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Notice of Appeal.

NOTICE OF APPEAL.

Filed February 19, 1925.

New Jersey Supreme Court

EDITH LORENTZ, who sues by JOHN LORENTZ, her next friend,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>	10
<i>vs.</i>				
PUBLIC SERVICE RAILWAY COM- PANY,	}	<i>Defendant.</i>		

To Abe J. David, Esq., attorney of plaintiff. 20

Sir:

Take notice that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in favor of the plaintiff and against the defendant in the above-entitled cause.

Dated Feb. 16, 1925.

Yours truly, 30

LEONARD J. TYNAN,
Attorney of Defendant.

(Endorsed) "Service acknowledged February 17, 1925. Abe J. David, attorney of plaintiff."

Complaint.

SUMMONS.

The defendant was duly summoned.

COMPLAINT.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

EDITH LORENTZ, who sues by
JOHN LORENTZ, her next
friend,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY, a corporation of the
State of New Jersey,

Defendant.

*Action
at Law.*

Complaint.

Plaintiff residing at Elizabeth, in the County
of Union and State of New Jersey, says:

1. That at all of the times hereinafter men-
tioned the defendant was in the possession, oper-
ation, management and control of a certain over-
head and elevated electrical railway system in
the City of Jersey City, New Jersey, running and
operating over Central avenue in a northerly
direction toward Booraem avenue, being public
streets and highways in said City of Jersey City,
New Jersey.

2. That in the management, operation and
control of said overhead and elevated electrical
railway system, the defendant did use certain

Complaint.

columns and piers for the support of its tracks
and rails, which columns and piers were erected
and constructed in the roadway of said public
streets and interfered with and impeded the
free and uninterrupted passage of travelers upon
said several highways.

3. That by reason of the manner in which
said overhead and elevated railway was con-
structed the natural light both at day and night-
time which would have come in and upon said
streets and highways and particularly upon Cen-
tral avenue were shut off rendering the drive-
way of said streets dark and dangerous for
travelers.

4. That on and for a long time prior to De-
cember 1, 1920, defendant did assume the duty
and obligation of properly lighting the roadway
and driveway of said public street and highway
known as Central avenue beneath its overhead
and elevated railway structure and did attempt
to place lamps, lights and illumination in places
to warn travelers upon said road and driveway
known as Central avenue of the various obstruc-
tions, columns and piers used and maintained
by said defendant in said highway for the sup-
port and maintenance of its overhead and eleva-
ted railroad system.

5. That on December 1, 1920, in the night sea-
son, the plaintiff was being lawfully driven upon,
over and along said public streets known as Cen-
tral avenue in the City of Jersey City, New Jer-
sey, in a southerly direction, at a slow rate of
speed and at a point directly south of Booraem
avenue, said automobile in which said plaintiff
was lawfully riding did hit, strike and collide with

Complaint.

a pier and column used and maintained by the defendant as aforesaid.

6. That the defendant negligently failed and omitted to have a light or illumination at or near said column or pier which was run into by plaintiff's automobile so as to warn plaintiff of the presence and existence of said pier and column and by means of the negligence of said defendant, its officers, agents and servants, the plaintiff was injured when said automobile collided with said pier and column.

7. That by reason of the collision of said automobile with said pier and column due to the negligence aforesaid of the defendant, plaintiff was hurled, tossed and thrown from said automobile to and upon the ground and pavement of said public street and highway known as Central avenue with great force and violence and was bruised and rendered sore, lame and disordered in and about her head, neck, body, limbs and internally and about her mouth, teeth and tongue and underwent and suffered great pain and anguish for a long space of time, to wit, hitherto and also permanently injured to the damage of the plaintiff, ten thousand (\$10,000.00) dollars.

30

SECOND COUNT.

8. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 5 and 7.

9. That the said defendant negligently permitted a certain pier and column used by it for the support of its overhead and elevated electrical railway located on Central avenue south of Booraem avenue to be so covered with dirt, grime and soot that it was impossible for the plaintiff or any person driving along said highway to see and observe said pier and column

40

Complaint.

although the headlights on the automobile in which plaintiff was then being driven were properly illuminated. By means of the negligence of the defendant in so maintaining said pier and column, the automobile in which plaintiff was then and there lawfully being driven on Central avenue, hit, struck and collided with said pier.

10

THIRD COUNT.

10. Plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 5 and 7.

11. The defendant assumed the obligation of properly lighting and illuminating the street, roadway and driveway of said Central avenue under its said overhead and elevated electrical railway system but performed such lighting and illuminating in such a careless and negligent manner that the lights placed by it did not warn the traveling public and particularly the plaintiff of the presence and location of the column and pier supporting said overhead and elevated electric railway system; that said defendant permitted the lights placed by it to become so covered with dirt, soot and grime that the rays of said lights did not throw to or upon or near its said column and pier so as to illuminate said pier for the traveling public to observe and have reasonable notice and warning of the existence and location of said column and pier.

20

30

By reason of the negligence of the defendant in so maintaining said pier and column, the automobile in which plaintiff was then and there lawfully being driven on Central avenue, hit, struck and collided with said pier.

ABE J. DAVID,
Attorney of Plaintiff.

40

Answer.

ANSWER.

Filed February 25, 1922.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	EDITH LORENTZ, who sues by JOHN LORENTZ, her next friend,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>
	<i>vs.</i>			
	PUBLIC SERVICE RAILWAY COM- PANY, a corporation,		<i>Defendant.</i>	<i>Answer.</i>
20				

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

FIRST COUNT.

1. It admits the allegations contained in paragraph one of the first count of the complaint;
- 30 2. It denies the allegations contained in the remaining paragraphs of said first count.

SECOND COUNT.

1. In answer to paragraph eight of the second count of the complaint, it repeats its answer to the first count;
2. It denies the allegations contained in paragraph nine of the said second count.

40

Answer.

THIRD COUNT.

1. In answer to paragraph ten of the third count of the complaint, it repeats its answer to the first count;

2. It denies the allegations contained in paragraph eleven of the third count.

10

FIRST DEFENSE TO ALL COUNTS OF THE
COMPLAINT.

1. It avers that the plaintiff, Edith Lorentz, was engaged in a common enterprise with the operator of the automobile in which she was riding, and that the negligence of the said operator contributed to the happening of the said alleged accident, in that said operator was operating the said automobile in a reckless and negligent manner, and at an excessive and high rate of speed, and without making proper observations, and without keeping the said automobile under proper control, and negligently and carelessly struck and collided with the pier and column in question, and so carelessly and negligently operated the said automobile as to endanger the safety of the said plaintiff.

20

SECOND DEFENSE TO ALL COUNTS OF THE
COMPLAINT.

30

1. It avers that the negligence of the servant of the plaintiff, Edith Lorentz, contributed to the happening of the said alleged accident, in that said servant recklessly and carelessly, and at an excessive and high rate of speed, and without keeping it under control, and without making proper observations with respect to where he was driving, drove the said automobile so that it struck and collided with the pier and

40

Answer.

column in question, and so negligently operated the said automobile as to endanger the safety of the said plaintiff.

THIRD DEFENSE TO ALL COUNTS OF THE
COMPLAINT.

- 10 1. It avers that the negligence of the plaintiff, Edith Lorentz, contributed to the happening of the said alleged accident, in that she failed to keep a proper lookout and to warn the operator of the automobile in question of the presence of the pier and column in question.

LEFFERTS S. HOFFMAN,
Attorney of Defendant.

20

30

40

Replication to Answer.

REPLICATION TO ANSWER.

Filed March , 1922.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

EDITH LORENTZ, who sues by
JOHN LORENTZ, her next
friend,

Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY, a corporation of the
State of New Jersey,

Defendant.

*Action
at Law.*

10

20

Replication to first defense.

1. Plaintiff denies the allegations of the first defense.

Replication to second defense.

1. Plaintiff denies the allegations of the second defense.

Replication to third defense.

1. Plaintiff denies the allegations of the third defense.

30

Dated, March 27, 1922.

ABE J. DAVID,
Attorney of Plaintiff.

40

Judgment.

SUBSTITUTION OF ATTORNEY.

10 Lefferts S. Hoffman, attorney of defendant, having died, Joseph Coult became attorney of defendant. On February 14, 1925, a substitution was filed making Leonard J. Tynan attorney of defendant in place of Joseph Coult.

JUDGMENT.

NEW JERSEY SUPREME COURT.

20 EDITH LORENTZ, who sues by
JOHN LORENTZ, her next
friend,
Plaintiff,
vs.
PUBLIC SERVICE RAILWAY COM-
PANY, a corporation of the
State of New Jersey,
Defendant.

30 This case was tried before Judge Peter F. Daly, with a jury at the Union Circuit, on February 2, 1925.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Twenty-six hundred and fifty (\$2,650) dollars.

Whereupon it is adjudged that the plaintiff, Edith Lorentz, who sues by John Lorentz her next friend, do recover of the said defend-

Judgment.

Damages	\$2,650.00	ant, Public Service Railway
Costs	50.60	Company, a corporation of
		the State of New Jersey, the
		sum of two thousand six hun-
		dred fifty dollars damages to-
		gether with her costs which
		have been taxed at the sum
		of fifty dollars and sixty
		cents, making in the whole
		the sum of two thousand
		seven hundred dollars and
		sixty cents.

Judgment entered February 7, 1925.

WM. S. GUMMERE,
C. J.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Edith Lorentz, direct.

NEW JERSEY SUPREME COURT.

EDITH LORENTZ, by JOHN LO-
RENTZ, her next friend,

vs.

10 PUBLIC SERVICE RAILWAY Co., a
corporation of New Jersey.

Before:

HON. PETER F. DALY, J., and a jury.

Elizabeth, N. J., Jan. 30, 1925.

Appearances:

20 Abe J. David, Esq., (by Mr. Wagner) attorney
for the plaintiff.

Joseph Coult, Esq., (by Mr. Straw) attorney
for the defendant.

A jury having been empanelled and found
satisfactory, they were sworn.

EDITH LORENTZ, sworn.

Direct examination by Mr. Wagner.

30 Q You are the girl who was hurt in the acci-
dent? A Yes.

Mr. Wagner: May I call Dr. Muller of
Jersey City out of order?

Mr. Straw: No objection.

(Witness withdrawn.)

George H. Muller, direct.

GEORGE H. MULLER, sworn.

Direct examination by Mr. Wagner.

Q You are a practicing physician of Jersey
City? A Yes.

Q How long have you practiced? A Fifteen 10
years.

Mr. Straw: Qualifications admitted.

Q Doctor, you treated Miss Lorentz, who was
hurt in the accident which I have narrated? A
I did.

Q Will you tell the jury when you treated her
and what you found? A Well, I did not have
much in the line of treatment for the first few
days because I was asked to come to Christ Hos-
pital by Mrs. Lorentz to see how the patients
were, and I went there the morning following, I
believe it was about nine in the morning, and I
had a little talk there with the interne. He told
me— 20

Mr. Straw: I object.

Q Never mind what he told you. A Both 30
eyes were bandaged up and her nose.

Q Do you know of your own knowledge what
injuries she suffered from? A Do you want
her subsequent injuries?

Q The injuries she had. A She had like a
fracture of the nasal bones, also a lacerated
wound of the nose.

Q The fracture extended where? A Just
the nasal bones here and the cartilage of the
nose. 40

George H. Muller, direct.

Q Any other things you observed? A She had a few bruises over the body, like contusions.

Q Do you know how long she was in the hospital? A I believe she was there about six days or so. I am not sure.

Q Did you see her at her home? A I did.

10 Q For how long? A I saw her for about three weeks after the accident.

Q From your observation of her condition and your medical knowledge could you form an opinion as to whether or not she suffered pain?

A I should think she would have, yes.

Q Over how long a period? A Well, that all depends. For at least until those bones united. They usually have pain till the bones heal.

Q How long does it take before they do heal?
20 A The bones generally unite between the eleventh and fourteenth day after injury.

Q How long after the accident was it that you discharged her as a patient? A About six weeks.

Q As a result of that injury is her nose normal or abnormal? A Abnormal.

Q Abnormal, in what respect? A Well, in both its shape, and I remember her about five
30 years ago when she had quite a different nose than she has at the present time. Her nose was practically straight, and now there is a concavity there due to the injury.

Q The upper part of her nose appears to be depressed? A Yes. That is where those bones were injured.

Q And you notice she has some scar there. Do you know whether that is the result of the accident? A That is the result of the accident,
40 yes.

George H. Muller, direct.

Q A good deal of that scar tissue has disappeared? A Yes. It has gotten along very nicely.

Q The scars which have remained, which have been there now four years, will they disappear or will they be permanent? A No, they are going to be permanent.

Q What can you say as to the nature of her breathing since the accident? A Well, she is somewhat of a mouth breather now practically, due to injury to the bones in the nose where the septum of the nose has been pushed aside and that naturally has caused and causes impairment in breathing.

Q Is mouth breathing as conducive to health as nasal breathing? A Nasal breathing is practically the breathing we should have in order to assume good health.

Q And mouth breathing is an impaired form of breathing? A It is.

Q Do you know of any other impediments or marks, the result of this injury to her? A I do not think so.

Q What is it? A No.

Q Do you know whether or not her upper lip or upper jaw was affected? A She complained there of one of her teeth at that time. It naturally did not injure the jaw. Sometimes an injury like that will cause injury to certain nerves that supply the teeth. It would have a tendency to cause decay in the tooth.

Q If she did have decay in one of the teeth it would have been the natural result of this? A I say at times it affects one of the nerves that supply that tooth.

Q Doctor, is there any particular tooth that you refer to? A I think she has one capped
40

George H. Muller, cross.

there. I do not know which one it is. I have not taken a look at it for a long time. It is so long ago.

Q If the nerves were injured that would affect the amount of nourishment reaching that tooth and retard the growth of it, is that what you mean, doctor? A Yes.

Cross examination by Mr. Straw.

Q Was there any destruction of the nerve or injury to the nerve of the jaw? A She had quite a deep laceration.

Q Was there any destruction to the nerve of the jaw? A That is hard to tell—

Q Was there any destruction to the nerve of the jaw? A There was.

20 Q Which nerve? A The branch of the nerve that supplies the upper jaw, one of the tri-facial branches.

Q What is its name? A Superior dental nerve.

Q What tooth was affected? A That I do not know at the present time.

Q On what side of the face? A Right side.

Q Was it upper or lower? A Upper.

30 Q You have examined it since the accident? A Well, I have looked in her mouth since the accident. I have not paid any particular attention to her tooth.

Q Did you treat the nerve or attempt to do anything for the nerve which was injured? A No, sir.

Q Was it possible to do anything for it? A No, sir.

40 Q You just made up your mind that it was injured and that was all there was to it? A (No answer.)

George H. Muller, cross.

Q And one of the teeth has been destroyed?

A So she claims, yes

Q What do you mean, so she claims? A She claims that that tooth is devitalized. I am not a dentist. I could not tell you much on that line; I could not give you any expert testimony on her teeth.

10

Q You have been testifying about her tooth. Is that not from expert knowledge? A It is as far as I am a doctor, but not as a dentist.

Q You are not sure of yourself as to teeth? A I am sure when it comes to the tooth being devitalized.

Q You did not treat the tooth? A No.

Q You do not know whether it was treated or not? A No, sir.

20

Q You say that she is somewhat of a mouth breather and that mouth breathing is an impaired form of breathing? A Yes.

Q You were asked by the counsel for the plaintiff whether or not it injures health. Does mouth breathing injure health? A Yes.

Q To any great extent? A Yes.

Q What does it do? A You get catarrhal conditions of the respiratory tract, nasal frontal tract.

30

Q Has this lady a catarrhal condition? A Yes.

Q Have you treated her for the catarrhal condition? A Yes.

Q When? A After the injury.

Q How long? A Right along. I have told her to keep on with her nasal douche and spraying the nose with an oily solution.

Q Has she a catarrhal condition? A She has this condition of the nose that would natur-

40

George H. Muller, cross.

ally cause a condition of mucous membrane that causes a catarrhal condition.

Q Has this lady catarrh? A Yes.

Q Have you been treating her for it? A Yes.

Q When was the last time you treated her for catarrh? A Three or four weeks ago.

Q At your office? A Yes.

Q How frequently do you treat her for catarrh? A Maybe once a month or so she has dropped in to see me.

Q Do I understand you have been treating her systematically and regularly for catarrh since the accident on the average of once a month? A Well, you see with the condition she has there—

Q Will you answer the question, please? A Yes.

Q At your office? A Yes.

Q Is she getting better? A I think she is doing very well, yes.

Q Has she recovered? A She has not recovered, no. With that condition they would not recover.

Q Catarrh cannot be cured, doctor? A No, sir; not with that condition, unless she perhaps had an operation on that nose.

Q Is it getting any worse? A No, sir.

Q You only have to treat it once a month? A That is all. It is all left to her to treat it night and morning with a nasal douche and spraying her nose. That is all you can do, unless you operate on it.

Q How many visits did you make to her home? A I went there generally on a Sunday afternoon. That was my afternoon off, and being Mr. Lorentz was a patient of mine in Jersey

George H. Muller, cross.

City and at that time he had his leg broken, I came out to see both of them.

Q How many visits did you make to the Lorentz home for the purpose of treating Miss Edith Lorentz? A I should judge about six or eight.

Q Six or eight visits all told? A Yes. 10

Q For Miss Lorentz? A Yes.

Q From the time you took over this case up until the present time? A That was at her home, not at my office.

Q How many visits at the office? A Perhaps about ten or twelve or so.

Q You say ten or twelve? A I have not any memorandum here that I could tell you right off.

Q Well, you keep books, doctor, don't you? A I do, yes. 20

Q And you looked them over this morning? A No, sir; I only got the subpoena early this morning, sir.

Q Do your records there show how many visits she made to your office? A Yes.

Q What is your best judgment, doctor? A Ten.

Q From the time of the injury down to the present time? A Yes. 30

Q I thought, doctor, you were treating her once a month for catarrh at your office? A Yes, I was.

Q And that has been four years ago. It ought to be nearly forty-four visits, oughtn't it, doctor? A Well, now, she comes in occasionally with her father—might be ill or some of the brothers, and I might want to look her over. I do not put that in extra. 40

George H. Muller, cross.

Q Were you mistaken then when you said you had treated her once a month for catarrh since the accident? A Well, I meant once a month perhaps for a year or so afterwards.

Q Were you mistaken when you said you treated her once a month for catarrh since the accident? A There are times when I—

Q Doctor, won't you answer the question, please? A No, I was not.

Q Then why do you say you only treated her ten times at the office in four years? A I did not think it was as long as that. It did not seem that long that this happened. She comes in occasionally. I would not keep any memorandum as to the number of times I did treat her.

Q You say her nose today is not as it was before? A No, sir.

Q Was her nose perfectly formed before? A Yes, it was.

Q Do you know the gentleman who sits here beside me, Mr. Kennelly? A No, sir.

Q Have you ever seen him before? A No, sir.

Q Did you see him on September 15, 1924, at your office, 102 Summit avenue, Jersey City, and have a conversation with him about the condition of Miss Lorentz? A Perhaps he was in there. I could not tell you that.

Q I ask you whether or not you said this to Mr. Kennelly: "That the daughter Edith's nose was anything but perfectly shaped before the accident?" A I never said anything like that, no, sir.

Q Her nose was perfectly shaped before the accident? A She had a perfect nose, yes.

George H. Muller, re-direct.

Q And did you say that her nose was now ruined for life as to her personal appearance? A I do, yes.

Q Do you recall now that you did talk to Mr. Kennelly? A I might say that, because from a severe injury like that—

Q Do you recall now that you did talk to Mr. Kennelly? A You see, in a doctor's office—

Q Do you recall, doctor? A No, I do not.

Q You said positively that you never had seen him. Do you mean that you do not remember that you saw him? A Men like that from the Public Service Railway Company—

Q Do you mean that you do not remember whether you saw him or not? A I will say that, yes.

Q Then it is possible you did have a conversation with him? A He might have been in my office, yes.

Re-direct examination by Mr. Wagner.

Q Doctor, how many years is it since this accident and the incidents in connection with it have been brought to your attention? A As I say, I believe it is five years ago that this accident happened.

Q It is four years ago? A Four years ago.

