendants in this case to erect a signal in the middle of the road, the plaintiffs could not recover even though the defendants did not light it, but that, on the other hand, if the defendants put up an extra protection to warn people of trains and obtained the consent of the State to its erection, it would be liable if it did not light it.

III.

CONCLUSION.

For these reasons we respectfully submit that the judgment of the Supreme Court should be affirmed.

Ocober Term, 1929.

EDWARD A. MARKLEY,
CHARLES W. BROADHURST,
Of Counsel.

COLLINS & CORBIN,
Attorneys of Defendants-Respondents.

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New Jersey Court of Errors and Appeals

ANNIE HOWARD,
Plaintiff-Appellant,

and

LEHIGH VALLEY RAILROAD COM-
PANY, a corporation of Pennsyl-
vania, and LEHIGH VALLEY RAIL-
ROAD COMPANY OF NEW JERSEY, a
corporation of New Jersey,
Defendants-Appellees.

GEORGE PENNELL,
Plaintiff-Appellant,

and

THE SAME,
Defendants-Appellees.

EMILY LASTER, by her next friend,
ROSE LASTER, and ROSE LASTER,
individually,

Plaintiffs-Appellants,

and

THE SAME,
Defendants-Appellees.

SADIE TEMPLE, by her next friend,
HELEN JONES,

Plaintiffs-Appellants,

and

THE SAME,
Defendants-Appellees.

RICHARD PENNELL,
Plaintiff-Appellant,

and

THE SAME,
Defendants-Appellees.

On Appeal
from
Supreme
Court.

**BRIEF ON BEHALF OF
PLAINTIFFS-APPELLANTS.**

At about 2 A. M., on September 1, 1928, a very misty, dark, moonless night, the five plaintiffs were riding in an automobile driven by Richard Pennell along a public highway known as County Road, in Manville Township, Somerset County. Crossing at grade of this highway are the tracks of the defendant railroad. The automobile was proceeding at 15 to 18 miles per hours when suddenly it collided with a sign post in the center of the highway which was constructed and maintained by the defendants. There were no lights on the sign post; there were no lights on the road. The sign post was entirely invisible. Injuries resulted to all the plaintiffs, who instituted suits in the First District Court of Jersey City. By consent of the attorneys, the cases were consolidated and tried by the court without a jury. Favorable verdicts for each plaintiff resulted. On appeal, the Supreme Court reversed, and it is from the judgments of reversal that plaintiffs appeal to this court.

It was admitted that the sign had no means whatsoever of illumination or of warning travelers of its presence in the center of the highway except upon the approach of a train (Case, pp. 44, 72, 73). Counsel for defendants in the opening to the trial court at page 44 of the Case stated that the signal "would alternately flash red while the train was within 2000 feet of the crossing" but there is nothing in the evidence to indicate at what particular distance of approach of a train the signal would function. In fact, the lights designed to flash when a train approached the crossing, were out of order, and the uncontradicted testimony of George Pennell established that when a train did cross the lights failed to flash (Case, pp. 55, 56).

So far as the evidence discloses, the defendants in erecting the sign post in the center of the highway acted upon their own initiative. They voluntarily, by means of a series of letters with the Board of Freeholders of Somerset County, sought and obtained permission to erect and construct the obstruction.

Upon their appeal to the Supreme Court, the defendants took the position that having obtained the permission of the Board of Freeholders to erect the sign in the center of the highway, that this permission excused them from the duty of illuminating or making the sign post visible to travelers upon the public highway.

Appellants contend that the defendants were negligent for the following reasons:

(a) The sign post being erected in the center of a public thoroughfare was an obstruction;

(b) That the County Board of Freeholders in granting permission, exceeded its lawful authority; and

(c) That despite the permission of the Freeholders defendants were negligent in that they failed to erect and maintain such a sign as the legislature required under Section 35 of "An Act concerning Railroads".

The Supreme Court reversed the judgments in plaintiffs' favor on the authority of *Lorentz v. Public Service Railway Company*, 103 N. J. L. 104. We shall demonstrate that that case has no bearing on the situation herein.

POINT ONE.

The County Board of Freeholders had no authority to grant the easement and hence the sign post was an obstruction.

