

I N D E X

	PAGE
Summons .....	1
Complaint.....	2
Answer .....	11
Reply.....	14
Rule Directing Entry of Judgment Upon Postea	15
Postea .....	17
Plaintiff's Opening .....	18
Motion for Non-suit on Plaintiff's Opening....	27
<b>JUDGMENT</b>	<b>28A</b>
Notice of Appeal and Ground.....	29

JUDGMENT

SUMMONS.

(Filed October 7, 1927.)

COUNTY OF CAPE MAY, SS:

*The State of New Jersey, to Atlantic City Railroad  
Company:* 10

You are summoned to answer the annexed complaint of Ada M. Lennon, administratrix *ad prosequendum* of the estate of DeWitt L. Lennon, deceased; Ada M. Lennon, administratrix *ad prosequendum* of the estate of Marion DeWitt Lennon, deceased; Oliver Lennon, and John Graham; in an action at law in the New Jersey Supreme Court;

And, take notice, that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you. 20

Witness, HONORABLE LUTHER A. CAMPBELL, ESQUIRE, Justice of our Supreme Court, at Cape May Court House, this 21st day of September, A. D. 1927.

EDWARD J. KELLEHER, 30  
Clerk.

BLEAKLY, STOCKWELL & BURLING,  
Attorneys.

## COMPLAINT.

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

ADA M. LENNON, adminis-  
tratrix *ad prosequendum*  
of the Estate of DEWITT  
L. LENNON, deceased;  
ADA M. LENNON, admin-  
istratrix *ad prosequen-*  
*dum* of the Estate of  
MARION DEWITT LEN-  
NON, deceased; OLIVER  
LENNON and JOHN GRA-  
HAM,

*Plaintiffs,*

v.

ATLANTIC CITY RAILROAD  
COMPANY,

*Defendant.*

Action at Law.  
Complaint.

30

The plaintiffs, Ada M. Lennon, administratrix *ad prosequendum* of the estate of Dewitt L. Lennon, deceased, duly appointed by the Surrogate of the County of Cape May on the 29th day of April, 1927, of the Borough of Whitesboro, County of Cape May and State of New Jersey; Ada M. Lennon, administratrix *ad prosequendum* of the estate of Marion

DeWitt Lennon, deceased, duly appointed by the Surrogate of the County of Cape May on the 29th day of April, 1927, of the Borough of Whitesboro aforesaid; both of the decedents at the time of their death, being also residents of the Borough of Whitesboro, County of Cape May, and State of New Jersey; Oliver Lennon, of the City of Atlantic City, County of Atlantic and State of New Jersey; and John Graham, of the Borough of Whitesboro, County of Cape May and State of New Jersey, demand of the defendant corporation damages as follows: 10

First count, being the complaint of Ada M. Lennon, administratrix *ad prosequendum* of the estate of DeWitt L. Lennon, deceased:

1. The plaintiff, Ada M. Lennon, has been appointed by the Surrogate of the County of Cape May, State of New Jersey, as administratrix *ad prosequendum* of the estate of the late DeWitt L. Lennon, and has been duly qualified and is now acting as such administratrix. 20

2. On the 18th day of October, 1925, the defendant was, and still is, a corporation existing under the laws of the State of New Jersey, and operating its trains through the Township of Galloway and the City of Egg Harbor, in the County of Atlantic and State of New Jersey. 30

3. On October 18th, 1925, at about 6.30 P. M., the plaintiff's intestate was operating his automobile in a general easterly direction on Liverpool Avenue, a public highway in the Township of Galloway, County of Atlantic and State of New Jersey, at or

near its intersection or junction with the tracks of the defendant company.

4. At the time aforesaid, the defendant company permitted its tracks adjoining said Liverpool Avenue to be improved and graded in such a manner as to present the appearance of being a public or private street or highway continuing across the tracks of the defendant company, and that the defendant  
10 had created such an appearance, whereby lawful users of said Liverpool Avenue were invited to cross the tracks of the defendant company.

5. At the time aforesaid, the defendant maintained its tracks in the form of a public or private crossing, intersection or roadway as a continuation of Liverpool Avenue aforesaid, across its tracks.

6. The plaintiff's intestate was operating his automobile in a careful manner, and entered the crossing of the tracks over the defendant's rails in a careful and cautious manner.  
20

7. At the time and place aforesaid, a train operated by the defendant, its agents, servants, workmen or employes, in a general northerly direction from Atlantic City to Camden, approached the public or private crossing, or implied crossing previously described, and the said train was being operated in a negligent manner in the following respect, that is to say:  
30

(a) It gave no warning signal of its approach to the place aforesaid, either by blowing of the whistle or ringing of the bell, in accordance with the statute in such case made and provided.

(b) It was being operated at an excessive and unreasonable rate of speed under the circumstances.

(c) In the operation of the train, the agents, servants, workmen or employes of the defendant company failed to observe the rights of lawful users of said public or private crossing or intersection or implied crossing or intersection.

(d) In the operation of the said train, the agents, 10  
servants, workmen or employes of the defendant  
company failed to use reasonable diligence to discover the plaintiff's intestate and the occupants of the said automobile in a position of peril and take precautions to avoid collision with said automobile.

8. The defendant corporation was likewise negligent in that:

(a) The said crossing or intersection or condition 20  
was maintained by the defendant corporation with  
no lighting facilities to warn lawful users of the  
public highway aforesaid of the danger of this crossing.