Q Did you render a bill to Mr. Lorentz? A I did, yes.

Q Do you recall the amount? A I think around \$220, somewhere on that line. As I say, I received a subpoena very late and I did not have a chance to look up the details on this case at all.

Q You were served yesterday? A Last evening. I was not home.

George H. Muller, re-cross.

Q You had some operations this morning?

A Yes.

Q Were you paid? A Yes.

Q Do you know what proportion of that bill represents the services rendered to the daughter and to the father? A I should judge maybe about one quarter of that would be for Edith, the daughter.

Q Do you recall the name, Dr. Pyle? A Yes.

Q Who is he? A He is a nose and throat specialist in Jersey City.

Q Was he called in? A At my suggestion, yes. I told him I thought it would be a good idea to have a nose and throat man see her on account of this severe injury.

Q That was for the purpose of consultation?
A Yes, sir.

Re-cross examination by Mr. Straw.

Q What was your bill for Miss Edith? A As I say I think about a fourth—I cannot tell you the amount of that bill. I think about \$225.

Q How do you make up that, doctor? A That I say a fourth? You see, Mr. Lorentz had a fractured leg at that time and I count my office visits three dollars and the house visits I count as ten dollars or fifteen dollars, from Jersey City.

Q Was it ten dollars or fifteen dollars, doctor? A All according to the time I spend.

Q How many would you have at ten dollars and how many at fifteen? A As I say, I could not offhand tell you that. I calculate according to the hours, according to the time that I spend on a case.

George H. Muller, re-cross.

Q Doctor, a fourth of your bill of \$225, would be \$51.25, would it not? You say you had six or eight visits at the house, is that correct?

A Yes.

Q And that would be either sixty or eighty at ten dollars, or it would be ninety or 120 at fifteen dollars? A Of course, if you want to figure it out that way. I do not figure those things out that way, as I say.

Q Then you had ten visits at the office at three dollars apiece? A Yes.

Q That is thirty dollars. How did you arrive at the figure of \$51.25 when at your own figures your bill probably was \$200? A As I say, I went out there to see two patients. I did not perhaps see Mr. Lorentz and charge him fifteen dollars and treat his daughter and charge her fifteen dollars.

Q Did you ever send a bill to Mr. Lorentz and charge him at the rate of ten dollars a house visit? A Yes.

Q When? A Probably two or three months ago I was out there.

Q When was the last time? A I cannot tell you that.

Q Did you ever send a bill to Mr. Lorentz for fifteen dollars a house visit? A Yes.

Q When was the last time? A I cannot tell you. I have sent him already bills for twenty-five dollars a house visit from Jersey City.

Q For what? A For services rendered to members of the family.

Q What service did you render to Mr. Lorentz when you sent him a bill for twenty-five dollars? A I cannot recall.

Q For what purpose? A He has asked me out there for some of the children being ill.

Louis Quinn, Jr., direct.

Q When was the last time you sent a twenty-five-dollar bill to Mr. Lorentz for one visit?
A Well, we will say a year ago.

Q Do you recall what that illness was at that time? A Yes, I think the boy had some little tonsil trouble—tonsillitis or something of that kind.

10 Q And you came from Jersey City to Elizabeth? A Yes.

Q Saw the boy and charged Mr. Lorentz twenty-five dollars and he paid you? A He did.

Q How long did you stay at that visit? A About five minutes.

20 LOUIS QUINN, JR., sworn.

Direct examination by Mr. Wagner.

Q You are a civil engineer? A Yes.

Q How long have you been practicing? A Twenty years.

Mr. Straw: We will admit Mr. Quinn's qualifications.

30 Q I ask you if you made the map that I show you? A Yes.

Q That indicates the junction of Central avenue and Booraem avenue? A Yes.

Mr. Straw: I have no objection to the admission of the map.

Mr. Wagner: I offer the map in evidence.

40 Admitted and marked Exhibit P. 1 of this date.

Grace Brandscomb, direct.

Q I show you two photographs and ask you if you made these? A Yes.

Q And they represent the scene of the accident? A Yes, at the same junction.

Mr. Wagner: At the same time the defense offers a number of photographs, and we consent to them. 10

The Court: By agreement they are admitted.

Photographs produced by the plaintiff admitted and marked P. 2 and P. 3 of this date respectively.

Photographs produced by the defense admitted and marked Exhibits D. 1, 2, 3, 4, 5 and 6 of this date respectively.

20

GRACE BRANDSCOMB, sworn.

Direct examination by Mr. Wagner.

Q You are employed at Christ Hospital, Jersey City? A Yes.

Q What is your position? A Pharmacist and record clerk.

Q I show you some records and ask you what they indicate—who they concern? A Edith Lorentz. 30

Q And this indicates the time she was admitted to the hospital—when she left? A Yes.

Mr. Wagner: These are admitted by consent.

Mr. Straw: Yes.

Admitted and marked Exhibits P. 4 and 5 of this date. 40

John Lorentz, direct.

JOHN LORENTZ, sworn.

Direct examination by Mr. Wagner.

- Q You are the plaintiff in this suit? A I am.
- 10 Q And sue for your daughter Edith? A Yes.
- Q You reside where? A In Elizabeth—El Mora, 125 Springfield Road.
- Q You formerly resided in Jersey City? A Yes.
- Q Were you living in Elizabeth at the time of this accident? A Yes.
- Q What is your business? A Vice-President and assistant treasurer of the Laidlaw
- 20 Company, Inc., New York.
- Q What do they do? A We supply all the automobile manufacturers, body builders and trim shops with material for automobiles.
- Q How old is your daughter Edith? A Now?
- Q Yes. A Sixteen.
- Q What does she do? A She goes to school.
- Q What school? A Vale Deane.
- Q What was the condition of her nose prior to the accident December 1, 1920? Normal, was it?
- 30 A I should think a normal nose.
- Q And was she deformed in any way? A No way whatever.
- Q Have any imperfection in breathing? A Not a bit.
- Q Where were you on the evening of December 1st, that is the night of November 30th? A I was at my cousin's house.
- Q Where is that? A New York avenue—well, I was not at his house, I was at a hall that
- 40 he had engaged.

John Lorentz, direct.

Q It was some sort of a celebration there? A It was his twenty-fifth wedding anniversary.

Q Who was with you on your return? A My daughter Edith, two nieces, Edna Schaub and Lulu Schaub.

Q Where was your daughter sitting? A In the front seat with me. 10

Q You were driving what kind of a car? A Chalmers touring car.

Q You were coming south along Central avenue? A I was coming along Central avenue going to Jersey City. I do not know whether it was south. I was going in that direction, toward the jury, from here (indicating on map).

Q You were going from here towards the jurors? A Yes.

Q Had you been on Central avenue before? 20 A Well, not very frequently. I know Central avenue, but not with an automobile.

Q What kind of a night was it with respect to weather conditions? A Raining; raining very hard.

Q Did you have a windshield cleaner on your car? A There is an automatic windshield cleaner, one of these things you wipe with your hands.

Q Was it necessary to use it? A Well, I should say I used it about every two minutes. 30

Q What time was it when you neared the intersection of Central avenue and Booraem avenue? A About one o'clock. I think it was about one o'clock.

Q Tell us what occurred when you neared that intersection? A When I got down here (indicating)?

Q Yes, what happened? A I was coming along Central avenue this way, coming through 40

John Lorentz, direct.

here with an automobile. Here is my position. The car is here. I passed this pillar. I remember it as if it was last night. They have a light underneath here some place, under the elevated structure. It is under, it is nowhere near here. I am coming along with the automobile this way, right even. Eventually I find
10 I am even with that pillar, but I am coming through here with the car, and as I passed that pillar, that pillar there, I naturally assume that an elevated structure, when you hit an elevated structure, that the pillars are one next to the other. I do not know of this funny construction here. They take this track down here into Booraem avenue. I am here. When I pass that pillar I see it distinctly. It was splashed with rain. I think I am headed between this pillar
20 and that. Instead of that I am headed for this pillar, and the next I knew I did not know anything.

Q Was there a light on that pillar? A No.

Q Was there any contrivance there to emit a sound? A Not a thing.

Q Was there anyone stationed there? A Not a person.

30 Q Was there anything to draw your attention to the existence of that pillar there? A Not a thing. I could not see that pillar. I would not have seen this pillar (indicating) if I had not seen the rain shining on it. I naturally assumed I was between an elevated structure and a sidewalk. That was what confused me. If a light was on that pillar I would have seen it, absolutely.

40 Q How fast were you going when you struck it? A About fourteen or fifteen miles an hour.

John Lorentz, direct.

Q What was your condition with respect to sobriety? A I was—I can swear to it, absolutely. I was sober. If I was not I would not wipe my windshield off.

Q Had you had anything to drink? A Yes, I had one drink downstairs. They had frankfurters and sandwiches. They offered a drink
10 and I had one drink downstairs.

Q A drink of what? A Whiskey.

Q What next do you remember after the collision? A I woke up in the hospital, and the interne was sewing my lip. I asked him what was the matter, and he said, "You had an accident." I said, "Where is the kid?" and he said, "She is injured." So I went unconscious. When I came back he was sewing my leg, fixing my leg. That is the last I remember.

Q I show you a memorandum and ask you whether or not that is in your handwriting? A Yes, that is my writing.
20

Q On April 26, 1922, you were apparently served with interrogatories as to your disbursements. Do you recall that? A Yes.

Q And you made answers? A Yes, that is my writing.

Q Do those notes and those figures represent your expenditures with regard to this accident—
30 arising out of it? A Yes.

Q And if they do I want you to give just those that relate to your daughter. A The first one Dr. Ball, \$25, that is for my daughter; Mr. Mueller's bill, \$229—well, as he testified, one-quarter—I don't know—

Q Well, it was a joint bill? A He visited my house to see both of us.

Q That was a joint bill for both of you? A Yes. Hospital \$63. That was for the two of us.
40

John Lorentz, cross.

Q How would you justly apportion that as to your daughter? A I would apportion that in half. Twenty-eight dollars for ambulance. That was for both of us. I will divide that in half. That was taking both of us home. Nurse \$100.

10 Q You paid a nurse \$100? A Yes. She was with us two weeks.

Q Was any of that attributable to the care of the daughter? A I take a quarter of that, because she watched the kid while she was attending to me. Davis' Drug Store, \$58.62. I will take a half off of that. Taxi to Jersey City, that was for my wife. When she heard of the accident of course she had to come down there in a hurry.

20 Mr. Wagner: We will not consider that at all. I consent that any mention of the taxi-cab be stricken out.

Cross examination by Mr. Straw.

Q You say you knew Central avenue but not with an automobile, that you had been there before. Just what did you mean? A When we were kids we used to spend our vacations on the hill. All my relatives lived on the hill.

Q When you spent your vacation on the hill was this elevated railroad there? A Yes.

Q I do not mean to pry. How long ago was that? A I am forty-three. When I was twelve years old. I never went up that part of Central avenue there. I was always down near Beacon avenue.

40 Q Did you know the elevated structure was there? A I knew an elevated structure was on

John Lorentz, cross.

Central avenue, but did not know the curve was there.

Q Had you ever been to the curve before that? A No. That was why I went slowly when I struck Central avenue, knowing the elevated structure was there.

Q When you struck Central avenue you knew 10 the elevated structure was there? A I knew it was there some place.

Q And you went slowly because you knew it was there some place? A Yes.

Q You were driving a Chalmers? A Yes, an open car, a touring car.

Q And you had your curtains up? A Yes.

Q All of them? A Yes. I had to keep them up. It was raining too hard. I could not see.

Q When you went over to the celebration, the 20 wedding anniversary, did you go over the same way you came back? A No; I came to Jersey City, up the Boulevard and came up—it is so long ago—I did not go through Central avenue on the way over. I went through the other streets. I went through another way, because after the accident, six weeks after, I said, "If I had only gone the way I came."

Q When had you been there to Central ave- 30 nue without an automobile prior to the accident? A I could not say that. Probably fifteen years before then. As I say, when we were kids I used to go up there.

Q You said you assumed the pillars were in a straight line? A Yes.

Q Didn't you look after you passed the first pillar? A I could not see anything. When I passed the first pillar I was unconscious.

Q Then what did you mean when you said 40 you assumed they were in a straight line? I am

John Lorentz, cross.

afraid I did not quite understand you. A I will explain it to you.

Q Will you use one of these photographs, because I am not very familiar with maps. Here are a number of photographs. Suppose we take any one of those which you feel fits the situation, and just explain to me. A Here is what I mean. This explains this construction, right here. There is the pillar I hit. Here is the pillar I refer to. That pillar is the pillar that I saw last. And I thought that that pillar was this pillar, and I thought the position of my car was here between that pillar and this sidewalk. Instead of that I am here, coming along Central avenue this way, headed for that pillar, and I see this pillar, and if anybody sees a pillar on their left and knowing there is an elevated structure there, they are going to assume those pillars are one next to the other. They would not assume anything else, unless you knew the construction of that elevated structure as it stands today. That is why I mentioned there should have been a light there. If there had been a light there I would have seen the pillar.

Q Show me how far that pillar is from the one you saw. A I should judge about eight or ten feet, maybe fifteen feet. I do not know now. I just saw it and then I hit. I must have hit, because I do not remember a thing.

Q And you were not going very fast? A Absolutely I was going very slow, until I got away from Central avenue.

Q Just picking your way? A That is it.

Q Does this photograph properly show the way those pillars were? A Yes.

Q When you got to the first pillar how fast were you going? A Which pillar do you mean?

John Lorentz, cross.

Q The one you say you saw and assumed the other was behind it. A I do not know. I was probably going thirteen or fourteen or fifteen miles an hour all through Central avenue, when I hit Central avenue.

Q When this pillar suddenly loomed up in front of you you had a chance to put your brakes on? A No. I never saw the pillar in front of me. It was raining too hard. I saw the pillar to the side of me, but not in the front. I could not help—that reflection.

Q What have you to say as to the illumination at the time of the accident in comparison to the illumination there (indicating a photograph)? A There is just as much difference between day and night as between that picture and when I saw it.

Q That really does not tell us much. A There was no illumination like that there that night. (Indicating on Exhibit D. 4.)

Q Where was the nearest light? A Underneath—under the structure, and one on the side.

Q Show us on any one of these pictures where the light that you saw was. A I do not remember seeing a light. What I saw was the reflection—the last thing I saw was the reflection on this pillar here, on the side of it. (Indicating on Exhibit D. 5.)

Q Is that the pillar you hit? A No. If that is the one on this side of me that is the one I saw the reflection of the water on. It was wet.

Q Then you were not familiar with this pillar situation at all but you just went right on assuming that they were on a straight line? A That is right.

Q And that assumption led to your accident? A That is right.

Otto Mullenberger, direct.

OTTO MULLENBERGER, sworn.

Direct examination by Mr. Wagner.

Q You are a Jersey City police officer? A Yes.

10 Q And were on December 1, 1920? A Yes.

Q Where were you stationed on December 1, 1920? A In police matters they call it nineteen post, Central avenue, which takes in from Sherman Place Station to Reservoir avenue.

Q Do you recall the night of this accident? A I do.

Q Were you present? A After the accident.

Q How shortly after it? A Well, as long as it took me to go two blocks, about three minutes.

20 Q What drew you to the scene of the accident? A The sound of the crash.

Q When you came there was there any light on the pillar that the automobile struck? A No.

Q Any red light or white light of any kind? A Not on that pillar.

Q Was there any gong there? A Nothing.

30 Q Was there any sound or was there any person or any unusual thing to draw your attention to the existence of that pillar there? A No, sir.

Q What character of a night was it? A It was a very foggy night and a heavy mist, a drizzle.

Q Did you see the car passing you before it struck the pillar? A I did.

40 Q Was it going fast or moderately? A At a moderate rate of speed. He could not go fast.

Otto Mullenberger, cross.

Mr. Wagner: I ask that that be stricken out.

Mr. Straw: I am satisfied.

The Court: It will be stricken out.

Q In your opinion was this car proceeding in a proper and cautious manner or what? 10

Mr. Straw: I object.

The Court: Objection sustained.

Mr. Wagner: Withdraw the question.

Q Can you estimate the speed of the car? A I could not.

Cross examination by Mr. Straw.

Q What were you doing two squares away from where the accident happened? A Patrolling my post, observing. 20

Q Were there many cars on the street? A Not at that point.

Q What kind of a car was this? A I remember it was a black touring car.

Q Had you seen any other black touring cars around that time? A Not at that hour.

Q One-thirty? A About one o'clock in the morning, I judge. 30

Q What drew your attention to this machine as it passed? A Having nothing else to do, as the car passed me I would notice it.

Q Nothing about it particularly, however, to draw your attention? A A policeman's work is always to be suspicious of everything.

Q Were you suspicious of that car? A No, just to keep in mind that it passed. 40

Otto Mullenberger, cross.

Q After that, how soon after that was it that you heard this crash? A After it got out of sight I heard the crash and heard the screams.

Q Can you tell me about how long after it was? A About three minutes.

Q About three minutes after it passed you, you heard the crash? A Yes.

10 Q Was it much of a crash? A Pretty loud. In the dead of night it sounded loud.

Q How far away were you? A Two blocks.

Q You heard the crash two blocks? A Yes.

Q And you heard the people screaming two blocks? A Yes.

Q And you went down? A Yes.

Q How long did it take you to get down? A About three minutes.

Q You got down as fast as the car got down? 20 A I had to run down. I had heavy rain clothes on.

Q When you got there what did you find? A I found a milk truck and Mr.—what is his name—Mr. Lorentz—and the daughter. Mr. Lorentz was in a semi-conscious condition and he was on the milk truck and we put this little girl on his lap and they leaned on my shoulder and I ordered the milk driver, by the name of Kunz, to go to the nearest hospital, which happened to be Christ 30 Hospital.

Q Were was the automobile with respect to the pillar when you got down there? A The engine of the auto was right straight, we will say, to the centre.

Q And where was the radiator of the automobile? A That was pushed way back underneath the hood.

Q Underneath the hood? A Yes.

40

Adolph Janitscheck, direct.

ADOLPH JANITSCHECK, sworn.

Direct examination by Mr. Wagner.

Q You are a resident of Jersey City? A Yes.

Q What is your occupation? A Foundry- 10 man.

Q Do you recall being in the neighborhood of Booraem avenue and Central avenue, Jersey City, on the night of the accident that has been mentioned? A Yes.

Q How far away were you from the junction of the two streets? A About a block.

Q Where were you? A We were on Jackson avenue line, on the reservoir station.

Q When you say "we" to whom do you refer? 20 A Mr. Bergman and myself.

Q Is he in court here? A Yes.

Q What drew your attention to the accident? A The crash. We heard the crash.

Q What kind of a night was it? A A very foggy night, drizzly.

Q What did you see when you neared the scene of the accident? A We could just see the headlights of the car, of the automobile.

Q Look at this map. Where is Jackson ave- 30 nue with reference to Booraem avenue, over here or here? A South.

Q This way? A Yes.

Q And you came up this way. I show you the pillar on which the accident occurred. Do you know whether there was any light on that pillar? A No, there was not.

Q Do you know whether there was any gong ringing or any contrivance to draw your attention to it? A No, nothing there. 40

Adolph Janitscheck, cross.

Q Do you see in the center there an indication of a light? A I see it there.

Q As you approached up here how far away was it before you could see this pillar; how near to the pillar did you come before you saw the pillar? A About twenty-five feet I should judge.

Q I will pace off twenty-five feet. This is about twenty-five feet. A That is about the distance.

Q You were from there to there before you could see the pillar? A Yes.

Q Any trouble with your vision? A No, sir.

Q How old are you? A Twenty-six.

Q Did you see them carried away? A I took Mr. Lorentz out of the car.

Q And where was he placed? A Mr. Bergman helped me, and just as we got him to the sidewalk I believe the officer came along. I do not remember very well whether it was the officer or not. But from that time on that party took care of Mr. Lorentz and the little girl and Mr. Bergman and myself took care of the two girls that were in the rear of the car at the time of the accident.

30 *Cross examination by Mr. Straw.*

Q Did I understand you to say you could see the pillar about twenty-five feet away? A Yes, about twenty-five feet.

Q And this was a very foggy night? A Yes.

Q You still saw the pillar twenty-five feet away? A Yes.