The pertinent section of "An Act concerning Counties" relating to the powers of a Board of Chosen Freeholders over county roads is Section 1117, found in 1 Comp. Stat. 1911-1924 Supplement, page 747, Secs. 48-1117, and the relevant portion thereof reads:

"* * * and provided, further, that the board of chosen freeholders shall not grant any easement, right of way, or use in, under or over, any portion of any county road in any municipality, unless the governing body of such municipality, or the board of public utility commissioners, shall consent thereto."

There was no evidence, and the defendants did not even assert, that the governing body of Manville Township or the Board of Public Utility Commissioners consented to the erection and maintenance of the sign post in and over the County Road.

The Board of Freeholders of Somerset County could not legally authorize the erection of an obstruction in the highway, and thereby relieve a railroad company from exercising reasonable care in the maintenance of a sign post in the highway, without notice of warning to unsuspecting travelers of its presence in the highway.

In the leading case of *Durant v. Palmer*, 29 L. 544, the Court of Errors and Appeals said:

"The street, and every part of it, per force of the common law is so far dedicated to the public that any act or obstruction that unnece-

essarily incommodes or impedes its lawful use by the public is a nuisance. The traveling public has a right to suppose that there is no dangerous impediment or pitfall in any part of it, without a light placed to give warning of it or a suitable railing to protect from it."

In *Opdycke v. Public Service Railway Co.*, 78 N. J. L. 576, Chancellor Pitney, speaking for this Court, at page 583, said:

"It is well settled that one who places an unauthorized obstruction within the limits of a highway as laid out is liable to an action at the suit of any person who is thereby specially deminished, and this although the obstruction or other nuisance may be without the limits of the travel way."

In that case it was further decided that the consent of the municipality to the erection of a bridge in the highway would not operate to relieve it from the duties imposed by the legislature or common law in the maintenance of that which is a nuisance.

In the case of *D. L. & W. R. R. Co. v. East Orange*, 41 N. J. L. 127, Mr. Justice Scudder spoke for the Supreme Court as follows, at page 131:

"It is clear from the citations above made that when the privilege is given to a railroad company to cross public highways then existing, or that may afterwards be laid, *it is not exempted from the common law duty of taking reasonable care to enable the public to use the highways with safety; * * * and it is even doubted whether the legislature can limit the obligation to discharge this important duty.*"

POINT TWO.

Defendants were negligent in failing to erect the kind of a sign post prescribed by the legislature.

Section 35 of "An act concerning railroads", as amended by the Laws of 1924, 2 Compiled Statutes, 1911-1924, Supplement Section 170-35, in so far as the issues in these cases are concerned, provides as follows:

"* * * every railroad company shall cause a conspicuous sign with such inscription and of such standard and design as shall be approved by the Board of Public Utility Commissioners of this State, its successors, or other governmental body having charge and control of public utilities in this State, to be maintained at each highway crossing at grade of its railroad, so as to be easily seen by travelers, but such signs need not be maintained in any city, town, borough or village unless required by the municipal authorities, or by the Board of Public Utility Commissioners of this State, its successors, or other governmental bodies having charge and control of public utilities in this State."

The record does not disclose that the defendants were required by any public authority to erect the signpost on the highway where the accident occurred. On the contrary, the testimony adduced by the defendants establishes that the defendants themselves by letters to the Freeholders of Somerset County requested permission to erect the structure (Case, p. 63, *et seq.*). Under these circumstances, defendants were under a duty to erect, construct and maintain a sign in strict compliance with the

provisions of the statute relating to signs on highways where the tracks cross at grade, and hence, such sign was required to be "*a conspicuous sign with such inscription and of such standard and design as shall be approved by the Board of Public Utility Commissioners of this State, its successors, or other governmental body having charge and control of public utilities in this State, to be maintained at each highway crossing at grade of its railroad, so as to be easily seen by travelers*". It is settled law that one who voluntarily assumes the performance of an act, must exercise reasonable care in the performance and maintenance thereof.

La Brasca vs. Hinchman, 81 Law 367;
Rhodes vs. Fuller Land, etc., Co., 92 Law
 569.

Nothing short of strict conformity of the statute by the defendants could be deemed the exercise of reasonable care. The evidence submitted by defendants indicated that the sign would only be illuminated upon the approach of a train.

Defendants' witness, James F. Donovan, testified as follows:

"Does that blue print show any means of illumination except when a train is approaching? A. No, sir; it does not.

Q. Was it discussed with the Board of Freeholders at the crossing at that time, in addition to the location of the signal, the question of whether or not there would be any illumination upon it when trains were not approaching? A. Yes, sir; it was explained to all of them that there would be no lights" (Case, p. 72, lines 28 to 40).