Q Was it much of a crash that attracted your attention to the accident? A Yes, it sounded

Adolph Janitscheck, re-direct.

like quite a crash, being it was an early hour in the morning and everything so quiet.

Q What had the early hour in the morning to do with it? A There is not as much noise at an early hour in the morning as at six in the morning.

Q You heard the crash? A Yes. 10

Q And you and Mr. Bergman went down to the scene of the accident? A Yes.

Q You saw the automobile against the post? A Yes.

Q What was the position of the radiator? A It was set back from the impact.

Q How far? A I do not know how far. I did not pay much attention to the condition of the radiator at that time.

Q Was it jammed back under the hood? A Yes. It looked as though it was jammed under the hood. 20

Re-direct examination by Mr. Wagner.

Q You say the lights of the automobile were lit? A Yes.

Q And they faced you as you came along? A Yes.

Q Did or did not those lights of the automobile throw any beams on the pillar? A No, they did not. The pillar was in between the two light, directly in the centre of the radiator. 30

Q I also draw your attention to this map. As you approach up here there are a series of lights in the centre? A Yes, I believe there are.

Q As you come from this direction the only light is behind the pillar? A Yes—at that time. 40

Walter Bergman, direct.

Q Has the situation been changed since? A Yes; there is a red light there now.

Q Towards where? A Right about here, I should judge, suspended from the trestle.

10 Mr. Straw: I ask that that be stricken out.

The Court: You should have objected. You should know that is not material, the condition that existed afterwards, Mr. Wagner.

Mr. Wagner: I did not ask the question. He volunteered that.

The Court: It is stricken out.

20 WALTER BERGMAN, sworn.

Direct examination by Mr. Wagner.

Q You live in Jersey City? A Yes.

Q Did you receive a subpoena to be here today? A Yes.

Q From whom did you receive it? A From Mr. Kennelly, I think his name is.

30 Q You were subpoenaed by the defense? A Yes.

Q You did not receive any subpoena from me? A No.

Q Were you in company of Mr. Janitscheck on this evening? A Yes.

40 Q Will you tell us what you know with regard to the accident? A Well, Mr. Janitscheck and I were standing on the structure of the Reservoir avenue station, I should figure it was about half-past one that night. We heard the crash. We ran

Walter Bergman, direct.

down the stairs and we seen the two headlights. When we got to the accident, if I remember right. I think the two girls sitting in the rear seat were standing on the sidewalk and were screaming, and they pointed toward the car and they were so excited that we did not know just what they said, but we ran toward the car and Mr. Janitscheck opened the door where Mr. Lorentz was sitting, and he was in an unconscious condition, and Mr. Janitscheck and I had a little trouble in getting him out, and when we did get him out we were standing there a minute or so or maybe less and this milk truck came along.

Q Well, they were taken on the milk truck? A Yes.

Q How close were you to that pillar in approaching it before you could see the pillar? A 20 Twenty to twenty-five feet.

The Court: Which pillar?

Q How close were you to the pillar against which the collision occurred—

The Court: Why not mark the pillars? Pillars marked (1) and (2).

The Court: There is no dispute between 30 you gentlemen as to number one being the one he actually came in contact with?

Mr. Straw: No, sir.

Q Coming north along Central avenue how close did you have to get to pillar number one before you saw it?

The Court: Do you understand that map, where pillar number one is? 40

Lulu Schub, direct.

The Witness: Yes. I know the exact location. Number one pillar, which the car struck, was one block away from where we were standing.

Q Was it a clear night or a foggy night? A
10 It was a foggy, misty night.

Q Could you see the pillar from where you started to walk from? A We could not see it a block away.

Q How close did you have to get to it before you saw the car? A Where the car was?

Q Yes. A About twenty to twenty-five feet.

Q Do you know whether or not the lights of the automobile were shining when you got there?
A If I recollect correctly only one was shining.

20 *Cross examination by Mr. Straw.*

Q Did you feel any vibration in the roadway?
A No, sir.

Q Did you observe the radiator? A Yes.

Q What was the condition of the radiator?
A It was pushed underneath the hood.

Q Jammed in? A Yes, sir.

30

LULU SCHUB, sworn.

Direct examination by Mr. Wagner.

Q You live in Jersey City? A I do.

Q You are related to Mr. Lorentz? A Yes.

Q You accompanied him in the car on December 1st? A I did.

Q You were also at that wedding celebration?
40 A Yes.

Emma Schub, direct.

Q At what rate of speed was the car going when you neared Central and Booraem avenues? A It was going a very moderate rate of speed, not more than fifteen miles an hour, I should say.

Q What was the condition of Mr. Lorentz as to sobriety? A What is that? 10

Q What was the condition of Mr. Lorentz as to sobriety—was he intoxicated or was he sober? A Why, he was perfectly sober.

Q Did you or did you not see that pillar that was struck? A I did not see it at all.

Q Do you recall what kind of night it was?
A It was a rainy and foggy and misty night.

Q You were seated in the car? A I was.

Cross examination by Mr. Straw.

Q Did you see the pillar at all? A I did not see it at all. 20

Q Could you see through the windshield?
A No, I could not.

Q Why couldn't you? A The rain was all over the windshield, and all you could see through was just the part the windshield wiper would clear off. I was in the rear of the car and could not see at all. 30

EMMA SCHUB, sworn.

Direct examination by Mr. Wagner.

Q You live in Jersey City? A Yes.

Q And are related to Mr. Lorentz? A Yes.

Q You are cousins? A Yes.

Q You are a sister of Lulu Schub? A Yes. 40

Edith Lorentz, direct.

Q You were in the car with Mr. Lorentz on the night of December 1st? A Yes.

Q And also attended that wedding anniversary? A Yes, I did.

Q On the way home at Central and Booraem avenues at what rate of speed was the car traveling? A We were just creeping along, being such miserable weather. I could not say how fast we were going.

Q In what way was the weather miserable? A It was raining and it was misty and foggy.

Q What was the condition of Mr. Lorentz, was he drunk or sober? A He was absolutely sober.

Mr. Straw: I object. There is no allegation Mr. Lorentz was anything but perfectly sober. In fairness to Mr. Lorentz I want to say that.

Cross examination by Mr. Straw.

Q Could you see through the windshield? A From the rear of the car I could not.

Q Why? A There were rain drops on it.

Q Was it covered with rain? A Yes, it was.

EDITH LORENTZ, recalled.

Direct examination by Mr. Wagner.

Q You live with your parents? A Yes, I do.

Q Father and mother? A Yes.

Q Where? A 125 Springfield avenue, Elizabeth.

Edith Lorentz, direct.

Q Do you go to school? A Yes.

Q Where? A Vale Deane.

Q How old are you? A I will be sixteen November.

Q Did you attend school at that time? A I just started at school.

Q Vale Deane? A Yes.

Q Were you with your father on the night of December 1st? A Yes.

Q Returning from Jersey City? A Yes.

Q What part of the car were you sitting? A In the front part.

Q Did you see the pillar which was struck?

A I did not look front. I was looking out the side.

Q How fast was the car going? A It was going very slow.

Q As you neared the railroad structure, what occurred? A I just happened to turn front and I did not see it.

Q You did not see what occurred? A No.

Q What happened? A I remember getting in a milk wagon.

Q Then next what do you remember? A I remember standing in the hospital.

Q What next do you remember? A When I was in the hospital I felt my nose, that is all I remember, until I was going up on the elevator to the operating room.

Q Do you recall what occurred after you felt your nose in the hospital? A No; I started to look at my hand, but I never got that far.

Q What do you mean by that, that you became unconscious? A Well, I think I went off again.

Q When did you recover consciousness, when did you wake up again? A When I was on the operating table.

Edith Lorentz, direct.

Q What do you recall then? A I remember asking the doctor how many more stitches he had to take.

Q What next do you recall? A I remember asking him again.

10 Q Do you recall how long you were in the hospital? A No, I do not remember, until they told me after I got out.

Q Do you recall what you did in the hospital? Whether you were in bed or walking about or what? A I remember after I was in there a while I got in a wheeling chair.

Q Do you recall how you were taken home? A In an ambulance.

Q How long did you remain in the house? A Well, for a month after.

20 Q When did you go back to school? A On the third of January.

Q What happened to you as a result of the accident? A Well, I broke my nose, and the shock stopped the growth of one of my teeth and I have a false tooth.

Q Which tooth is that? A It is this tooth (indicating).

30 Mr. Wagner: Indicating the upper right canine.

Q How do you breathe now? A Differently. I had my adenoids out. That made me breathe all right.

Q You had your adenoids out before the accident? A Just before.

Q Then you breathed well? A I did breathe well then.

Q How do you breathe now? A I breathe through my mouth at night.

40 Q While you are asleep? A Yes.

Edith Lorentz, direct.

By the Court.

Q What about the daytime? A I breathe through my mouth in the daytime sometimes, but I try and stop it.

By Mr. Wagner.

10 Q That is, you make a constant effort to breathe through your nose? A Yes.

Q Will you step down here? This line that runs down your nose from here to there, was that there before the accident? A No.

Q Was that there before? A No, it was not.

Q Was your tooth stunted in growth before the accident? A It was just starting to grow.

20 Q It was a second tooth? A Yes.

Q Did you suffer any pain? A I did while I was in the hospital, and I did the month that I was home.

Q When did you cease to suffer pain? A I still suffer now on account of the bone being down further than the rest. There is a bone down here. (Indicating.)

Q And that hurts you? A Yes, it does.

30 Q Was the upper part of your nose as depressed before the accident as it is now? A No, it was like everybody else's nose.

PLAINTIFF RESTS.

Mr. Straw: I move for a judgment of non-suit on the ground that no negligence has been proven against the Public Service Railway Company.

The Court: The motion is denied.

Edith Lorentz, direct.

Mr. Straw: Exception. Mr. Wagner has consented that I might offer at the present time the copy of the ordinance.

Mr. Wagner: We admit the structure was there lawfully under the permission of the municipal authorities.

10 Mr. Straw: Under this ordinance?

Mr. Wagner: I have no objection to that.

The Court: It is admitted that this copy is a true copy of the ordinance under which this elevated structure was located as mentioned—ordinance dated June 5, 1889.

Admitted and marked Exhibit D. 7 of this date.

20 Mr. Straw: I have here a copy of a contract between the municipality and the Public Service Electric Company, which provides for the lighting of this elevated road underneath by the Public Service Electric Company and supplying the current to the city.

30 Mr. Wagner: I object to it because I do not think an arrangement between the municipality and the defendant is binding on the plaintiff to the extent of curtailing or limiting such rights as the plaintiff might have under our statutes.

Mr. Straw: This is not between the defendant company and the city, it is between the electric company and the City of Jersey City.

40 Mr. Wagner: Then I think the objection is better than that. Irrespective of what arrangements this company may have had with the city incidental or antecedent or subsequent to the permit to erect the pillars there—regardless of that, that is a private

Edith Lorentz, direct.

arrangement between them, and any breach of that would render them answerable only to the contractee, but as between this defendant and this plaintiff the question is granting that the Public Service had a right to obstruct the street as it did, did it maintain that which we may term a legalized nuisance in a way consistent with the rights of the plaintiff? 10

The Court: It could not be a nuisance if it was legalized. A nuisance is something that is illegal.

Mr. Straw: I have a representative of the Public Service Electric Company here to prove it if he objects.

The Court: He does not object that there is not such a contract, but he objects to its relevancy. 20

Mr. Wagner: Yes.

The Court: I will admit the contract at present, subject to a motion subsequently to strike it out.

Admitted and marked Exhibit D. 8.

Mr. Wagner: They are admitted for the examination of the Court?

The Court: They are admitted over your objection, but the Court says you may renew that objection later on. It will not be shown to the jury until you have had an opportunity to renew the motion if you so determine. 30

Nicholas F. Furey, direct.

NICHOLAS F. FUREY, sworn.

Direct examination by Mr. Straw.

Q Where do you live? A Jersey City, 47 Duncan avenue.

10 Q And you are a practicing physician? A I am.

Q Of what institution are you a graduate?
A Vanderbilt University, Nashville, Tennessee.

Q When did you graduate? A 1897.

Mr. Wagner: His qualifications are admitted.

Q Do you know Miss Edith Lorentz, the plaintiff in this cause? A I examined her.

20 Q Have you seen her since? A Only today in the court room here.

Q Have you observed her today in the court room? A I have.

Q Where did you sit with respect to her? A I sat directly opposite to her for a considerable time. She was sitting in a chair where the court attendant is now, and I was sitting along the rail.

30 Q Did you observe her, doctor? A I did.

Q Is she a mouth breather, doctor? A She is not.

Q Why do you say that? A I say that for the reason I observed her some space of thirty-five minutes during which time she did not breathe through her mouth at any time. I again observed her when she sat alongside of me for a space of about twenty minutes. During that time she did not breathe through her mouth.

40 Q Doctor, she testifies that she breathes through her mouth at night. Is there anything

Nicholas F. Furey, cross.

unusual about that? A Nothing. Most people do. I do.

Q Most people with normal noses do, would you say? A Yes.

Q Why do they, doctor? A It seems to be a relaxation of the muscles, and furthermore they do it for the reason that the mucous membrane of the nose becomes dry and there is difficulty in the air passing through the nasal passages, and nature comes to the relief by opening the mouth and giving a greater air space or greater canal for the air to pass through. 10

Q Does breathing through the mouth injure the health? A I would say not. If that was the case everybody's health would be injured—the vast majority of people for they breathe through the mouth at night. 20

Cross examination by Mr. Wagner.

Q You heard her testify that during the day she makes a conscious effort to breathe through her nose? A Yes.

Q Do you mean to say deliberately, doctor, that mouth breathing as a general proposition is equally valuable for the human body as nasal breathing? A It is not equally valuable, for the reason we have the hair in the nose to act as sort of a strainer to collect the dust which we might inhale. Therefore it is better to breathe through the nose than through the mouth. 30

Q And there is another advantage which you have omitted, isn't there, doctor? A There may be many more.

Q Yes. One is to reduce the temperature of the air breathed in somewhat to the temperature of the body before it reaches the lungs, isn't that so? A I think that is rather fanciful. 40

Nicholas F. Furey, cross.

Q But it is one of the reasons given in medical books, doctor? A There are many things in medical books that I do not agree with.

Q You will not assert that mouth breathing is as valuable for systematic functioning as nasal breathing? A No, it is not.

10 Q And if a person were a mouth breather, other things being equal, such a person would be handicapped as against one who is a nasal breather, other things being equal? A I think the handicap is so small it is really not worth considering.

Q If a patient came to you would you advise the patient that it would make no difference to him whether he were a nasal breather or a mouth breather? A I do not get the gist of that
20 question.

Q Would you advise any patient as a matter of fact to breathe through the mouth rather than through the nose? A No. It gives the person an ugly appearance. Another reason as I say, the nasal passages collect the dust, more so than the mouth.

Q And nasal breathing is what nature intended for us? A Yes.

30 Q And when it is interrupted there is an impairment to the person even though, as you say, in a slight degree? A Very slight.

Q And even in sleep, nasal breathing is better than mouth breathing, if it can be accomplished? A You are not so apt to keep other people awake.

Q And for yourself it is better, is it not? A I suppose it is, yes, I can say it is.

Q Surely. In fact, if you so desired, you
40 could name quite a number of diseases that might

Nicholas F. Furey, cross.

be traceable to mouth breathing? A I do not know of any.

Q You do not know of any at all? A Not one.

By a Juror.

Q Would you advise a person to breathe
10 through the nose or through the mouth? A Nose.

By Mr. Wagner.

Q How do you know that most people at night are mouth breathers? A Statistics show that. I have not visited them personally, but it is known that most people breathe through the mouth at night.

Q But medical science is trying to educate
20 them to the opposite, is it not? A At night? I do not know of any education along that line myself. I have never heard of it.

Q Would you prefer to have a patient at night breathe through the mouth or through the nose? A Through the nose.

Q Absolutely. And there is a difference in the functioning of the body when it is under conscious control and when that conscious control has parted, as in sleep, is there not? A A
30 difference in the function?

Q Not a difference, but if a person has an impediment or an imperfect method of functioning in some organ or nerve or limb, he may during wakefulness consciously control it and lose that control during sleep, is that not possible? A Everything is possible in the human body.

Q I am only asking you if that particular
40 thing is possible? A It is.

Nicholas F. Furey, cross.

Q And probable? A Yes, even probable.

(Adjourned to Monday, February 2, at 9:30 o'clock in the forenoon.)

10 Elizabeth, N. J., February 2, 1925.

Trial resumed pursuant to adjournment.

Mr. Wagner: Does the Court wish me to bring up the question of the introduction of this lighting contract this morning?

The Court: Yes, if you wish.

20 Mr. Wagner: I desire to point out that this is a contract between the municipality of Jersey City and the Public Service Electric Company; that the Public Service Electric Company is not a party to this suit; that the municipality is not a party to this suit; that the matters in the contract are entirely extraneous and have no relevancy to this issue; that any agreement which the municipality might make with a corporation which is not connected with either the plaintiff or the defendant would not be binding upon the plaintiff and would not be binding upon the defendant; that neither of us would be obligated to take notice of it. Because of its utter irrelevancy to this issue, I don't think it is admissible.

30

The Court: I will hear you.

40 Mr. Straw: The allegation in this case, as I understand it, is that the Public Service Railway Company by some act or the omission of some act caused this accident, and Mr. Wagner is basing his entire case on the

Nicholas F. Furey, cross.

illumination given at that particular place. It is a part of our defense that the railway company had nothing whatever to do with the illumination of the street, and this is a part of a street. In order to establish that we must show first who was charged with the duty of illumination and secondly, how it was done. The only way that this can be done is by direct testimony showing that the City of Jersey City was chargeable and did undertake to light this particular place and for that purpose we desire to offer the contract between the City of Jersey City and the Electric Lighting Company. It seems to me most material to the issue, because that way and only that way (other than by parol testimony) can we show how this particular section, the part complained of in this complaint is illuminated. Therefore I feel it is most material, and respectfully ask your Honor to receive it as an exhibit.

10

20

The Court: I have not any question about its admissibility. The primary duty of lighting the streets was on the city. If there was anything in the ordinance under which this elevated structure was erected that transferred that duty by contract or any other way to the trolley company, the situation would be different. The contract refers to a map, but the map does not accompany the contract, but there is sufficient in the contract to show that the City of Jersey City in providing for street lights placed some of the lights on the poles or supports of this elevated structure. In the absence of the map, we are not informed as to whether there were lights on each one of these sup-

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Nicholas F. Furey, cross.

ports, and therefore we do not know whether there was a light under this contract on the support or pole that the plaintiff's automobile came in contact with, and that, to my reasoning would be a very interesting question, as to how far that would concern the question of liability in this case. Clearly, under this contract, the City of Jersey City never relieved itself from the primary duty of street illumination. The interesting question in this case is whether in addition to the lighting for general street purposes, there was incumbent on the trolley company the duty, irrespective of the general street lighting, of placing warnings of some kind, like a light at nighttime, of the existence of these posts in the streets. That is the only question, really, in this case, because you could not find anyone guilty of negligence unless you can first show a duty, and in none of the cases that have been presented to me is there a complete analogy with this present case, and it is remarkable to me that the attorneys have not been able to find some decisions on such a common situation as this, where a municipality gives a special use in the public street to a public utility corporation, as to how far that public utility corporation is charged with the protection of the public through the existence in the ordinary highway of a permanent and continuing structure. For the present, however, I will admit the contract as corroborative evidence of the ordinance itself, which says nothing about the imposition of a duty on the trolley company to provide for street illumination. You may have an exception.

William Paul McDonald, direct.

WILLIAM PAUL McDONALD, sworn.

Direct examination by Mr. Straw.

Q Where do you live? A Jersey City.

Q Whereabouts in Jersey City? A 62 Bartholdi avenue.

Q By whom are you employed? A By the City of Jersey City.

Q In what department? A Department of Streets and Public Improvement.

Q Does your department have to do with the lighting of streets? A It does.

Q Are you familiar with the elevated railroad structure on Central avenue, Jersey City, near Booraem avenue? A Yes.

Q I ask you whether or not you have in your possession an ordinance, or resolution, rather, relating to the lighting of that structure, passed by the City Commissioners of the City of Jersey City, and if you do, I ask you to produce it. A Yes (producing papers).

Q What is that that you hold in your hand? A The resolution.

Q Is that the original resolution? A The original resolution.

Q Passed by the Commissioners of the City of Jersey City? A Yes, sir.

Q And what does it refer to, please? A "Resolved, that the—"

Mr. Wagner: I object.

Q What generally does it refer to? A The lighting system on Central avenue.

Q And whereabouts on Central avenue? A Central avenue between Ferry street and Hoboken avenue.

William Paul McDonald, direct.

Q Are you familiar with Central avenue between Ferry street and Hoboken avenue? A Yes, sir.

Q Are you familiar with Booraem avenue? A Yes, sir.

10 Q Where does Booraem avenue cross Central avenue, if it does, with relation to Ferry street and Hoboken avenue? A Booraem avenue is one block south of Ferry street.

Q Is it between Ferry street and Hoboken avenue? A Between Ferry street and Hoboken avenue.

Q Will you read the resolution, please?

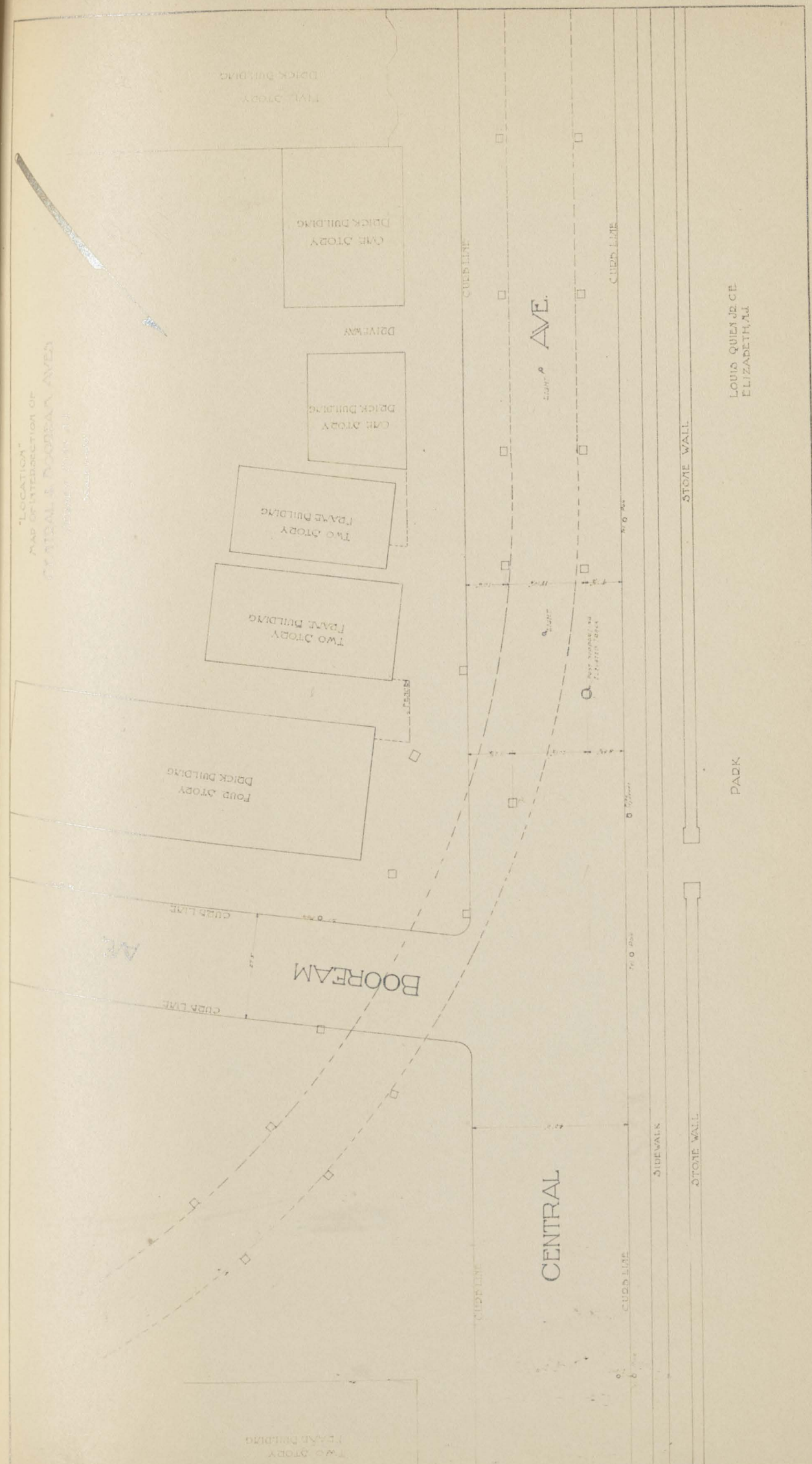
Mr. Wagner: I object.

The Court: On what ground?

20 Mr. Wagner: On the ground, your Honor, that the general ordinance of the City of Jersey City for the lighting of that locality does not relieve the Public Service Railway Company which operated those pillars from any special duties that devolve upon the Public Service Railway Company, arising out of the particular nature of that particular case; in other words, if the City of Jersey City, for instance, decided in the exercise of its judgment, that a certain light was sufficient within a certain area, of a certain kind of lighting, certain type of lamp, that nevertheless, if the Public Service Company or any individual maintained in that street a structure or a contrivance which by its location there occasioned a particular set of circumstances involving possibility of danger to pedestrians or drivers having a lawful use of that highway, it was charged by the law of our State with the exercise of com-

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Edith Lorentz, by next friend, vs Public Service Railway Co.
Exhibit D-1.



Edith Lorentz, by next friend, vs Public Service Railway Co.
Exhibit D-2.



Edith Lorentz, by next friend, vs. Public Service Railway Co.
Exhibit D-4.



Edith Lorentz, by next friend, vs. Public Service Railway Co.
Exhibit D-5.



Edith Lorentz, by next friend, vs. Public Service Railway Co.
Exhibit D-6.



William Paul McDonald, direct.

mensurate care and caution, and to hold otherwise would be to substitute the ordinances of a municipality for the case law of New Jersey, revolving about the relationship between individuals. The objection is overruled and you may have an exception.

Q Will you read the resolution, please? A 10
 "Resolved, that the Public Service Electric Company be and is hereby authorized and directed to install seventeen arc lights on Montgomery street between Barrow and Bergen avenues, and fourteen on Central avenue between Hoboken avenue and Ferry street and relocate the present fourteen arc lights from their location on Central avenue between Hoboken and Ferry street shown on map submitted by the said Public Service Electric Company as recommended by the lamp 20
 inspector and approved by the director of the Department of Streets and Public Improvements, in accordance with the terms of the contract and subject to conditions as set forth in the resolution passed by the Board of Street and Water Commission April 29, 1912."

Mr. Straw: I offer it in evidence.

The Court: It may be admitted. 30

Mr. Straw: What is the date of that resolution?

The Witness: October 21, 1919.

(Resolution offered in evidence marked Exhibit D. 8.)

Q Have you also the contract entered into between the City of Jersey City and the Public Service Electric Company for the lighting of Central avenue between Hoboken avenue and 40

William Paul McDonald, direct.

Ferry street, in accordance with the resolution just read? A Well, the contract with the Public Service Electric Company is for all lights in Jersey City.

Q Does it also include the lighting of Central avenue between Hoboken avenue and Ferry street? A It does.

Q What is the date of that contract? A The first of December, 1914.

Mr. Straw: I offer that in evidence and ask that it be marked.

Mr. Wagner: That is objected to.

The Court: Objection overruled.

(Marked Exhibit D. 9.)

Q Were those lights installed, Mr. McDonald? A Yes.

Q And who is the person who has charge of the lighting in Jersey City of this particular location? A Mr. John Bird.

Q Is Mr. John Bird here? A No, sir; he is sick in bed.

Q How old a man is Mr. John Bird? A About eighty-four.

Q And you say he is ill? A Yes, sir.

Q How long has he been sick in bed? A About two weeks I think it is.

Q He has not been up for two weeks? A No, sir.

The Court: He is the man had charge of it in the summer of 1920?

The Witness: Yes, sir.

Mr. Straw: That is all.

William Paul McDonald, cross—re-direct.

Cross examination by Mr. Wagner.

Q What is the date of the second contract that was offered in evidence? A The contract is the first of December, 1914.

Q The first of December, 1914? A Yes, sir.

Q And for how long a period did it run? A Five years.

Q So that it expired the 30th of November, 1919, did it not? A Yes.

Q And that contract was not enforced on the day of this accident, was it? A I do not know anything about the accident.

Q The accident occurred December 1, 1920, and this contract had ceased to exist, had it not? A Yes, this contract expired the thirtieth of November, 1919, five years from 1914.

Mr. Wagner: I ask again your Honor, in the light of that, that this contract be excluded from the case.

The Court: In the light of what?

Mr. Wagner: In the light of the fact that it was not operative at the time of the accident.

Mr. Straw: May I ask a few further questions on this subject?

The Court: Yes.

Re-direct examination by Mr. Straw.

Q Do I understand that the contract expired November 30, 1919? A Yes, sir.

Q Was any contract between the City of Jersey City and the Public Service Electric Company involving the installation of lights at this particular place subsequent to the contract you

William Paul McDonald, cross.

have brought here today? A That I do not know.

Mr. Straw: That is all.

The Court: What have you to say about the objection?

10 Mr. Straw: I cannot meet the objection, if your Honor please, it must be excluded.

The Court: Objection sustained.

(The contract was thereupon withdrawn as an exhibit.)

Mr. Straw: With whom are your dealings between the City of Jersey City, respecting the lighting of Central avenue, between Hoboken avenue and Ferry street?

20 The Witness: The Public Service Electric Company.

Mr. Straw: That is all.

Mr. Wagner: Is this correspondence a part of the evidence?

Mr. Straw: No.

The Court: Just the resolution, and as he has already stated the contents of the resolution, we will not need that in at all.

30 *Cross examination by Mr. Wagner.*

Q Do you know at the time the resolution was passed, there was a request from the municipality of Jersey City, that particular attention be paid to this pillar, and that certain specifications were added to the ordinance which the Public Service Electric Company refused to accept? A No, sir; I do not.

40 Q Do you recall that? A No, sir; I do not.

Thomas McBride, direct.

Q Isn't it a fact, Mr. McDonald, that the Jersey City bus drivers complained of insufficient lighting in connection with that ordinance at the time that this ordinance was passed? And isn't it a fact that the bus drivers asked also, that a light be placed at the junction of these streets, Booraem avenue and Central avenue, and that against the objection of the Electric Light Company the city directed a light to be placed there? 10

Mr. Straw: Objected to.

The Court: Sustain the objection.

(Witness excused.)

THOMAS McBRIDE, sworn.

20

Direct examination by Mr. Straw.

Q Where do you live? A 21 Broadway, Metuchen, New Jersey.

Q By whom are you employed? A The Public Service Electric Company.

Q In what capacity? A Supervisor of street lights.

Q And how long have you been employed by the Public Service Electric Company in the supervision of street lights? A For the past twelve years. 30

Q Therefore you were employed in 1920 by that company in that capacity? A Yes, sir.

Q Are you familiar with the location of Central avenue, Jersey City, between Hoboken avenue and Ferry street? A I am.

Q Are you familiar with the location of Central avenue, Jersey City, and Booraem avenue? A Yes, sir. 40

Thomas McBride, direct.

Q What is there, at Central avenue? A That is the turning point from Booraem avenue into Central avenue, of the elevated structure.

Q Are you familiar with the lights maintained on that structure? A Yes, sir.

10 Q Are you familiar with the lights that were maintained on the structure on December 1, 1920? A Yes, sir.

Q Mr. McBride, when were those lights put there? A In the year 1920.

Q And do you recall what part of the year? A I just could not say what part, I believe it was in the summertime.

Q They were put there before December 1, 1920? A Yes, sir.

20 Q Do you know who owns them? A Why, the Public Service own the lights, but they are maintaining them for the City of Jersey City.

Q You mean the Public Service furnishes the lights and maintains them? A Yes, sir.

Q Is that part of your work? A Yes, sir.

Q By whom are you directed to maintain the lights? A The Public Service Electric Company.

Q And do you maintain them? A Yes, sir.

30 Q Where are the lights with respect to those pillars? A There is one light just below the first column, that is what you would call the first of the two columns.

Q Are you familiar with maps, Mr. McBride? A Partially.

Q I call your attention to Central avenue and to a structure indicated here; do you know what that refers to, what that represents? A Yes.

40 Q What is that? A That represents the elevated structure turning from Booraem avenue into Central avenue.

Thomas McBride, direct.

Q Now, I call your attention to certain marks on the map indicating pillars and ask you whether you are familiar with them? A I am.

Q I call your attention to the pencil notation under the pillar marked number two? A Yes, sir.

10

Q Are you familiar with that? A Yes.

Q I show you a picture marked Defendant three and ask you if you will show me on that picture where the pillar marked two on the map is? A That would be this one here.

Q Now, where is the pillar marked number one on the map shown on that picture? A Right here.

Q Will you take the pencil, with Mr. Wagner's permission, and mark pillar number one and pillar number two—put a one under the first and a two under the second? A Yes.

20

Q I show you another photograph marked Exhibit Defendant five and ask if you can designate the pillars number one and number two and if so—do they show there? A Yes.

Q Now, which is one and which is two? A This is number one and this is number two.

Q Mark them, please. A Yes.

Q Now, will you do the same thing on this photograph, indicating them by number one and number two? A Yes.

30

Q I also call your attention to Exhibit P. 3 and ask you to mark one and two there.

Mr. Wagner: At this point it might be well to place on the record that it is conceded by counsel for both sides, that since the accident pillar number one at its base has been surrounded by concrete.

40

Thomas McBride, direct.

Mr. Straw: Yes, all of which has no bearing however.

Mr. Wagner: Just for the identification of the picture.

Mr. Straw: Yes, but counsel agrees that it has no bearing on the case?

10 Mr. Wagner: Yes, it has no bearing on the case.

Q You are now looking at Exhibit P. 2? A Yes, number one is here but number two does not show on this picture.

Q Do they show on this picture Exhibit D. 4, and if they do, kindly mark them? A (Witness complies.)

20 Q I call your attention to Exhibit D. 6 and ask you whether the pillars show there, and if they do will you mark them? A Number one is on the picture and number two is not.

Q I call your attention to Exhibit D. 1 and ask you will you please mark them on that picture? A Yes. (Witness complies.)

30 Q What are your duties with respect to these lights, Mr. McBride? A Supervision of the trimming and cleaning of the lights and any outages, taking care of repairing the lamps and seeing that the lamps are changed when needed.

Q Where are the lights with respect to this elevated structure? A Under the structure in the center of the roadway.

Q Are there lights on any of the pillars? A No, sir.

Q Have there been lights on any of the pillars at any time since the summer of 1920? A No, there have not been.

40 Q Do you recall December 1, 1920? A Yes.

Thomas McBride, direct.

Q Is there anybody who is working for you who was working at that time, on that particular night more directly in charge of the lights than you are? A The night inspector at that time has died. He died a few months ago.

Q What was his name? A Mike Comensky. 10 He was street lamp inspector at night, afternoon and night, and any outages he covered at once.

Q He was employed by whom? A The Public Service Electric Company.

Q Do you keep records of outages, as you call them? A Yes.

Q What are outages? A Where the lights are reported out by the police, or found by the light inspector himself. 20

Q And reported to him? A Reported to the complaint operator.

Q Who in turn reports it where? A He reports it to the street lamp inspector who has charge of the report of lights out.

Q Have you those records with you? A No, I have not.

Q Were there any complaints received about lights being out with respect to this immediate section on December 1, 1920? A No, sir. 30

Mr. Wagner: Objected to.

Mr. Straw: I withdraw the question.

Q Have you any knowledge of any lights being out on the evening or early morning of December 1st, the evening of November 30, 1920, and the early morning of December 1, 1920, at the location of Central avenue between Hoboken avenue and Ferry street? 40

Thomas McBride, direct.

Mr. Wagner: Objected to, unless he has knowledge of it.

A No, sir.

Q Were any lights reported to you as having been out at that time?

10 Mr. Wagner: I object to the question because it contemplates hearsay evidence.

The Court: The objection is sustained.

Q If lights had been reported out, Mr. McBride, would there be any record made of it?
A Yes.

Q Don't answer the next question until counsel has an opportunity to object. Is there any record in your possession which has come to you officially, of any light having been reported out at the time?

Mr. Wagner: I do not object to that question.

A No.

Mr. Wagner: He said he has no records at all here with him.

30 Q I didn't mean here, I mean in your company or in your possession.

Mr. Wagner: I object to that question.

Mr. Straw: Having come to him officially.

Mr. Wagner: I object to that unless the answer is merely yes or no as to whether there are records.

40 Mr. Straw: I am asking him directly whether he has officially been advised or

Thomas McBride, cross.

reported to of any light having been out at that time, because it is his business to know that.

Mr. Wagner: I object to it.

The Court: The objection is sustained.

Q You are employed by the Public Service Electric Company? A Yes, sir. 10

Q And you are not employed by the Public Service Railway Company? A No, sir; the Public Service Electric Company.

Mr. Straw: Cross examine.

Cross examination by Mr. Wagner.

Q Do you know whether since 1920, the intensity of the light has been increased? 20

Mr. Straw: Objected to.

The Court: Objection sustained.

Q Do you know whether or not prior to 1920 that is, when this contract of 1919 expired, the intensity of the lights was increased?

Mr. Straw: Objected to.

Q There was a contract which expired in 1919, do you know about that? A I believe so. 30

Q And then a new arrangement was made for lighting in 1919, is that so? A Yes.

Q Now, was there any difference in the intensity of the lighting between the period preceding 1919, and the period subsequent to 1919?

Mr. Straw: I object to that as not material. 40

Wilbur S. Griffin, direct.

The Court: He has testified to the lighting at the time of the accident, has he not?

Mr. Wagner: Yes.

The Court: That is all we are interested in. The objection is sustained.

Mr. Wagner: That is all.

10

(Witness excused.)

WILBUR S. GRIFFIN, sworn.

Direct examination by Mr. Straw.

Q Where do you live? A Leonia Heights, New Jersey.

20 Q And by whom are you employed? A The Public Service Electric Company.

Q In what capacity? A Operator of the Palisades sub-station.

Q How long have you been so employed? A Since April 28, 1920.

30 Q Are you familiar with the location of Central avenue between Hoboken avenue and Ferry street, Jersey City? A Well, I know where the streets join; I do not know anything more than just the location.

Q That is just what I mean. Did you have to do with the electric lights under the elevated structure at that point? A Yes, I have control of that.

Q Did you have control of that on December 1, 1920? A Yes.

40 Q Was there any trouble on the line, so far as you know affecting street illumination of the lights under the elevated structure between Hoboken avenue and Third street on

William Tieterman, direct.

Central avenue, Jersey City, on that day or evening? A No, sir.

Mr. Straw: Cross examine.

Mr. Wagner: No questions.

(Witness excused.)

10

WILLIAM TIETERMAN, sworn.

Direct examination by Mr. Straw.

Q Where do you live? A 95 Booraem avenue, Jersey City.

Q By whom are you employed? A The Jersey City Police Department.

Q Do you hold any official position in the City of Jersey City? A Lieutenant. 20

Q Lieutenant of police? A Yes, sir.

Q And you were lieutenant of police on December, 1920? A No.

Q What were you at that time? A Round sergeant.

Q Where were you on the early morning of December 20, 1920, between midnight and 3 A. M.? A At the Sixth Precinct Station on Central avenue. 30

Q Doing what? A Desk duty.

Q I meant December 1, 1920. A Desk duty at the Sixth Precinct.

Q What do you mean by desk duty? A I was at the desk at the time.

Q For what purpose? A Police procedure, and everything.

Q I do not know what you mean by police procedure. A Well, I had charge of the station there at the time. 40

William Tieterman, direct.

Q And you received telephone calls of any kind of trouble while you were on desk duty?

A Yes, sir.

Q And that is what you were doing there that night? A Yes, sir.

Q Do you keep a blotter? A Yes.