"Q. Was it discussed with them that there would be no illumination on this signal? A. Yes."

There was no competent evidence to establish that it was a "conspicuous sign with such inscription and of such standard and design as was approved by the Board of Public Utility Commissioners of this State". No evidence whatsoever was offered that the particular sign constructed by the defendants was approved by the Board of Public Utility Commissioners or other governmental body having charge and control of public utilities in this State.

There was no formal resolution of the Board of Freeholders granting permission to the defendants to erect the obstruction. The defendants avowedly and solely for the purpose of establishing the consent of the Board of Freeholders introduced into evidence a series of letters written by them to the Freeholders and a letter written by the clerk of the Board to defendants purporting to permit them to proceed with their work. This the defendants' attorney termed the "resolution". One of the letters from the defendants contained the naked and uncorroborated self-serving assertion that the sign was satisfactory to the Public Utility Commissioners. When objection was made to the series of letters, counsel for respondents declared that he offered them only for the purpose of proving the permission of the Freeholders; and for this purpose only were they admitted in evidence (Case, pp. 63, 64, 65). These statements were not offered to prove the facts; such purpose was expressly disavowed.

The Supreme Court, however, misinterpreted this series of letters and in its opinion (Case, pp. 83, 84) evidently accepted at face value the assertions of the letters, that the sign "conformed to the usual cross-arm type," and "that the structure was a lawful structure, erected pursuant to lawful public authority and similar to many such structures." No evidence was offered to prove any of these asser-

tions. It is not entirely clear why the Supreme Court chose to accept these hearsay statements as though they had been put into proof, and in fact proved. The Supreme Court thus disregarded the limited purpose for which the letters were offered in evidence and overlooked the plain and universal rule of law, stated as follows in 23 Corpus Juris at page 56:

“But it is usually considered that if the evidence is limited to a particular purpose, its effect must be confined to that purpose, especially if the evidence would not be independently competent for any other purpose.”

Section 35 was the only statutory sanction for the erection of a signal. *Defendants must concede that they did not obey it.* The statute provides for a conspicuous sign to be maintained so as to be easily seen by travelers. A reasonable construction of the statute would require the defendants to maintain the sign in such a manner that it would be visible to travelers upon the highway at all times or made conspicuous in such a manner as to give notice and warning of its presence to those lawfully using the highway.

What the defendants erected was a sign which would only give warning of approach of trains. Whereas, *it should have been so maintained as to apprise travelers upon the highway not only of the approach of trains, but of its very existence in the highway.* Since we have seen the signal was in plain contravention of the terms of Section 35, *the Board of Public Utility Commissioners would have had no authority to approve it under that section.* The sign must be “easily seen by travelers”. Otherwise it might be the direct cause of more wrecks than it prevented. In this language, therefore, the Legislature articulated the standards of care it

deemed reasonable in the erection of railroad markers. These standards bound its agents, the Board of Public Utility Commissioners, to whom is entrusted the general supervision of railroads, and especially the duty to be watchful to enforcing safety requirements which are imperative for the protection of the public.

The statute further indicates clearly—clearly the desire of the lawful authorities as to the nature of any signs that might be erected, required or not. Since these authorities had sole jurisdiction in the regulation of railroad crossings, no Board of Freeholders could authorize the railroad to maintain a crossing signal in direct contravention with the requirements of the statute.

The cases of *Coan v. Public Service Electric & Gas Co.* and *Hilliard v. Same*, 6 Adv. Rep. 1267, 142 Atl. 665, affirmed by this court in 7 Adv. Rep. 343, 144 Atl. 917, are directly in point and control the present situation. In those cases, the plaintiffs were riding in an automobile which collided with an electric light pole of the defendant near a bridge. The pole was erected in that part of the highway devoted to vehicular traffic. Plaintiffs claimed that the pole was erected in the highway without warrant of law. Defendants appealed from the judgment entered in favor of the plaintiffs. The defendant in those cases, as here, contended that the pole was placed in the position which it occupied with the permission of the governing body of the City of Camden, consequently it was lawful and that its presence in the highway imposed no liability upon defendants for accidents such as made the basis of the suits. Chief Justice Gummere, speaking for the Supreme Court, said:

“Assuming that the City of Camden consented to the erection of the pole in the place where it was located, this fact, we consider, does not

justify a reversal of the judgments for either of the reasons stated. By the first section of 'An act relating to electric light, heat and power companies' (P. L. 1896, p. 322), such companies have a right to erect their poles in any street of any incorporated city, providing they obtain municipal authority for doing so, and further providing 'that the same shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the said roads and highways' (3 Comp. St. 1910, p. 3152, Sec. 35).

"The grant of the municipality cannot override the statute, and cannot legally authorize the erection of poles in public streets in locations which would interfere with the safety or convenience of travelers thereon."

The cases cited are parallel and controlling for the apparent reason that the consent of the Freeholders of Somerset County to the erection of the sign post could not override Section 35 of the Railroad Act hereinbefore referred to which required a conspicuous sign approved by the Board of Public Utility Commissioners or other governing body having charge and control of public utilities in this State to be maintained at the highway so as to be easily seen by travelers.

POINT THREE.

The *Lorentz* case regarded as controlling by the Supreme Court has no bearing on the situation herein.

The Supreme Court in its *per curiam* opinion (Case, pp. 83, 84) relied exclusively on the case of *Lorentz v. Public Service Railway Company*, 103 N. J. L. 104. A vast abyss lies between the situa-

tion presented in that case and the situation in the cases at bar. The facts in the *Lorentz* case were as follows: Plaintiff was riding in an automobile which collided, at night, with one of the columns of an elevated structure maintained by the defendant on Central Avenue, a prominent thoroughfare in Jersey City. Plaintiff charged that the railroad was negligent because of the use of the columns in the roadway; in failing to have a suitable light, and in allowing the column to become dirty, so that it could not readily be seen. The driver of the automobile had been driving between the two lines of pillars and was aware of their presence, but said he could not see the pillar he ran into. The defendant contended that since the structure had been erected by contract pursuant to statutory arrangement with the state and in accordance with strict and detailed specifications provided by the State and municipal authorities, it could not be held liable for conforming to the law; and the Court sustained this position. The evidence established that the structure had been authorized by a statute of 1886 and had been in place since 1889. The Jersey City ordinance enacted under the above-mentioned law was introduced in evidence. Section 2 of that ordinance, determined the location of the columns in question. No claim was made that the requirements of the local ordinance as to the location of the pole had been violated. In answer to the plaintiff's claim that the defendant was negligent in failing to light the pole with which she collided, the Court said, at page 109:

“We find no such duty laid down in the statute or ordinance, and without some requirement in one or the other, we are unable to say that any such duty existed. The right to erect and maintain the structure was conferred, without any such qualification, and it seems

reasonable to say that where neither the statute nor ordinance mentions the matter it must be assumed that the ordinary public lighting of the street was considered sufficient in the premises."

Surely, the situation above outlined is radically different from the situation here. In the cases at bar, the defendants did not erect or maintain the obstruction in strict conformity with the statutes thereto relating.

Every person must know that a trestle requires the support of pillars, and is therefore charged with knowledge or notice of such presence. While, on the other hand, a person traveling along an unlighted country highway, as plaintiffs were, has no more reason to suspect the presence in the center of a highway of a sign post than he would have to suspect the presence of a building in the center of a highway devoted primarily to public travel. A glimpse at the photographs in the State of Case will reveal the obvious distinction between the cited case and those under consideration.

In the instant cases, the defendants did not act under any legislative enactment, but were mere volunteers in requesting the permission of the Board of Freeholders to erect the obstruction in the center of the highway. They had only themselves to satisfy. Once they decided on the installation, they had no excuse for not proceeding carefully and in full compliance with law. Mere local permission of the Board of Freeholders could not exempt defendants from the exercise of reasonable care. The Freeholders were consenting to an encroachment on a public highway. They could not absolve defendants from *tort* liability. Considering the menace of placing an unilluminated obstruction on a public thoroughfare which itself was an unlighted country road, defendants were guilty of negligence.

Defendants in their brief in the court below relied, in addition, upon the cases of *W. B. Wood Co. v. Balsam*, 100 N. J. L. 296, and *Denzer v. D. L. & W. R. R. Co.*, 103 N. J. L. 95. Assuming that they may again rely on these cases in this court we desire to point out that each of those cases are clearly distinguishable from the facts of the instant case.

Those cases deal uniformly with situations where the legislature or some municipal body acting either in its own original sovereign capacity, or under some empowering legislation has enacted a mandatory and specific law. In each instance the defendant did precisely what was required of it, neither more or less. In such circumstances the Court has held that a defendant cannot be penalized for doing the very thing the law required of him.