10 Q Did you keep a blotter that night? A Yes, sir.

Q Are reports of lights out on streets made to you or were they made to you or any person acting in your capacity on December 1, 1920? A Well, I cannot recall unless I look at the telephone book. When there are lights out the officer telephones it to the station.

Q Did any officer telephone to you respecting lights under the elevated structure on Central avenue near Booraem avenue on the early morning of December 1, 1920? A No, sir.

Q You have examined the blotter since that time at my request or the request of my client? A Yes, sir.

Q And you found no report? A There is no report in the blotter of lights being out. They go in the telephone book.

Q Have you the telephone book? A Yes, sir.

30 Q Is there any report of lights being out in that location on that night in the telephone book? A Not in that location.

Mr. Straw: Cross examine.

Mr. Wagner: I could have objected, but I cannot see its relevancy.

The Court: You certainly could have objected.

Mr. Wagner: I have no questions.

40

(Witness excused.)

Alfred P. McCullough, direct.

ALFRED P. McCULLOUGH, sworn.

Direct examination by Mr. Straw.

Q Where do you live? A Weehawken, New Jersey, 217 Oak street.

Q By whom are you employed? A By the Public Service Railway Company. 10

Q In what capacity? A Division superintendent.

Q How long have you been division superintendent? A Since 1892.

Q Of what division? A Hudson Division.

Q Embracing what territory? A All of the Hudson Division.

Q And what is the Hudson Division? A Taking in Jersey City, Bayonne, all through there. 20

Q Is the territory on Central avenue between Hoboken avenue and Ferry street, which includes the structure of the railroad, within your jurisdiction? A Yes.

Q You are familiar with that location? A Yes.

Q When was that structure erected? A Well, I am not positive of the year, somewhere in 1884 or 1885. 30

Mr. Wagner: Do you know of it to your own knowledge?

The Witness: No, sir.

Mr. Wagner: I object to it.

Mr. Straw: I consent.

Q Are you familiar with the street and the elevated structure where it turns from Booraem avenue into Central avenue? A Yes, sir. 40

Alfred P. McCullough, direct.

Q What kind of a street is it? A Well, Booraem avenue runs west, the elevated structure runs west and turns south onto Central avenue.

Q Were you familiar with it on December 1, 1920? A I have been familiar with it right along. I go through there every day.

10 Q What kind of a pavement is there there? A Asphalt pavement.

Q How wide is Central avenue?

Mr. Wagner: There is the map which will give that.

The Court: Well, if he can tell.

The Witness: There is room enough for two—

20 The Court: You were not asked that; you were asked how wide it is.

The Witness: Well, I should judge—

Mr. Wagner: I object to what he judges.

Q What can you say with reference to Central avenue, how many cars can pass abreast?

A Well, two cars can pass abreast.

30 The Court: That is something he cannot give expert opinion on. The jury knows as much about that as I do. Give the width and they can tell how many cars can pass in a certain width.

Q Are there any lights on the piers or pillars of the elevated structure at all? A No, sir.

Mr. Straw: Cross examine.

Mr. Wagner: No questions.

40 The Court: Where are those lights?

Alfred P. McCullough, direct.

The Witness: The lights are in the center of the elevated structure, underneath.

The Court: Are there any other lights on that street where the elevated structure passes except the lights that are under the center of the structure?

A Yes, sir, at all of the stations. 10

The Court: Well, on the sidewalk are there any lights?

The Witness: Yes, sir.

The Court: So that there are street lights on the sidewalk besides?

The Witness: Yes, sir.

By Mr. Wagner.

20 Q You do not recall of your own knowledge whether there were other lights there on December 1, 1920, do you? A No, sir.

Q And you would not be able to deny, would you, that the nearest street light on the sidewalk was 190 feet away from the scene of the accident? A No, sir.

Mr. Straw: Objected to. 30

The Court: Does he know the situation as existed on December 1, 1920?

Mr. Wagner: I asked him if he did and he says he does not.

By Mr. Straw.

Q Do I understand you do not know what lights were there on December 1, 1920? A I know what lights were there. 40

DeWitt Romaine, direct.

The Court: The lights that were there on December 1, 1920?

The Witness: Yes, sir.

Q Are you able to say that the number of sidewalk lights which are there today are the
10 same as December 1, 1920?

Mr. Wagner: Objected to as immaterial.

The Court: I think I will allow that under cross examination.

A The lights not on the elevated structure, I could not say when they were put there.

Q As to the lights on the sidewalk? Exclusive of the lights that are on the top of the
20 structure, and in the center of the structure, you have no knowledge? A No, sir.

Mr. Straw: That is all.

(Witness excused.)

DE WITT ROMAINE, sworn.

30 *Direct examination by Mr. Straw.*

Q Where do you live? A Passaic, New Jersey.

Q In what business are you engaged? A The automobile business.

Q And how long have you been in the automobile business? A Since 1898.

Q What part of the automobile business are you engaged in? A Repairing, storing, selling,
40 in fact everything pertaining to automobiles.

DeWitt Romaine, direct.

Q Did you see a Chalmers car, the property of Mr. Lorentz, which is alleged to have figured in an accident on December 1, 1920? A Yes, sir.

Q When did you see it? A December 6, 1920.

Q Where did you see it? A At the Hudson 10 Service Station on Communipaw avenue.

Q Where is that? A Communipaw avenue between the Boulevard and West Side.

Q Did you examine it? A Yes, sir.

Q Carefully? A Yes, sir.

Q What did you find? A Do you want me to itemize it?

Q I want you tell me exactly what you found? A The radiator and shell was badly damaged.

Q Where is the radiator? A In the front 20 of the car.

Q Where was it when you saw it? A On the car.

Q Whereabouts on the car? A I do not quite understand you.

Q What position was the radiator in when you saw it? A Well, in a smashed-up condition on the car.

Q Just tell me what else you found? A The 30 fan and fan bracket—the fan bracket was pushed into the motor block. The right gooseneck was badly bent, the front axle badly bent, the starting motor was broken, the starting chain was broken, the radiator pan, the right front fender, the right front hood sill, the exhaust manifold broken in two places.

Mr. Wagner: Are you reading from something?

DeWitt Romaine, direct.

The Witness: A copy of something made at the time of the accident.

Mr. Wagner: Let me see it, please. When did you write these things down?

The Witness: December 6th.

Mr. Wagner: December 6th?

10 The Witness: Yes, December 6, 1920.

Mr. Wagner: Whose handwriting is this in?

The Witness: My handwriting.

Mr. Wagner: You say you made this memorandum from a copy of something else?

20 The Witness: Oh, no. When I go around and examine cars, I have to keep those things in a little book, write them down at the time of the accident and file it away with the report.

Mr. Wagner: That is, you went to see this car on December 6th?

The Witness: Yes, sir.

Mr. Wagner: And wrote these things down while you were examining the car?

The Witness: Yes, sir.

Mr. Wagner: Go ahead.

30 Q Using that only for the purpose of refreshing your recollection, tell me what else you found? A The instrument board, the dash board was a complete wreck, the front cross member, the right steering arm, the right steering throw yoke, the radiator support, the generator switch, four motor arms, the left front spring, the transmission main shaft and super-shaft, both windshield glasses, the back curtain and the back part of the top was thrown forward, knocked

40

DeWitt Romaine, cross.

loose from the body, the gasoline tank, the rear spring, and the body was in bad shape.

Q What do you mean bad shape? A Why, where it was bumped, the cowl was sprung.

Q What model was it? A 326.

Q What year was that? A 1916.

Q What would you say as to the general condition of the car? A Before or after the accident? 10

Q Right after the accident. A Very poor condition.

Q When you saw it? A Yes, sir.

Q What do you mean very poor condition? A So much so that it would be impossible to repair it without costing entirely too much money.

Q What was the value of the car when you saw it on December 6, 1920? 20

Mr. Wagner: One moment, that is objected to.

The Court: Why?

Mr. Wagner: There is no claim for damages to the car. We are suing just for the injuries to the child.

The Court: That is so, the objection is sustained.

Mr. Straw: Cross examine. 30

Cross examination by Mr. Wagner.

Q That car was pretty well a wreck, wasn't it? A Yes, sir; I would say it was.

Q Do you know how the accident occurred, do you know what occasioned the accident? A From what I heard.

Q Did you listen to the testimony? A Yes, some of it. 40

DeWitt Romaine, cross.

Q Do you know the weight of a Chalmers car of that type? A Not the exact weight, but I can judge.

Q What is its approximate weight? A About three thousand pounds.

Q Two and one-half tons? A About that.

10 Q How long have you been in the automobile business? A Since 1898.

Q And if you were told that a car weighing two and one-half tons— A How many tons?

Q Two and one-half. A One ton and a half.

Q I mean a ton and a half, excuse me, with four passengers in it, three of them adults, going along between twelve and fifteen miles an hour, and struck a rigid iron pillar supporting an elevated railroad structure, wouldn't you say that all those things that happened would be a natural consequence? A I don't think so.

20 Q You don't think so? A No, not at twelve miles an hour.

Q Do you realize, Mr. Romaine, that a car— do you know what a car traveling at fifteen miles an hour would cover in a second, how many feet? A Well, I would have to figure that up.

Q Well, it would cover sixty-six feet, I calculated that. A Well, I don't know.

30 Q A car going at fifteen miles an hour would travel sixty-six feet in a second, and if I tell you that a car traveling at sixty-six feet per second was traveling twice as fast as a body will fall attracted by the law of gravitation—

The Court: Do you know how fast a body will fall attracted by the law of gravitation?

The Witness No, sir.

40

The Court: Neither do I.

DeWitt Romaine, cross.

Q If a weight of a ton and a half falling sixty-six feet in a second should strike the radiator of that car, would it cause the things that happened to this car? A But that was rolling and not falling.

Q If an object weighing a ton and a half fell from a distance of sixty-six feet, which it would cover in a second, traveling as fast as that car was going, would it be natural for those things to happen to this car which you saw? 10

Mr. Straw: I object to that, there is no evidence that this machine fell at all.

The Court: His answer is that it did not fall, it was rolling.

Q I will ask you this question: Consider this car standing still and if you had a pillar, an iron pillar weighing a ton and a half and it bumped against this car with a velocity of sixty-six feet per second, do you think it would cause the damage which you have recited as happening to this car? A The pillar would be different than an automobile, because it is solid and an automobile has some give to it. 20

Q This pillar was solid. A That is different, a pillar striking a car. 30

Q It is? A Yes.

Q Well, you disagree with the law of action and re-action, don't you?

The Court: He doesn't say whether he does or not, nobody knows what the law of action and re-action is, that I know of, that is interested in this case outside of yourself, possibly.

Mr. Wagner: That is all.

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Edward M. Kenelly, direct.

Re-direct examination by Mr. Straw.

Q Now, Mr. Romaine, how fast do you think this car must have been going to do the damage that it did?

10 Mr. Wagner: I object.

Mr. Straw: I withdraw the question.
(Witness excused.)

EDWARD M. KENELLY, sworn.

Direct examination by Mr. Straw.

Q Where do you live? A Morristown, New Jersey.

Q By whom are you employed? A The Public Service Railway Company.

Q In what capacity? A Investigator.

Q And how long have you been connected with the Public Service Railway Company? A Fourteen years.

Q Do you know Dr. Miller who testified here on Friday? A I do, yes.

30 Q Did you see him on September 15, 1922? A Yes, sir.

Q Where? A At his office on Summit avenue, Jersey City.

Q For the purpose of discussing with him the injuries to Miss Edith Lorentz? A Yes, sir.

Q Did you ask him—do you recall whether he said these words to you: "The daughter's Edith's nose was anything but perfectly shaped prior to the accident"? A He told me that at that time, yes, sir.

40

Edward M. Kenelly, cross.

Mr. Straw: Cross examine.

Cross examination by Mr. Wagner.

Q Did he sign such a statement? A No, sir.

Q Have you any statement signed by him?

A No, sir.

Q Did you ever see the doctor before? A 10 No, sir.

Q And did you ever see him since? A That is the first and only time I ever met the doctor.

Q How long were you there? A Possibly an hour.

Q Did he have patients waiting? A Well, I was waiting some forty-five minutes for him to come in and I was the first one to go into his office.

Q What time was it when you saw him? A 20 Along about two o'clock.

Q In the afternoon? A Yes, sir.

Q Two hours after the accident, is that right? A Yes, sir.

Mr. Wagner: That is all.

(Witness excused.)

Mr. Straw: We rest.

Mr. Wagner: I told Mr. Straw last Friday that I had asked Mrs. Lorentz to give me some pictures of this child taken before the accident, and they only reached me after our case had closed. Mr. Straw, I think has no objection to our producing them now.

Mr. Straw: I think we can go further and admit that if Mrs. Lorentz were called she would testify that just prior to the accident her daughter's nose was as it is shown in the picture.

40

Edward M. Kenelly, cross.

Mr. Wagner: Then we offer these pictures

The Court: They are admitted to show the appearance of the child's nose before the accident.

Mr. Wagner: Yes.

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(Marked in evidence Exhibits P. 6 and P. 7.)

AFTER RECESS.

Mr. Wagner: If your Honor please, I ask for permission to amend the complaint on file by adding after paragraph six the following:

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6-A. The structure of the defendant, aforesaid, was so constructed and maintained with respect to its design and location as to render dangerous the use of the highway for other lawful purposes, and therefore was a nuisance, the existence of which was the proximate cause of the accident and the injuries to the plaintiff.

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6-B. The said structure was so constructed and maintained with respect to its design and location as to render dangerous the use of the highway for ordinary travel and other lawful purposes when it, the said structure lacked light, signals and warnings as to its existence at such time as the ordinary view was obstructed, weakened or destroyed through darkness, fog or other atmospheric conditions, and that it was the existence of this nuisance which was the proximate cause of the accident and injury to the plaintiff.

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For this purpose, and in connection with this, your Honor, we admit for the plaintiff that the structure was a standard structure and we will

Motion for Direction of Verdict.

admit also for the purpose of the record and to obviate the necessity of the defendant producing evidence to the contrary, that there were no other accidents at this point or because of this nuisance of which we complain.

The Court: The amendment will be allowed.

Mr. Straw: Exception.

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MOTION FOR A DIRECTION.

Mr. Straw: I move your Honor, for a direction of a verdict in favor of the defendant the Public Service Railway Company on the following grounds:

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The allegation in this cause charges negligence. It does not charge a nuisance, nor does it charge anywhere that the Public Service Railway Company has maintained a nuisance. I very frankly confess I spent Saturday and Sunday in an endeavor to find cases on this point but I have not been able to find any. I can conceive of no duty, when it comes to the consideration of a plain damage case not in the light of a nuisance, imposed upon my client the railway company to do the work which is primarily chargeable to the City of Jersey City and against whom, it is my humble opinion this action should be brought, if an action is sustained. The City of Jersey City is not only primarily liable and chargeable under the law with the lighting of its streets, but as your Honor has already indicated, there is nothing in the resolution or in the franchise or in the contract which transferred the duty of maintaining street lighting or any other kind of lighting, from the shoulders of the City of Jersey City to the shoulders of this company.

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Motion for Direction of Verdict.

Here is a situation, if it please your Honor, that has existed since 1889, where folks used this street, I assume, and I think it is fair for your Honor and the jury to assume, in great number, where the lights are right in the middle of the elevated structure, where there are street lights, arc lights and everything done to illuminate that particular place done by the City of Jersey City. I concede it to be a different situation, if it please your Honor, if this were a temporary obstruction, if it were an excavation or an obstruction of some sort put on the street temporarily, but here is a part of a public improvement made by my client and illuminated by the city, which has been in existence for years and years. The evidence is that there never was a light on any one of these pillars. Down to the present time the railway company was not in the business of lighting streets. This is not a dangerous instrument in the sense of the term, and there is not any theory upon which I can find that this company has neglected to do something that it ought to have done or done something that it ought not to have done. Again, if it please your Honor, if there is a duty which falls upon my client, it is an affirmative one. My adversary has not shown any duty attaching to this defendant company. He has not maintained a prima facie case. He has not attempted to sustain the burden of proof. He simply comes in here and says that his client, who admittedly was driving down the street that night, never saw the pillar until he struck it, while other members of his family who were in the car say that they saw the pillar twenty-five feet away. Now it does not seem to me that Mr. Wagner has made out a scintilla of evidence

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which would place an obligation on this defendant company to do anything with regard to that. I say it is not a nuisance case, it is a plain damage case. There is no right of contract or otherwise and if there was a right of contract it could not relieve in tort the liability of the City of Jersey City.

Therefore I respectfully urge a direction of a verdict to be granted in favor of the Public Service Railway Company.

The Court: I deny the motion for a direction of the verdict.

Mr. Straw: Exception.

CHARGE TO JURY.

The Court thereupon charged the jury as follows:

Gentlemen of the Jury:

Counsel for the plaintiff has requested me to charge as law the following requests:

1. The grant of an ordinance to the defendant permitting the elevated structure and pillars in Central avenue, Jersey City, did not take away from the general public its right to use the street in a lawful manner.

That is true.

2. The ordinance permitting the defendant to erect pillars for its elevated structure in Central avenue, Jersey City, did not release the defendant from its duty to exercise reasonable care and caution in maintaining said pillars.

That is true.

Charge to Jury.

3. It was the duty of the defendant to use such reasonable care and caution in maintaining the pillars of its structure so that no harm arising from negligence of the defendant should come to persons lawfully using the street.

That is true.

10 4. The defendant owed to the plaintiff the duty of making use of such reasonable safeguards, taking into account all the circumstances and reasonable probabilities of the situation as would avoid injury from its pillars in the streets to the plaintiff while plaintiff is in the reasonable use of the streets.

That I have changed somewhat from the way Mr. Wagner has given it to me, and Mr. Wagner may have an exception if he wants it.

20 5. There is no absolute duty on the part of one using a highway to observe defects and obstructions therein, but the duty exists of making such observation as the circumstances of the case reasonably require.

That is true.

30 6. If the defendant took some precautions to avoid injuries to the plaintiff from the negligence of the defendant, the jury still has a right to consider whether the precautions taken were sufficient to relieve the defendant of the charge of negligence.

That is true.

7. If the negligence of the defendant is the proximate cause of the plaintiff's injuries, the plaintiff is entitled to recover even if the negligence of the driver of the automobile contributed to the accident.

That is true.

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Charge to Jury.

8. A person lawfully riding in an automobile, which is lawfully proceeding on a street and is injured in consequence of a collision with an obstruction in the street, which obstruction has been negligently maintained, such negligence being the proximate cause of the injuries, may recover against the person maintaining and operating the obstruction, even though there is a legal right to maintain the obstruction.

10

That is true.

9. The legal right to maintain an obstruction in the street does not carry with it the right to maintain such obstruction in an unlawful, improper and inefficient manner.

That is true.

Gentlemen of the jury, in this case, if you find from the facts after applying to such facts the law as the Court will give it to you, and as I have already read, that the defendant is responsible to this plaintiff who sues as the next friend of his daughter, then the plaintiff is entitled to a judgment in such an amount as will fairly and adequately compensate for the injury done to this girl and for the pain and suffering she has endured, and for whatever permanent injuries you may find as a matter of reasonable certainty have followed the accident.

20

The defendant in this case is a big corporation, the Public Service Railway Company of New Jersey. While you and I, as normal men, have naturally not only a sympathy, but a very intense sympathy for this child who has appeared on the witness stand, we have no right to indulge our sympathy at the price of unlawfully taking money away from even a corporation. You and I are not the kind of men that

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Charge to Jury.

believe in making somebody else pay, having no concern about the right or wrong of it, as long as it does not come out of our own pockets. Therefore, you are the kind of men who are going to say that, if this girl is lawfully entitled to compensation, you are going to give it to her, and if under the law as applied to the facts in this case she is not, as a matter of law, entitled to a judgment, you will, of course return a verdict in favor of the defendant. I am emphasizing that because you gentlemen are, in my supreme confidence, big enough to pass upon this case without any sort of sympathy on the one side or prejudice on the other, and that you will do your duty according to the law and the solemn oath of office which you took. These remarks are also made because there are serious questions of fact in this case that are entitled to your free and impartial discussion. Get the viewpoint of each and every juror; discuss it with regard for one another's opinion, without partiality, with the exercise of your good, honest common sense, and if, after such a consideration as that which I know this case is going to get, you find that the defendant is responsible, then and then alone will you be concerned with the question of what the amount should be, because, of course, you will not be at all concerned with that unless you do come to some such conclusion. If you find that the plaintiff is entitled to a verdict, remember that it is a matter of putting into cold-blooded dollars and cents as far as you reasonably can, an amount that will be fair and adequate in compensation for the injuries and suffering of this girl, and the permanent injury.

When it comes to the question of compensating for permanent injury, it is not a matter of

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guesswork or speculation, or even of possibility. You must find from the evidence and the preponderance of the evidence as a matter of reasonable certainty, the permanent injury as to its fact; if you find the fact, then also as to its nature and extent.

You have no doubt followed this case with interest because of the motions that have been made by the gentlemen who have so honorably conducted this interesting case, who have so deported themselves as to show to you and to me that they are creditable members of a high profession, with no other desire than to assist you men in reaching an honest and proper conclusion. You have no doubt followed the discussions on the interesting legal questions that were involved in this case, but you take the law from the Court and if the Court is wrong that it not your fault, and if either side feels aggrieved at the lack of soundness of any conclusion that the Court might make, they have their right of redress to an appellate court. As I have heretofore reminded you, you are not to get the impression that because the Court has granted or refused these motions that have been made during the progress of this trial, that the Court has formed any conclusion at all as to what should be the verdict in this case, because, gentlemen, I have none. You have that very serious problem still before you. You take the law from me as the court, but when it comes to the questions of fact, that is entirely within your province, and in that province you as jurors, and you alone are the sovereigns in the determination of those facts. The Court may express opinion even on facts, but it does not bind you, and when there are such expressions of opinion,

Charge to Jury.

they are simply given by the Court for the purpose of controlling you? No. Of assisting and guiding you, if they do, and as far as they may do.

10 This defendant company is the successor in its rights, so far as this particular piece of railway is concerned, to the North Jersey Traction Company, which a great many years ago got an ordinance from the City of Jersey City to erect a structure so that they would have an elevated railway in certain streets of the City of Jersey City, including Central avenue, and that ordinance, which is in evidence, provided for the erection of a structure that, so far as the details of the kind of a physical structure is concerned, does not elaborate to any large degree. It did
20 provide, however, that these supporting posts should be at least ten feet from the sides of the street. It made no provision as to the lighting of this structure at nighttime, or at any other time. It made no provision for any warning of any kind for either night or day being put on the structure. It made some provisions (that are not pertinent here, but to give you an idea of what the ordinance included) as to the rate of fare that could be charged on this railway. However,
30 it is admitted that so far as the physical structure itself is concerned, it was of standard construction. And it is admitted that there had never been such an accident as this at any time before in the whole history of that construction of this elevated railroad, and that is an important point, as I will refer to hereafter.

It is claimed, however, that although this structure was put up presumably to the complete satisfaction of those who gave the franchise or license or right, yet that no municipality has a right to
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Charge to Jury.

give a corporation or any one else the use of a public highway which is of such a character in its nature and design as makes it dangerous that it has no right to permit the erection, for example, of an elevated structure, the maintenance of which forms a common nuisance in that if it is maintained without proper warning as to its
10 existence it means danger to the lawful users of the road. The contention is that such was this case. Now, ordinarily, when we use the word nuisance it conveys to our minds something in the nature of an offense to the senses, but a nuisance, as the word is used in this case, is such a thing or structure as this, when its continued maintenance means danger to those lawfully entitled to the use of the place where it is put. Wherein was it dangerous? As stated before,
20 there was nothing in the ordinance that required this railway company specifically to put lights on this structure. You will remember so that so far as the lighting of the street itself was concerned, that was primarily a duty that belonged to the City of Jersey City, and it is a duty that they still maintain, and they never even attempted, because of the granting of this franchise, to put the street lighting, as such, upon
30 this railroad company. You heard the testimony to the effect that they had the ordinary street lights, street lamps there. In addition to that there were those lights placed under the center of this structure as indicated on that map. Of course the structure is of a much greater length than is shown there, but the map is sufficient to indicate where those lights were placed. Who placed the lights there? The defendant company? No. Another corporation, the Public Service Electric Light Company. Although it
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Charge to Jury.

has a similar name, it is just as different from this company as a matter of law, and in the proper determination of this case, as though it were called the Elizabeth Light Company. And what did this Public Service Electric Light Company do? They installed these lights under contract with the City of Jersey City, and the City of Jersey City paid for the maintenance of those lights. Notwithstanding that, the contention is that the defendant company when it got the right to put this structure in the public highway had the duty of seeing that it was so maintained on its own responsibility as to give warning so as to safeguard the reasonable user in the reasonable use of the street. Now, did they maintain a public nuisance in that they maintained something that was dangerous? This night upon which this accident happened admittedly was a foggy night. There is no proof that the street lights were not lighted; there is a contention based upon evidence that the street lights were lit, and that these center lights under the elevated structure were also lighted. Now then, where was there negligence? Where was there a nuisance upon their part? That is for you to say. What caused this accident? Was it because of the lack of reasonable warning as to the existence of this structure on this kind of a night? Because this kind of a night was the kind that any one naturally expects from time to time, a foggy night. What was their duty as reasonably prudent persons, so far as giving warning to the lawful users of that street as to the existence of this structure? After you have determined what was that duty as reasonably prudent persons you come to the question: Did they comply with their duty? If they did, then

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there was no negligence on their part and this would simply be an accident, the result of the negligence of the driver of the plaintiff's car, or one of those unavoidable accidents for which nobody could be held responsible, because it is the duty of the plaintiffs in these cases as a matter of law when they charge negligence or charge the existence or the maintenance of a nuisance, through the preponderance of the evidence to affirmatively prove it to your satisfaction before you can hold the defendant responsible.

Now, the defense is that there was not a single duty that a reasonable person could be expected to perform that they didn't do, and they go further and say that this unfortunate accident was the result of the negligence of the driver of this car, that it was an accident for which he was responsible. Deliberately responsible? No. A person deliberately responsible, or working from a vicious turn of mind, would be guilty of a crime. If it was the negligence of the plaintiff, gentlemen, that caused this accident and the injury to his own daughter, it was not cruelty on the part of the plaintiff, but simply carelessness on his part if he was negligent and it was his negligence that caused the accident. In arriving at whether or not the cause of this accident was his negligence and not due to the existence of a nuisance, not due to the negligence of the defendant, what are you to consider? Your own good common sense will determine that, but I might suggest this as one of the questions that naturally will come to you as to whether or not it was negligence on his part.

You will remember that it was admitted in this case that although this structure had been there for years and years, yet no such accident

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as this had ever happened before. Is that a fact to be considered in determining the question, that because it had never happened to anybody else before that there must have been negligence on the part of the driver? I do not know but it is in evidence. Then another question you will ask yourselves is this: Did this driver of the plaintiff's car know of the existence of this structure? Doesn't he admit that he did? He had lived in Jersey City, had he not? Hasn't he admitted in his testimony that he knew this structure was there?

Another thing in determining whether or not there was negligence on the part of the plaintiff or negligence on the part of the defendant, or the maintenance of a nuisance on the part of the defendant, is the kind of a night it was. The plaintiff was charged as a reasonably prudent man with driving that car as a reasonably prudent person would have driven it under the time, place and circumstances, and under the weather conditions that existed that night. Could he see through the windshield? Could anyone in the rear seat see through the windshield? What did one of the nieces say in that respect? That she could not see through the windshield. It was, then, a pretty bad night in that respect. How far could he see? Was his vision so obscured that it was the part of a reasonably prudent man not to go on at all? I do not know. You are to pass on those questions. Then what does he give as a reason why he could not see this pillar? He says because there was a reflection from one of these center lights on this first pole, the pole that was nearest to him as he was coming along, and as I infer from his testimony, concluded that the space to the right of that light

Charge to Jury.

was clear, and on such a presumption as that he goes ahead and runs into this other pole which he says he could not see. Where was the light that reflected on this first pole? If the light reflected from that first pole, if he was watching, wouldn't it also reflect on the pole that he ran into? I don't know. All these questions suggest themselves to me. I have no positive conclusion about them, but I am simply suggesting them so that when it comes to the important questions of fact, if I can help you because of my experience and study of this thing, as well as my general experience as a trial judge, I am doing so, that is all. So that all of those things will be taken into consideration by you gentlemen in determining what was the cause of this collision with the pole. Was it the sole and exclusive negligence of the defendant? Was it due solely and exclusively to the fact that they maintained a nuisance there in the public highway? A nuisance that was a danger to the ordinary, reasonable use of that street? Or was it solely due to the negligence, even though the unfortunate negligence, of the driver of the plaintiff's car?

Those are the questions that you have to pass upon, gentlemen, and I know that you are going to do it fairly and impartially, without sympathy, without bias, and when you have done that then you will have performed the highest duty that can be imposed upon a thoroughbred, clean-blooded American.

Exhibit D. 7.

Exhibit D. 7.

THIS IS TO CERTIFY, That the annexed is a true copy of an Ordinance passed by the Board of Aldermen of Jersey City, April 27, 1889, and approved by the Mayor of said city May 2, 1889, entitled "An Ordinance to authorize the North Hudson County Railway Company to construct an Elevated Railroad through that part of Central Avenue which lies south of Ferry Street to Hoboken Avenue with privilege to cross Hoboken Avenue, and also to cross Newark Avenue.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Corporate Seal of "The Mayor and Aldermen of Jersey City," this Fifth day of June A. D. 1889.

JOHN E. SCOTT,
City Clerk of Jersey City.

AN ORDINANCE.

To authorize the North Hudson County Railway Company to construct an elevated railroad through that part of Central avenue which lies south of Ferry street to Hoboken avenue, with privilege to cross Hoboken avenue, and also to cross Newark avenue.

Whereas the North Hudson County Railway Company desires to continue its present elevated road from its westerly terminus through Ravine avenue and through its private property formerly belonging to the estate of Naomi C. E. Wright, deceased, to Central avenue, thence southerly over Central avenue to and across Hoboken avenue and further over private property to and across Newark avenue to Pavonia avenue

Exhibit D. 7.

and have obtained the consent in writing of the owners of at least one-half of the property fronting on said Ravine avenue and Central Avenue, respectively:

And Whereas, the construction and operation of such road will greatly facilitate public travel and be of much benefit to that section of the city and to the city at large:

Therefore, The Mayor and Aldermen of Jersey City do ordain as follows:

Section 1. That permission is hereby granted to the North Hudson County Railway Company to construct, maintain and operate an elevated railroad on Central avenue from a point at or near Ferry street, to Hoboken avenue; thence southerly over private property to Pavonia avenue, with privilege to cross Hoboken avenue and also to cross Newark Avenue.

And that the consent heretofore granted to said company by ordinance approved October 13, 1887, to construct, maintain and operate an elevated railroad from the westerly terminus of its elevated incline plane, or elevated road at or near Palisade Avenue and Ravine avenue on and over said Ravine avenue westerly, is hereby ratified and confirmed.

Section 2. That in constructing said elevated railroad the supporting posts of said structure shall be located in the carriage way at a distance of about ten feet from the curb stones, as indicated on the plan annexed to the petition of, and approved by the owners of more than one-half of the frontage on Central Avenue, now on file in the City Clerk's office; that the distance longitudinally between the said posts shall not be less than thirty feet except in places where it may be found necessary, in the proper construction of

Exhibit D. 7.

the road, to set them nearer together, and that there shall be at least thirteen feet in the clear between the surface of the street and the under side of the lowest beam or girder of said elevated road.

That said company, for the convenience of the
 10 people who wish to use said elevated railroad, shall build suitable stations and stairways at suitable places and land the same on the sidewalks next to the curb stone, in the manner indicated on the plans above mentioned.

Section 3. That said company in constructing said road shall not injure or interfere with any water pipe or sewer connection, unless it cannot be well avoided, in which case it shall restore the same, or substitute others for the same, to the
 20 full satisfaction of the owners of the adjoining land; and it shall restore the surface of the street and sidewalk to as good a condition, around the posts and staircases as it found them when it commenced its work.

Section 4. That the motive power to be used on said elevated railroad shall be either by cable moved by stationary steam power, or by electric power; but in no case shall steam locomotives be
 30 used, unless specially hereafter permitted by the owners of a majority of the frontage and by the Mayor and Alderman.

Section 5. That the fare on said elevated road, for carrying one person on the same, shall not exceed five cents either way.

Section 6. That said company shall commence its work within one year following the passage of this ordinance, unless delayed by legal proceedings.

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Exhibit D. 7.

Section 7. That in case of the violation of the provision of this ordinance, the Board of Aldermen shall have power to repeal this ordinance upon notice to said company.

Section 8. That said company shall not exercise any authority or do anything under the provisions of this ordinance until it shall have filed
 10 a bond, executed by two sureties, in the sum of ten thousand dollars, that it shall and will faithfully comply with all the provisions of this ordinance; said bond to be approved by the Corporation Counsel and Board of Aldermen.

Passed April 27, 1889.

PATRICK H. O'NEILL,
 President.

ORESTES CLEVELAND,
 Mayor. 20

JOHN E. SCOTT,
 City Clerk.

Approved May 2, 1889.

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Grounds of Appeal.

GROUND OF APPEAL.

Filed August 27, 1925.

New Jersey Court of Errors and Appeals

- | | | | |
|----|---|---|--|
| 10 | EDITH LORENTZ, who sues by
JOHN LORENTZ, her next
friend,
<div style="text-align: right; padding-right: 10px;"><i>Plaintiff-Appellee,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> PUBLIC SERVICE RAILWAY COM-
PANY,
<div style="text-align: right; padding-right: 10px;"><i>Defendant-Appellant.</i></div> | } | <i>Action
at Law.</i>

<i>On Appeal
from the
New Jersey
Supreme
Court.</i> |
|----|---|---|--|

- 20 To: Abe J. David, Esq., attorney of plaintiff-appellee.

SIR:

TAKE NOTICE that the following are the grounds of appeal which the defendant-appellant will urge why the judgment heretofore rendered against it in the above-entitled cause, should be reversed, set aside, and for nothing holden:

- 30 1. The Court, at the close of the case of the plaintiff-appellee, although requested so to do by the attorney of the defendant-appellant on the ground that no proof of any act of negligence on the part of the defendant-appellant had been produced, refused to non-suit the plaintiff-appellee;
- 40 2. The Court, at the close of the whole case, although requested so to do by the attorney of the defendant-appellant on the ground that no proof of any act of negligence on the part of

Grounds of Appeal.

the defendant-appellant had been produced, refused to direct the jury to return a verdict in favor of the defendant-appellant.

Dated August 24, 1925.

Yours truly,

LEONARD J. TYNAN, 10
Attorney of Defendant-Appellant.

(Endorsed) "Service acknowledged August 26, 1925. A. J. David, Atty. of Plaintiff-Appellee."

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New Jersey Court of Errors and Appeals

EDITH LORENTZ, who sues by JOHN LORENTZ, her next friend,	}	<i>Action at Law.</i>
<i>Plaintiff-Appellee,</i>		<i>On Appeal from the New Jersey Supreme Court.</i>
<i>vs.</i>		
PUBLIC SERVICE RAILWAY COM- PANY,	}	
<i>Defendant-Appellant.</i>		

BRIEF OF DEFENDANT-APPELLANT.

The plaintiff was riding in an automobile driven by her father, in Jersey City, at night. The automobile collided with a supporting pier or column of the elevated street railway owned and operated by the defendant, causing injury to the plaintiff, who in consequence sued the defendant, and recovered the judgment (p. 10 of Book) from which the defendant has taken this appeal.

The grounds of appeal (p. 102) are two in number, (1) Refusal to non-suit; and (2) Refusal to direct a verdict for the defendant. A motion for non-suit for lack of proof of negligence of the defendant was made (bottom of p. 47) and denied, and (top of p. 48) exception to such ruling was taken. A motion for the direction of a verdict for the defendant on the ground that no negligence of the defendant had been shown, and no duty on the part of the defendant company had been shown, was made (pp. 85, 86 and 87), and denied (p. 87), and an exception to such ruling was taken.

The general character of the accident sufficiently appears from the following testimony of John Lorentz, the father of the plaintiff:— (p. 26, l. 35) “Q Where were you on the evening of December 1st, that is the night of November 30th? A I was at my cousin’s house. Where is that? A New York avenue—well, I was not at his house, I was at a hall that he had engaged. (p. 27) Q It was some sort of a celebration there? A It was his twenty-fifth wedding anniversary. Q Who was with you on your return? A My daughter Edith, two nieces, Edna Schaub and Lulu Schaub. Q Where was your daughter sitting? A In the front seat with me. Q You were driving what kind of a car? A Chalmers touring car. Q You were coming south along Central avenue? A I was coming along Central avenue going to Jersey City. I do not know whether it was south. I was going in that direction, toward the jury, from here (indicating on map). Q You were going from here towards the jurors? A Yes. Q Had you been on Central avenue before? A Well, not very frequently. I know Central avenue, but not with an automobile. Q What kind of a night was it with respect to weather conditions? A Raining; raining very hard. Q Did you have a windshield cleaner on your car? A There is an automatic windshield cleaner, one of these things you wipe with your hands. Q Was it necessary to use it? A Well, I should say I used it about every two minutes. Q What time was it when you neared the intersection of Central avenue and Booraem avenue? A About one o’clock. I think it was about one o’clock. Q Tell us what occurred when you neared that intersection? A When I got down here (indicating)? Q Yes, what happened? A I was coming along Central avenue this way, coming through (p. 28)

here with an automobile. Here is my position. The car is here. I passed this pillar. I remember it as if it was last night. They have a light underneath here some place, under the elevated structure. It is under, it is nowhere near here. I am coming along with the automobile this way, right even. Eventually I find I am even with that pillar, but I am coming through here with the car, and as I passed that pillar, that pillar there, I naturally assume that an elevated structure, when you hit an elevated structure, that the pillars are one next to the other. I do not know of this funny construction here. They take this track down here into Booraem avenue. I am here. When I pass that pillar I see it distinctly. It was splashed with rain. I think I am headed between this pillar and that. Instead of that I am headed for this pillar, and the next I knew I did not know anything. Q Was there a light on that pillar? A No. Q Was there any contrivance there to emit a sound? A Not a thing. Q Was there anyone stationed there? A Not a person. Q Was there anything to draw your attention to the existence of that pillar there? A Not a thing. I could not see that pillar. I would not have seen this pillar (indicating) if I had not seen the rain shining on it. I naturally assumed I was between an elevated structure and a sidewalk. That was what confused me. If a light was on that pillar I would have seen it, absolutely. Q How fast were you going when you struck it? A About fourteen or fifteen miles an hour. (p. 29) Q What was your condition with respect to sobriety? A I was—I can swear it, absolutely. I was sober. If I was not I would not wipe my windshield off. Q Had you had anything to drink? A Yes, I had one drink downstairs. They had frankfurters and sand-

wiches. They offered a drink and I had one drink downstairs. Q A drink of what? A Whiskey. Q What next do you remember after the collision? A I woke up in the hospital, and the interne was sewing my lip. I asked him what was the matter, and he said, "You had an accident." I said, "Where is the kid?" and he said, "She is injured." So I went unconscious. When I came back he was sewing my leg, fixing my leg. That is the last I remember. * * * (p. 30, l. 39) Q Did you know the elevated structure was there? A I knew an elevated structure was on (p. 31) Central avenue, but did not know the curve was there. Q Had you ever been to the curve before that? A No. That was why I went slowly when I struck Central avenue, knowing the elevated structure was there. Q When you struck Central avenue you knew the elevated structure was there? A I knew it was there some place. Q And you went slowly because you knew it was there some place? A Yes. Q You were driving a Chalmers? A Yes, an open car, a touring car. Q And you had your curtains up? A Yes. Q All of them? A Yes. I had to keep them up. It was raining too hard. I could not see. * * * Q You said you assumed the pillars were in a straight line? A Yes. Q Didn't you look after you passed the first pillar? A I could not see anything. When I passed the first pillar I was unconscious. Q Then what did you mean when you said you assumed they were in a straight line? I am (p. 32) afraid I did not quite understand you. A I will explain it to you. Q Will you use one of these photographs, because I am not very familiar with maps. Here are a number of photographs. Suppose we take any one of those which you feel fits the situation, and just explain to me. A Here is what I mean.