In the case of *W. B. Wood Co. v. Balsam*, 100 N. J. Law 296, plaintiff's truck ten and one-half feet tall, was damaged by collision with a fire escape which protruded from defendant's building out into and ten feet over a highway. The Department of Labor had ordered the fire escape placed where it was at the time of the collision. The Commissioner in ordering the fire escape so placed acted under mandatory authority conferred by Chap. 64, Laws of 1904, and Chap. 214, Laws of 1911. Section 11 of this act provides, that such fire escapes shall be located not more than ten feet above the ground. Mr. Justice Lloyd, speaking for the Court said, "Here, the damages which the plaintiff company sustained was through a collision on the public highway with a structure not only authorized *but required by law and which the property owner could not avoid placing where it was.*" (Italics ours.) Defendant had no option or discretion in the matter.

Denzer v. D. L. & W. R. R. Co., 103 N. J. L. 95, cited by the defendant, is not analogous to the case

at bar. There the railroad company had built an underpass which continued a public highway under its tracks. The trestle was supported by three sets of perforated, concrete walls, one at the east curb, one at the west curb and a third at the middle of the highway. The plaintiff in crossing from the east to the west side of the street walked through the perforated supports and was knocked down by a passing automobile.

The Board of Public Utility Commissioners had ordered the abolition of the grade crossing and the railroad pursuant to that order made a contract with the municipality for such abolition. The structure in question was in strict conformity with the order and the specifications laid down in the contract.

Unless the structure authorized by the Public Utility Commissioner contained an obvious danger to pedestrians, the latter would be guilty only of a mistake of judgment for which the railroad could not be penalized.

If, on the other hand, the danger was in fact so flagrant as to present itself to any reasonable man, the most that can be said is that the contract with the railroad should have been reformed. But until that reformation was accomplished the railroad could not be held accountable for a loss arising out of strict conformance with the detailed, mandatory requirements of the legislature and its agents.

In the case at bar, if we accept the defendant's own contention, there was no statute or ordinance that controlled or defined the exact character of the structure it planned to place in the highway. There was only the naked consent of the Board of Freeholders, entirely devoid of specification as to design and detail. This consent carried no such absolution from liability as the defendant claims. Defendants wanted to place in the public highway a

sign post which constituted a real impediment to traffic, an impediment which would not be visible on a dark night. Plainly, there was at least some risk of accident; plainly, the risk was needless whatever its degree; plainly, therefore, the inference of fault may be drawn unless the risk was so remote or trifling that reasonable men in the exercise of reasonable care would not have striven to avoid it. The passive acquiescence of the Board of Freeholders to the construction of the sign post was not and is not the same thing as the affirmative, detailed requirements of the ordinance and statute in the *Lorentz* case. That acquiescence did not relieve the defendant of the duty to exercise reasonable care.

In the *Lorentz* case we have a structure built to serve the general public along lines and specifications dictated by that public (through its representatives). It is, therefore, to that extent, a public improvement. A sign post visible on bright nights only, built with the passive consent of the Board of Freeholders, is no more a public improvement than a defective rail or broken gate.

The doctrine laid down in the *Lorentz* case is salutary when restricted to the actual holding of the case. It is submitted that this holding is fairly summarized as follows: Where, in pursuance to plans and specifications which are incorporated into a mandate or a contract with the state authorities, a private corporation constructs a public utility, the private owner of the improvement ought not be held liable for defects in the original plans which show up through usage. The holding cannot be expanded to any situations besides these.

The defendants would have the Court ignore every significant element of the *Lorentz* decision and absolve a railroad company of negligence, however gross, provided only it had induced some pub-

lic body or officer to acquiesce in its individual misfeasance.

In conclusion, we respectfully submit that the defendants, having erected in the center of a public unlighted highway an obstruction not in strict conformity with the statutory requirements, of the presence of which under the undisputed facts, no reasonable warning was given to travelers on the highway, constituted negligence upon the part of the defendants for which they are legally answerable to the plaintiffs who sustained injuries by reason thereof. There was ample evidence to support the findings of fact of the Trial Judge of the District Court, and the Supreme Court erred in reversing the judgments.

**The judgments of the Supreme Court
should be reversed.**

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SAMUEL TARTALSKY,
Of Counsel.