This explains this construction, right here. There is the pillar I hit. Here is the pillar I refer to. That pillar is the pillar that I saw last. And I thought that that pillar was this pillar, and I thought the position of my car was here between that pillar and this sidewalk. Instead of that I am here, coming along Central avenue this way, headed for that pillar, and I see this pillar, and if anybody sees a pillar on their left and knowing there is an elevated structure there, they are going to assume those pillars are one next to the other. They would not assume anything else, unless you knew the construction of that elevated structure as it stands today. That is why I mentioned there should have been a light there. If there had been a light there I would have seen the pillar. Q Show me how far that pillar is from the one you saw. A I should judge about eight or ten feet, maybe fifteen feet. I do not know now. I just saw it and then I hit. I must have hit, because I do not remember a thing. Q And you were not going very fast? A Absolutely, I was going very slow, until I got away from Central avenue. Q Just picking your way? A That is it. Q Does this photograph properly show the way those pillars were? A Yes. Q When you got to the first pillar how fast were you going? A Which pillar do you mean? (p. 33) Q The one you say you saw and assumed the other was behind it. A I do not know. I was probably going thirteen or fourteen or fifteen miles an hour all through Central avenue, when I hit Central avenue. Q When this pillar suddenly loomed up in front of you you had a chance to put your brakes on? A No. I never saw the pillar in front of me. It was raining too hard. I saw the pillar to the side of me, but not in the front. I could not help—that reflection. Q What have

you to say as to the illumination at the time of the accident in comparison to the illumination there (indicating a photograph)? A There is just as much difference between day and night as between that picture and when I saw it. Q That really does not tell us much. A There was no illumination like that there that night. (Indicating on Exhibit D. 4.) Q Where was the nearest light? A Underneath—under the structure, and one on the side. Q Show us on any one of these pictures where the light that you saw was. A I do not remember seeing a light. What I saw was the reflection—the last thing I saw was the reflection on this pillar here on the side of it. (Indicating on Exhibit D. 5.) Q Is that the pillar you hit? A No. If that is the one on this side of me that is the one I saw the reflection of the water on. It was wet. Q Then you were not familiar with this pillar situation at all but you just went right on assuming that they were on a straight line? A That is right. Q And that assumption led to your accident? A That is right.”

Part of the foregoing testimony of Mr. Lorentz is—(p. 32)—“And I thought that that pillar was this pillar, and I thought the position of my car was here between that pillar and this sidewalk.”

As No. 1 was the pillar or pier with which the automobile came in contact (p. 41), it would seem that he made the mistake of thinking that No. 2 was an outside pier of the elevated structure when in fact it was an inside pier. It was probably this mistake, causing him not to look for No. 1, which was his undoing more than the alleged poor illumination. He said, however, (p. 28, l. 35)—“I naturally assumed I was between an elevated structure and a sidewalk. That was

what confused me. If a light was on that pillar I would have seen it absolutely.”

Evidently what Mr. Lorentz had in mind is that there should have been a special light upon that particular pillar. The general question of lights in the neighborhood seems to be considered a secondary matter. Janitscheck said (top of p. 38) that as he approached the pillar he had to get within twenty-five feet of it before he saw it. This witness heard the crash and went there. He says (p. 39) that when he got there the lights of the automobile were lit, and “The pillar was in between the two lights, directly in the centre of the radiator.” When Walter Bergman got there (p. 42, l. 18) his recollection is that only one auto light was shining. The general character of the street lighting at that point is testified to by Thomas McBride (pages 63 &c), an employee of a corporation known as Public Service Electric Company, which company maintained the lighting for the city of Jersey City, (p. 66, l. 32)—“Q Where are the lights with respect to this elevated structure? A Under the structure in the center of the roadway. Q Are there lights on any of the pillars? A No, sir.”

The photographs in question were amongst those admitted by agreement (page 25). Owing to their being similar to those of the defendant, the plaintiff has waived the inclusion in the Book of her photographic exhibits P-2 and P-3, but the defendant's photographic exhibits, D-1, D-2, D-3, D-4, D-5 and D-6, are all secured together and laid in the printed book.

During the testimony of Walter Bergman (pages 41 and 42, the following occurred:— p. 41, l. 28) “The Court: Why not mark the pillars?

Pillars marked (1) and (2). The Court: There is no dispute between you gentlemen as to number one being the one he actually came in contact with? Mr. Straw: No, sir. * * * (p. 42). The Witness: Yes. I know the exact location. Number one pillar, which the car struck, was one block away from where we were standing. Q Was it a clear night or a foggy night? A It was a foggy, misty night. Q Could you see the pillar from where you started to walk from? A We could not see it a block away. Q How close did you have to get to it before you saw the car? A Where the car was? Q Yes. A About twenty to twenty-five feet."

Similar markings were made by witness McBride (p. 65) on others of the photos, so that the photographic exhibits of the defendant, D-1, D-2, D-3, D-4, D-5 and D-6 all have the two piers or columns in question numbered in ink, and a glance at the copies of them in the printed book will at once show the pier or column (No. 1) which (p. 41) was agreed on as the pier against which the automobile collided. That the night was bad for vision, seems unquestioned. John Lorentz (p. 31) said,—“A Yes. I had to keep them up. It was raining too hard. I could not see.” Otto Mullenberger said, (p. 34) “A It was a very foggy night and a heavy mist, a drizzle.” Adolph Janitscheck said (p. 37)—“A A very foggy night, drizzily.” Walter Bergman said, (p. 42) “A It was a foggy, misty night.” Lulu Schub said, (p. 43)—“A It was a rainy and foggy and misty night.” Emma Schub said, (p. 44) “A It was raining and it was misty and foggy.”

We concede that negligence of the driver of the automobile was not imputable to this plaintiff Edith Lorentz, and that the question of her own

contributory negligence was properly for the jury.

This appeal is based among other things upon the proposition that the defendant's piers or columns, supporting its elevated structure, were rightfully in the street, and that their status was so determined by Legislative and Municipal sanction that it was more than that of an ordinary easement upon the public highway, and that their erection in fact constituted a circumscribing or curtailing of the street surface devoted to public travel, a dedication to this defendant's predecessor in title of so much of the roadway as was necessary for the foundations of the piers or columns in question, and a limitation of the roadway as fully as the curbstone was a limitation, and that consequently, so long as the pillars or piers did not fall, and were not erected in unlawful and unauthorized places, no duty to the public, such as attaches to the user of an ordinary easement in a public highway, attached to this defendant as the owner, erector and maintainer of these piers. The status of the defendant was not that of a user, in common with others of the public easement. The spaces occupied by these pillars were not used in common with others, as is the case with street railway tracks. The use of those parts of the highway in which those piers were, was exclusively the use of this defendant, and we submit that the statute and the cases hereinafter referred to show that *the fee of the land upon which the piers stood*, was in this defendant at least so long as such land should be occupied by such piers. As long as the piers were erected in legally authorized places, the only duty in connection with them that this defendant owed to the public using the highway was to use due care that the piers should not fall.

Chapter 47 of the Laws of 1886 (Pamphlet Laws of 1886, page 126) was enacted before the days that electric railroads became general, and refers to operation by cable, but it is nevertheless the foundation, by means of subsequent legislation, recognizing and authorizing electric propulsion of the defendant company's present rights. It is entitled,—

“An act to enable street car or horse railroad companies to provide better accommodation to the public, by using what is now known as the cable system for motive power on elevated roads.” The above-named statute gives to the street car companies power of condemnation. We will discuss its legal effect later in this brief. The Ordinance of the City of Jersey City, which gave specific rights to this defendant's predecessor, was admitted in evidence (p. 48) and marked Exhibit D-7. It is printed in full in the printed book (pages 98-99-100 and 101) and will be again hereinafter referred to.

It was admitted by the plaintiff's attorney that the elevated structure was lawfully there. On page 48, line 5, of the Printed Book appears the following: “Mr. Wagner: We admit the structure was there lawfully under the permission of the municipal authorities. Mr. Straw: Under this ordinance? Mr. Wagner: I have no objection to that. The Court: It is admitted that this copy is a true copy of the ordinance under which this elevated structure was located as mentioned—ordinance dated June 5, 1889. Admitted and marked Exhibit D. 7 of this date.”

The effect of the foregoing admission necessarily included an admission that the terms of the ordinance referred to had been complied with, and that the conditions of the Legislative act

above mentioned, and under the authority of which the ordinance in question had been passed, had likewise been complied with.

On page 84 of the Printed Book, and in connection with certain amendments to the complaint, the plaintiff's attorney made the following admission:—“For this purpose, and in connection with this your Honor, we admit for the plaintiff that the structure was a standard structure and we will (p. 85) admit also for the purpose of the record and to obviate the necessity of the defendant producing evidence to the contrary, that there were no other accidents at this point or because of this nuisance of which we complain.”

This admission of standard construction eliminates from the case any question of negligence in that regard.

The complaint (p. 2) is in three counts. In the first count, the allegation of Paragraph 2 that the piers and columns “interfered with and impeded the free and uninterrupted passage of travellers upon said several highways” is evidently, in view of the admissions aforesaid, not relied on. The same is true of Paragraph 3, concerning the structure rendering the driveway dark and dangerous, except so far as Paragraph 3 is a support for Paragraph 4, which alleges that the defendant assumed the duty of lighting the roadway beneath the overhead railway, and attempted to do so. As to this last paragraph, there is no evidence in the case that the defendant assumed this task or did any such lighting. On the contrary, the evidence is that the City of Jersey City undertook such lighting and in fact performed same, it being in evidence that the City of Jersey City made a contract with a

lighting corporation known as the Public Service Electric Company for that purpose. Paragraph 5 of the first count details the accident, and Paragraph 6 alleges negligence of the defendant in that it "failed or omitted to have a light or illumination at or near said column or pier—." The count therefore does not allege any duty to light except that arising from an alleged assumption of duty and undertaking so to do, and in the absence of any proof of such assumption of duty and undertaking, the count has no substance to support a judgment.

The second count (p. 4) inserts in place of Paragraph 6 of first count (failure to light) a paragraph alleging that the pier in question was so covered with grime, &c., through the negligence of the defendant, that the headlights of the automobile did not disclose it. We do not recall any proof in the record of such grime, soot or dirt, and there can be no inference of same from the mere alleged fact that the pier or column was difficult to see.

In the third count, Paragraph 6 of the first count is replaced by a paragraph (No. 11) which alleges (1) that the defendant assumed the obligation of lighting; (2) that it performed such lighting in a careless and negligent manner, so that the lights placed by it did not warn the plaintiff of the presence and location of the pier; (3) that it permitted the lights placed by it to become covered with dirt, soot and grime so that the rays of light did not illuminate the pier in question. This count is based entirely upon the assumption of the obligation to light, and the undertaking to carry out such obligation. As there is no proof whatever of such an assumption, and no proof whatever that the defendant ever did any lighting whatever, this count has

no substance whatever, especially in view of the fact that there is proof that the City of Jersey City undertook and did the lighting. No substantial allegation of the complaint, therefore, had any support from the evidence in the plaintiff's case. It is only when we consider the amendments to the complaint (p. 84) that serious argument is called for. Paragraphs 6-A and 6-B there appearing presumably relate to the first count (page 4), as that is the only count that contains a Paragraph 6. However, there is still left in the first count Paragraph 4, which makes the count turn on the alleged *assumption of duty* of lighting, and undertaking of duty of lighting, by the defendant, which allegation, as we have pointed out, has no support whatever in the evidence.

Considering the amendments 6-A and 6-B (p. 84) as independent allegations, we find that 6-A alleges the structure to be a nuisance in the highway. In view of the admissions by plaintiff's attorney that the structure was lawfully there, and was a standard structure, said paragraph has no substance. The same is true in view of the ordinance (Exhibit D-7, page 98 of Book), and of the Legislative authorization hereinafter set forth.

Amendment 6-B (page 84) avers that the structure was a nuisance "when it, the said structure lacked light, signals and warnings as to its existence at such time as the ordinary view was obstructed, weakened or destroyed through darkness, fog or other atmospheric conditions,—".

This last is the only allegation of the complaint as amended which seems to need consideration.

In making the last mentioned amendment to the complaint, counsel probably had in view the

case of *Cochran v. Public Service Electric Company*, 97 New Jersey Law Reports, Page 480, in which case it appeared that the City of Newark had erected a safety isle on Clinton Avenue, a truck ran into it one night, and in the resulting suit it was claimed that the isle was unlighted. As the obligation of Public Service Electric Company was only upon its lighting contract with the City of Newark this court held that the suit in question would not lie against Public Service Electric Company, but Mr. Justice Swayze, speaking for this court, said,—

“The safety isle constituted such an obstruction that if it was not properly lighted it might become a nuisance and although this nuisance would be due to the negligence of the City in failing to light the obstruction it had created, the city would not escape liability under the rule of *Freeholders of Sussex v. Strader*, 18 *Id.* 108, but would be liable for positive misfeasance as in *Hart v. Freeholders of Union*, 57 *Id.* 90. The primary duty to light was a duty of the City to prevent its own action from being a nuisance,—” &c.

The whole point of difference between the Cochran case above cited and the case at bar is that, in the Cochran case, the safety isle in fact was an obstruction in the public highway, erected, we presume, without special Legislative sanction, while in the case at bar the piers or columns supporting the overhead roadway originated in a Legislative sanction that gave to the railroad company the power of condemnation against abutting owners for the acquisition of land upon which to erect them, which power of condemnation presumably was exercised in all cases in which the abutting property owner did not agree with the railroad company concerning the

matter. Our claim is that such piers and columns, built on spots in the roadway set aside for that purpose in furtherance of a Legislative sanction, were not in any sense obstructions in the highway, or a use of the public easement, but were in effect structures erected upon land which was virtually the private land of the railway company, and no longer a part of the highway.

In the recent case of *W. B. Wood Co. v. Balsam*, New Jersey Advance Reports, Vol. 2, page 1685, and 126 Atlantic Reporter, page 480, our New Jersey Supreme Court held:

“1. Persons using a public highway are obliged to observe a lawful obstruction erected therein, and to govern themselves accordingly in its use.

“2. A fire escape constructed upon the outside of a building projecting over a public highway, and placed in strict conformity with the statutory provisions for its erection, is not a private nuisance, and no right of action accrues to the owner of a truck which was damaged by coming in collision with such fire escape.”

In the above case Judge Lloyd, speaking for our Supreme Court said,—

“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."

As has been pointed out in the case at bar, the amending paragraph 6-B on page 84 is the only allegation of the complaint that seems to need discussion. There was some proof that fog limited vision, and that there was no light upon the pier against which the automobile collided. The allegation was not negligence, but nuisance, and of course, as was said in *W. B. Wood Co. v. Balsam*, above quoted from,—"though a lawful construction may not become a public nuisance, yet it may become an actionable wrong where special damage to private property is entailed,—." In the case at bar, however, we submit that the piers or columns having legislative sanction, as we will presently point out, were authorized by law as fully as was the fire escape in the case of *W. B. Wood Co. v. Balsam*, above quoted from. The fact that in the latter case the property owner was required to put the fire escape there can make no difference. In both the case of the fire escape and in the case of the pier or column in question for the elevated structure, the State had effectively circumscribed and curtailed the highway, and as our Supreme Court said in the above quoted case of *W. B. Wood Co. v. Balsam*,—"There is no vested or property right in the use of the highway which the State cannot circumscribe or curtail."

Chapter 47 of the Laws of 1886 at page 126 of the Pamphlet Laws for that year, authorizes

street railway companies to construct, maintain and operate one or more elevated railroads, with necessary stations and stairways over the streets or highways of such cities, towns, etc. within the limits of the territory in which any such company is authorized by law to construct and operate surface roads. The statute provides that the cars on such elevated roads shall be propelled by means of a wire rope or cable and not by locomotive steam engines. The statute then proceeds as follows:—"—and provided, further, that such elevated roads shall be constructed in such manner, in regard to the position of supporting posts or pillars, and in regard to elevation above the street or highway over which they are to be constructed, as not to interfere with the use of any public sewer, water pipe or any other public work, nor with ordinary public travel thereon, except to such extent as may be unavoidable in carrying out the provisions of this act; and provided, further, that no elevated railroad shall be constructed over any street or highway unless the consent, in writing, of the owners of at least one-half of the property fronting on such street or highway be first had and obtained, and unless all damage, if any, done to property fronting on such street, the owner or owners of which have not given their consent, be first ascertained and paid in the manner hereinbefore provided; and provided, also, that the consent of the municipal authorities of the city, town or township, in which such road is proposed to be built, be first had and obtained."

The statute then proceeds to provide "That when such company or companies, or their agents, cannot agree with the owner or owners thereof for the use, grant or purchase of any land or materials, or easement or easements, or the right

to pass along the street in front of any property which may be required for the purpose of executing this act, or when by reason of the absence or legal incapacity of such owner or owners no such agreement can be made,—” and the statute then proceeds to outline a plan for the condemnation by commissioners appointed by one of the justices of the Supreme Court of the required lands, materials, easements or right of passage.

(See Compiled Statutes of 1910, p. 4993.)

The foregoing statute was enacted in the year 1886. The ordinance of the City of Jersey City which gave to the defendant's predecessor in title North Hudson County Railway Company, the right to construct the elevated railroad in question (which ordinance as Exhibit D. 7 in the present case appears at page 98 of the Printed Book) was approved May 2, 1889. The statute referred to required the consent in writing of the owners of at least one-half of the property fronting on such street. The ordinance referred to recites that such consent has been obtained. The ordinance, foreseeing the dawn of the day of electric power provided in Section 4 as follows:—(p. 100, l. 25) “Section 4. That the motive power to be used on said elevated railroad shall be either by cable moved by stationary steam power, or by electric power; but in no case shall steam locomotives be used, unless specially hereafter permitted by the owners of a majority of the frontage and by the Mayor and Aldermen.”

The ordinance further provided as follows:—(p. 99, l. 30) “Section 2. That in constructing said elevated railroad the supporting posts of said structure shall be located in the carriage way at a distance of about ten feet from the

curb stones, as indicated on the plan annexed to the petition of, and approved by the owners of more than one-half of the frontage on Central Avenue, now on file in the City Clerk's office; that the distance longitudinally between the said posts shall not be less than thirty feet except in places where it may be found necessary, in the proper construction of the road, to set them nearer together, and that there shall be at least thirteen feet in the clear between the surface of the street and the under side of the lowest beam or girder of said elevated road.”

The evolution by which electric power was allowed to succeed horse power and cable power has a statutory basis and need not here be enlarged upon. The ordinance of Jersey City as heretofore pointed out, gave consent for the use either of cable driven by steam power or for electric power.

The admission made by Mr. Wagner, attorney for plaintiff, on page 48, that “the structure was there lawfully under the permission of the municipal authorities,” and the same attorney's admission at the bottom of page 84 that the structure was a standard structure, necessarily carry with them the presumption that this defendant and its predecessors in title have complied with all the conditions and provisions of the aforesaid statute and of the aforesaid ordinance.

Section 2 of the ordinance above quoted refers to a plan on file in the city clerk's office by which the details of the construction became fixed, and said Sec. 2 specifically provides that as indicated on said plan “the supporting posts of said structure shall be located in the carriage way at a distance of about ten feet from the

curb stones—.” &c. The longitudinal distances of the supporting posts are also fixed. Except for the fact that the railway company did not have to build the elevated road unless it wanted to, it had to put these piers and columns in the exact positions designated by the ordinance aforesaid and the plan referred to therein, just as absolutely as did Mr. Irving Balsam have to place his fire escape in the case of *W. B. Wood Co. v. Balsam*, decided by our Supreme Court, reported in 126 Atlantic Reporter, p. 480, and hereinbefore commented upon. In the case at bar, just as in that case,—“Those using the highway were obliged to take cognizance of this lawful construction, and to govern themselves accordingly.” As was said in the Balsam case,—“There is no vested or property right in the use of the highway which the state cannot circumscribe or curtail.” We submit that in the case at bar the erection of the piers or columns was by Legislative act a circumscribing and curtailing of the highway and not a use in common with others of the public easement. Nobody else could use the spots upon which these piers or columns stood, except of course, for underground pipe work, which the statute of 1886 prescribed should not be interfered with. It is true that the statute prescribes that there shall be no interference with ordinary public travel “except to such extent as may be unavoidable in carrying out the provisions of this act—”. But so far as public travel was concerned, the sequestration for the exclusive use of the elevated railway of the spots shown on the plan for the erection of the piers or columns was basic and unavoidable and therefore necessarily constituted a circumscribing and curtailing of the highway.

We submit that the scheme of the statute aforesaid with its power of condemnation, coupled with the ordinance aforesaid, with its specific designation of the location of the supporting posts, indicates an exclusive right in the defendant, probably even amounting to a fee, in the spots formerly constituting a part of the highway but now occupied by the supporting posts or columns of the elevated railway and no longer a part of the highway. In New Jersey it has been settled that the abutting owner owns to the center of the street, subject to the public easement. The consent obtained before the passage of the ordinance of at least one-half of such abutting owners and the presumption that necessarily arises that the condemnation proceedings provided by the Statute of 1886 were fully carried out as to non-consenting abutting owners, gave an exclusive right as to the spaces occupied by the columns to the railway company except as to the public easement, and by virtue of the statute aforesaid and the ordinance aforesaid such public easement was eliminated as to the spots required for the erection of such piers or columns.

We are aware that our New Jersey Court of Chancery has held (Year 1890)—that the placing of poles in the middle of the street, for the purpose of using electricity for street car propulsion, does not impose a new servitude on the land in the street, as “the poles facilitate the use of the street as a public way.” (See *Halsey v. Rapid Transit Street Railway Co.*, 2 Dickinson’s Chancery, 380.)

But in the year 1896, in the case of *Roebeling v. Trenton Passenger Railway Co.*, 29 Vroom 666, this court indicated otherwise holding, as to a street railway act authorizing the erection of

poles and wires for electric propulsion, and a municipal ordinance thereunder, that neither the statute nor the ordinance were void, on the ground of the taking of private property for pole rights just inside the prosecutrix's curb line, but that—"For such injuries, the remedy of the party injured is by action. If the acts done under color of the ordinance, or the statute be found to be an unlawful invasion of the rights of private property, an action will lie in which neither the ordinance nor the statute would be a justification."

This latter case, of *Roebing v. Trenton Passenger Railway Co.*, quotes Chancellor Green, in *Hinchman v. Paterson Horse Railroad Co.*, 2 C. E. Green, 75, as holding that the rights of an abutting owner were not prejudiced or interfered with by a street railway, operated as there authorized, to a greater degree than they would be affected by their use as an ordinary highway, and that the mode in which the company was authorized by its charter to use the streets of the city in fact created no additional servitude upon the lands. The matter there under consideration was a horse railroad, but referring to the change to electric power, the Roebing case said,—

"The change in the motive power of the cars did not necessarily occasion any injurious effects upon the prosecutrix's property." The Roebing case, however, indicated, as above stated that the acquisition of pole rights would have to be with the consent of the owners. In the Hinchman case, as to horse railways, Chancellor Green said,—

"They are ordinarily, as in this case, required to be laid level with the surface of the street,

in conformity with existing grades. *No excavations or embankments to effect the land are authorized or permitted.* The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less than that produced by omnibuses and other vehicles in ordinary use."

The foregoing is a very different picture from that of an elevated railroad that superimposes in effect a second street upon the first, using the first street for its supporting columns. The latter undoubtedly is an additional servitude upon the lands of the abutting owners, who in this state own to the centre of the highway. It is so far an additional servitude that it is entirely inconsistent with the ordinary use of the highway, and this permanent, exclusive, and continuous use of these parcels of land for supporting piers or columns raises a conclusive presumption, after this long lapse of years, that this defendant is the owner in fee, by purchase, or by condemnation, of said parcels of land.

In the case at bar, while the admission in the record that the elevated structure is rightfully in the street and is of standard construction, together with a reference to the statute of 1886, and the introduction in evidence of the ordinance D-7 are probably sufficient for the purpose, we beg also to call attention to the fact that in the New Jersey case of *State v. Riggs*, 106 Atlantic Reporter, 216, it is stated that poles belonging to a utility company in a public street are presumed to be legally there. This principle would doubtless apply as well to the piers and columns of this defendant's elevated railway.

In *State v. Laverack*, 5 Vroom, 201, it was held that:—

“1. The legislature has not the power, under the constitution of this state, to authorize a market to be held in a public street of a city, without providing compensation to the proprietors of the contiguous lands who own to the centre of such street.

“2. The general principle is, that when land is acquired by the public for one particular use, *no additional* burthen can be superadded without compensation to the landowner.”

Evidently, in enacting the statute of 1886 concerning elevated railways, the Legislature had this fact in mind, for it provided for condemnation proceedings to fix the compensation payable for damage if any to abutting owners who did not come to an agreement in the matter with the railway company.

There are few elevated street railways in New Jersey. Indeed, the one now under consideration may be the only one. As a consequence, there is a dearth of law in New Jersey concerning this building of one roadway above another.

The case of *Story v. New York Elevated Railroad Company*, 90 New York Reports, page 122, was an action to restrain the defendant from constructing an elevated road upon a street upon which the plaintiff's land and warehouse abutted. The plaintiff, apparently, due to the way conveyances had been drawn, owned the fee of the street in front of his property, subject to the public easement. It was held “that the proposed structure was incompatible with and destructive of the use of the street as such, and unless plaintiff's property rights, so far as interfered with, were properly acquired and compensation made

therefor, would violate” the constitutional provision which prohibits the taking of private property without just compensation.

It seems quite clear that a *permanent structure* above the street surface, and an encroachment thereby and by its use upon the open frontage *owned in fee* by the abutting proprietors was not in contemplation at the time of the setting aside of the land in the street as charged with a public easement, for such public easement had as its controlling factor the maintenance of such streets as open streets and perpetual frontage, light and air. (See *People v. Kerr*, 27 N. Y. 188, and *Craig v. Rochester R. R. Co.*, 39 N. Y. 404). In the case at bar, the setting aside of small plots of land on which to erect these permanent pillars or columns was not the giving to the railway company of the use of the public easement, but was the giving to it, at least while so occupied, the exclusive control over, and essentially the fee, of said small plots of land.

In New Jersey it is established that the fee in the lands over which highways have been laid, is in the abutting owner. This principle was laid down by this court in *Rogers v. Warrington*, 90 New Jersey Law Reports, page 653. That case also decided that—“The owner of the fee, for the soil in the highway, may maintain an action of ejectment against any person wrongfully taking or claiming exclusive possession of the same.”

In that case there was an action of ejectment to recover possession of land in the public highway in front of the plaintiff's lot, on which portion of the highway the defendant had erected a public drinking fountain or water trough. A de-

fense was interposed as to the land in the street occupied by the drinking fountain, which had been erected by consent of the municipal authorities. The court said,—

“It is the accepted law of this state that lands on which streets and highways have been laid the fee is in the abutting owner. *Hoboken Land and Improvement Co. v. Mayor, &c. of Hoboken*, 36 N. J. L. 540; *Starr v. Camden, &c. Railroad Co.*, 24 Id. 592. It also has long been the settled law of this court that the owner of the soil in such cases may maintain an action of ejectment against any person wrongfully taking or claiming exclusive possession of the same.” (Citing a number of cases.)

So, in the case last quoted, the consent of the municipality had no legalizing effect, and neither could sanction by the Legislature have had any effect, unless and until the abutting property owner had been compensated.

Such exclusive possession as in the aforesaid case of the drinking fountain, and as in the matter of the land needed for the piers and columns in the case at bar, is not a use of the highway in common with others, as is, for instance, a surface street railway track, which latter is no additional burden upon the public easement. The taking of exclusive possession of a portion of the public street is not a use of the easement. It is such a taking of the property of the abutting owner that the taker can be ejected unless compensation be made to the abutting owner.

It therefore follows, in the case at bar, that the existence of the elevated railroad for all these years, and the exclusive possession for all that time by the defendant and its predecessors in title of the portions of land upon which

the supporting piers or columns are maintained, raises a conclusive presumption that all abutting property owners have been compensated for the fee of the spots so taken for such supporting piers or columns. It was no temporary taking. It was taken for all time. It was the equivalent of a fee. Those who did not voluntarily consent were presumably compensated in accordance with the provisions of the condemnation proceedings provided for in the statute of 1886 hereinbefore referred to. As to the public right of user, that, so far as concerns such spots, was destroyed by the Ordinance of the City of Jersey City (Exhibit D-7 and printed in the Printed Book), sanctioned by the aforesaid statute of the year 1886, circumscribing and curtailing the surface of the street by the elimination therefrom of the locations for piers or columns shown on the plan referred to in the Ordinance, just as, in the case of *W. B. Wood Co. v. Balsam*, N. J. Advance Reports, Vol. 2, page 1685 (126 Atlantic Reporter, 480) the erection of a fire escape circumscribed and curtailed the highway.

In the case at bar, as the pier or column in question, and the land upon which it stood, were both the private property of this defendant, this defendant owed no duty to the traveling public to give warning, by lights or otherwise, of the existence of its private land and lawful structure at that place, any more than it would owe such a warning concerning its private land and lawful structure at any other place, and never could such structure be a nuisance.

Whether or not the City of Jersey City, in view of its having allowed this defendant's predecessor in title to acquire such private property, and to erect the pier or column in question thereon, was under a duty to this little girl to

light the surrounding thoroughfare, and whether or not the city, which under the proofs in the case had undertaken such lighting, had sufficiently performed it, are matters which we need not here discuss, any more than we need discuss whether the girl's own father, driving home from that party, where he had a glass of whiskey, was not himself to blame for the accident.

We respectfully ask that, because of error in refusing the motion to non-suit, and because of error in refusing the motion to direct a verdict for the defendant, the judgment be set aside.

Respectfully submitted,

LEONARD J. TYNAN,
Attorney of and of Counsel with
Defendant-Appellant.

JOSEPH COULT,
Of Counsel.

New Jersey Court of Errors and Appeals

EDITH LORENTZ, who sues by JOHN LORENTZ, her next friend,	}	<i>Action at Law.</i>
<i>Plaintiff-Appellee,</i>		<i>On Appeal from the New Jersey Supreme Court.</i>
<i>vs.</i>		
PUBLIC SERVICE RAILWAY COM- PANY,	}	
<i>Defendant-Appellant.</i>		

BRIEF OF PLAINTIFF-APPELLEE.

Defendant erected pillars for support of its elevated electric railway structure on Central avenue in Jersey City. This railway turns into Central avenue at the corner of Booream avenue, describing an arc. The pillars extend westward along Central avenue, beginning at Booream avenue. East of Booream avenue, Central avenue is free from obstruction of pillars. These facts appear from the map and pictures of Book.

Plaintiff was riding home at night with her father in his automobile westward over the unobstructed part of Central avenue. When the car reached the obstructed part of the street it struck the foremost pillar in its path of travel, the pillar indicated as No. 1 on the pictures and map. The night was concededly rainy, misty, drizzly and foggy, with visibility low. (Defendant's brief and excerpts of testimony therein, pp. 2, 5, 8.) There was no red or other distinctive light on the pillar, nor any contrivance to emit a sound, nor any person there designated by defendant to warn approaching vehi-

cles, nor any method taken by defendant to indicate specifically the dangerous presence of the pillar in the street.

The jury supported plaintiff's view that the defendant had been negligent in improperly guarding the pillar, and giving none or insufficient notice and warning of its presence to the lawfully traversing public, there being ample evidence from plaintiff's and corroborating testimony on which to predicate a verdict. Plaintiff's exhibits showing extent of her injuries are not made part of Book by defendant, the amount of damages being unchallenged, the appeal confining itself to whether or not the judgment is tenable.

There is no proof or inference of contributory negligence of the driver, and if there were, defendant concedes it would not be imputable to plaintiff (Defendant's brief, p. 8).

The sole question is whether defendant owed any duty in the premises to plaintiff. The pillars were placed pursuant to municipal ordinance following legislative authority. Defendant holds its single duty was to maintain the pillars pursuant to the ordinance and see that they should not fall (Defendant's brief, p. 9). And, further, that the ordinance created a fee of defendant in the pieces of the street land on which the pillars stood.

It is far-fetched to elongate defendant's easement into a fee. There are incidents to a fee, such as alienation, mortgaging, non-limitation of use, permanence of holding, and unrestricted right to do with property what the fee owner desires, subject to non-contravention of law, none of which apply to the defendant. The defendant here had only the single right to main-

tain its pillars. This was not an irrepealable grant, as with a true fee. Section 7 of the ordinance (p. 101 of Book) provides for repeal, in case of violation. The ordinance by its terms created a revocable easement.

Interborough Rapid Transit Co. v. Gallagher, et al. (Supreme Court, Special Term), 90 N. Y. S. 104, 44 Misc. Rep. 536, and *Brooklyn El. R. Co. v. City of Brooklyn*, Sup. Ct. Appellate Div. 1896, 37 N. Y. 560, point out the illogical results reached if a street easement is considered as a fee, for then there would be all sorts of fees in a single thoroughfare. An overhead railroad, a surface railroad, a sub-surface railroad, bridge owners, telegraph and telephone line owners, etc., could all claim fees to the same ground. The first case says: "Notwithstanding plaintiff's charter, the city has still the right to make use of the streets for proper and authorized urban purposes." The latter case says: "Grants to railroads must be construed as subject to the paramount right of the public to use those highways for all proper purposes."

Defendant contends that so long as it complied with the ordinance as to manner of erection and maintenance of the pillars, it was not subject to any other form of liability. This is a sweeping claim. An arrangement between two contracting parties, Jersey City and defendant, could not annihilate rights in the street of a third party, the general public. To admit that would be to make city ordinances the arbiters of and superior to the negligence law of the State.

From the wording of the ordinance, fixing the size of the pillars, placing them approximately ten feet from the curb, and creating three lanes of travel along the street, it is plain that the

main purpose of the highway, its use by the traversing public, was preserved.

The ordinance defines the rights *inter se* between the city and defendant, prescribing conditions under which the latter may preserve its easement, and conditions under which it might lose the easement, and these matters are particular to the contracting parties. Apart from contractual relations between defendant and the municipality, there remain the obligations of defendant so to conduct its operations and so to maintain its pillars that neither by omission or commission should it inflict injury on the public having a right in the street.

"A railroad corporation, by its very incorporation under the laws of the State, assumes as one of its primary obligations that it shall operate the road under such conditions as to properly secure the safety of the general public." *Muntz v. Algiers & G. Ry. Co.*, 35 So. 624.

Opdyke v. Public Service Railway Company, 78 Law 576, states:

"It is well settled that one who places an authorized 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 damaged."

"Travel by the public is the primary purpose of a highway." *Boone v. Clark*, 214 S. W. 607.

Durant v. Palmer, 29 New Jersey Law 544, says streets and sidewalks are presumed to be free from obstructions to the full width, and a person injured by reason of an excavation is not bound to show ordinary care, unless the defendant shows that the excavation was guarded by a light or railing, or in some other way, to warn the public of the danger.

North Jersey Street Railway Co. v. Morhart, 64 New Jersey Law 236, holds that even if a street is lawfully obstructed, the licensee owes a duty to exercise reasonable care that the obstruction made by it does not injure persons lawfully using the highway for passage.

Thus we have the accepted generalization, that persons given exceptional privilege in a street, as making an excavation, laying an obstructing hose across, maintaining a bridge, running cars over tracks, etc., have a double obligation, one, observing the municipal regulations governing the privilege, and, second, exercising reasonable care in use of the privilege, as affecting rights of others lawfully in the street. The fundamental reason for the second obligation does not change when the privilege may be for a day, a week, a year, or, as in the instant case, an indefinite time.

Defendant draws a distinction in its favor because it is in exclusive possession of the street spaces on which the pillars stand, whereas in the *Opdyke*, *Cochran* and other cited cases, there was a joint use of the street by the public and persons having a special privilege in the street. This is a distinction which does not run deep. Exclusive possession does not give immunity from the rule. A trolley company uses the street jointly with the public. If a trolley car became stalled on the tracks on a dark night it would for the time be in exclusive possession of part of the street. But it would remain under the obligation to the traveling public of having red or other lights on it, or in some reasonable manner warn the traveling public of its dangerous presence. So, also, when there is license granted to lay a hose across the street, or otherwise obstruct it, or to make an excavation, the posses-

sion of the used space is exclusive in the licensee during exercise of the license. But the obligation still remains of reasonable guarding, lighting or other suitable warning under the circumstances, so that people lawfully using the street may not come to harm through negligence of the licensee.

"It has been held that natural persons, who assume no public duties, are liable if they suffer their property to remain in a dangerous condition; as that the occupier of land is bound to fence off a hole or area upon it which adjoins or is so close to a highway that it may be dangerous to passers-by if left unguarded. The same rule has often been extended to turnpike roads, where the statute made no provision for liability of the company. And the same rule has been extended generally to railway companies in this country, without question, so far as persons are rightfully in the use of the same." *Redfield on the Law of Railways*, Vol. 1, p. 634.

If an affirmative duty lies to make apparent to the traveling public the existence of a danger spot adjoining a highway, how much more emphatic is that duty where a pillar stands in a street in the direct path of travel!

Facilitation of travel and traffic, and the free interchange of ideas and commodities, untrammelled as far as may be, are inextricably bound up with civilization, and hence with law. Conceptions of legal obligations have their origin in social necessities. The essence of a public highway is the openness of the thoroughfare, the word "thorough" here having its derivative meaning of "through." On land and sea, in lanes of travel, there being diversification and fullness of use, there have grown up necessities of warning, by lights, sound and otherwise, to

apprise of the occupation of space in the path of traffic, and these have legal recognition. There is legal sanction for the public assumption of the unobstructedness of a thoroughfare, unless reasonable attention is drawn to the obstruction. As an inescapable corollary, there arises the affirmative obligation to surround the obstruction with warning of its existence. Warning comes through the senses, usually sound or sight, most often the latter. Sight brings up the matter of visibility, and where that is an obligation, and there is evidence of insufficiency, the question of the degree and propriety of visibility becomes one for the jury.

If defendant's contention is correct, namely, that its single general obligation was to keep the pillars from falling, that it owed no duty of appraisal to people lawfully in the street, then it is logical to say that the defendant could assume a position of unconcern, be oblivious to the presence of others, act with its pillars regardless of whether or not people lawfully in the street knew of their existence. If it owed no duty to keep the pillars apparent and visible, it could rightfully make them non-apparent and invisible, and still keep within the requirements of its ordinance. If there were a paint that had the quality of totally absorbing light, which is the scientific desideratum in making an object not discernible, and if this paint were cheap and durable, the defendant could follow the way of economy and use this paint on its pillars and make them invisible. This would be a right following logically upon defendant's contention, if that contention is sound. We have here the classicist example of *reductio ad absurdum*. The spectacle of a steel pillar, strong enough to support a railway, placed in the forefront of traffic

in a public street, invisible, making a trap to invite destruction and death, does not commend itself to legal support. Neglect of lighting or other warning, combined with the drizzle and darkness to be expected along the Atlantic coast, and present in this case, can well approximate invisibility.

There is no right to render a pillar in a street invisible, though the pillar be there lawfully, and this negation is of course founded on the affirmance that there is the duty of preserving visibility. Following the line of the decision of our courts, in a disputed case, there being evidence of negligence, the degree of visibility or other warning requisite under the circumstances from the viewpoint of reasonableness, is for the jury.

Geise v. Mercer Bottling Company, 87 Law 224, says:

"There is, of course, no absolute duty on the part of one using the highway to observe defects and obstructions therein, but the duty exists of making such observation as the circumstances of the case reasonably require, and this is a question for the jury."

The driver of an automobile, along a publicly traveled street, with no previous intimation of an unusual situation, is not expected in a sudden emergency, when instants are precious, to draw on his reminiscences or calculate with mathematical nicety and precision, the relative positions of obstructions. An obvious menace should be attended with equally obvious warning.

Defendant urges it never attempted any special lighting on the pillar, hence cannot be held for insufficient lighting. Also that there were no other accidents. Its failure to take precau-

tions under misapprehension of duty is its own risk, and sparseness of accident speaks for its good fortune, not in its defense.

Respectfully submitted,

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Plaintiff-Appellee.

CHARLES WAGNER,
Of Counsel.