(b) It failed to maintain a watchman in charge  
of the said crossing or condition, warning gates to  
guard the approach of the crossing or condition, or  
other device to protect the public in general and the  
plaintiff's intestate and the occupants of the auto- 30  
mobile aforesaid, in accordance with the statute in  
such case made and provided.

(c) It failed to protect a crossing or condition  
which was in the nature of a dangerous trap by a  
fence or signs warning users of Liverpool Avenue  
aforesaid, of the danger existing thereon.

9. By reason of this collision and the negligence aforesaid, the plaintiff's intestate, DeWitt L. Lennon, was instantly killed by the said train of the defendant corporation at the said time and place.

10 The plaintiff further avers that the deceased, DeWitt L. Lennon, was the husband of the plaintiff, administratrix, Ada M. Lennon; that he was a strong and healthy young man, twenty-three years of age, earning a substantial income at his vocation as a tailor, and the plaintiff and her three surviving minor children were solely dependent upon him for support, and by reason of his death have suffered and will suffer severe financial loss, and the care and guidance of a father and husband.

20 The plaintiff, Ada M. Lennon, therefore demands of the defendant, as administratrix *ad prosequendum* of the estate of DeWitt L. Lennon, deceased, for the benefit of the widow and next of kin of said DeWitt L. Lennon, deceased, damages in the amount of twenty-five thousand dollars (\$25,000.00).

Second count, being the complaint of Ada M. Lennon, administratrix *ad prosequendum* of the estate of Marion DeWitt Lennon, deceased:

30 1. The plaintiff, Ada M. Lennon, repeats each and every allegation in the first count as paragraph 1 of the second count, with the same force and effect.

2. The plaintiff, Ada M. Lennon, mother of Marion DeWitt Lennon, has been duly appointed by the Surrogate of Cape May County, State of New Jersey, administratrix *ad prosequendum* of the estate of Marion DeWitt Lennon, a minor, age seven years,

and has duly qualified and is now acting as such administratrix.

3. The decedent, Marion DeWitt Lennon, was a passenger in the automobile driven by the decedent, DeWitt L. Lennon, at the time and place aforesaid, and had no control whatever over the operation of the said automobile.

4. By reason of the negligence aforesaid, the decedent, Marion DeWitt Lennon, was instantly killed by the said train of the defendant at the said time and place. 10

The plaintiff, Ada M. Lennon, administratrix *ad prosequendum* of the estate of Marion DeWitt Lennon, therefore, demands of the defendant, for the benefit of the next of kin of said Marion DeWitt Lennon, deceased, damages in the amount of twenty thousand dollars (\$20,000.00). 20

Third count, being the complaint of John Graham :

1. The plaintiff repeats each and every allegation in the first count as paragraph 1 of the third count, with the same force and effect.

2. At the time of the occurrence aforesaid, the plaintiff, John Graham, was a passenger in the automobile driven by the decedent, DeWitt L. Lennon, but had no control whatever over the operation of the said automobile, and the driver, DeWitt L. Lennon, was not at the time and place aforesaid operating the automobile on any mission or as the servant or at the request of the said John Graham. 30

3. By reason of the negligence aforesaid, the plaintiff, John Graham, received a fracture of the leg, suffered injury to his head, bruises, lacerations and contusions over his entire body, and suffered a permanent shock to his nervous system, and other injuries of an external and internal nature, some of which are permanent in character.

10 4. By reason of these injuries, the plaintiff has suffered and will in the future suffer considerable pain; has required and will require hospital, medicines and medical treatment to effect a cure of said injuries; has lost and will in the future lose considerable time from his place of employment; sustained other damages on account of injuries to his clothing and incidental expenses, and received injuries permanent in character.

20 The plaintiff, John Graham, therefore, demands of the defendant damages in the amount of fifteen thousand dollars, (\$15,000.00).

Fourth count, being the complaint of Oliver Lennon:

1. The plaintiff repeats each and every allegation in the first count as paragraph 1 of the fourth count, with the same force and effect.

30 2. At the time and place aforesaid, the plaintiff, Oliver Lennon, was a passenger in the automobile driven by the decedent, DeWitt L. Lennon, but had no control whatever over the operation of the said automobile, and the said decedent, DeWitt L. Lennon, was not at the time and place aforesaid operating said automobile on any mission or in any service of the plaintiff, Oliver Lennon.

3. By reason of the negligence aforesaid, the plaintiff received fractures of both feet, requiring amputation of two toes on the right foot, and compound fracture of the right foot and ankle, severe injury to the right shoulder blade, and lacerations and permanent sprain of the ligaments of the right shoulder and neck, fracture of the right collar bone, and other bruises, contusions and lacerations over his entire body, as well as other external and internal injuries, some of which were permanent in character, and has suffered a complete nervous breakdown. 10

4. By reason of the negligence and the injuries aforesaid, the plaintiff, Oliver Lennon, has suffered and will suffer in the future considerable pain; has required and will in the future require medicines, hospital and medical treatment to effect a cure of said injuries; has expended and will expend various sums of money in obtaining said treatment; has lost and will in the future lose considerable time from his place of employment, resulting in loss of earnings; has suffered and sustained other damages on account of injuries to his clothing, and incidental expenses, and received injuries permanent in character. 20

The plaintiff, Oliver Lennon, therefore, demands of the defendant, damages in the amount of twenty-five thousand dollars (\$25,000.00) 30

BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Plaintiffs.*

[ENDORSED]

Duly served, September 24th, A. D. 1927, on Atlantic City Railroad Company by delivering and leaving with H. W. Narr, agent, a true copy of the annexed summons and complaint, at office, foot of Mechanic Street, City of Camden, N. J.

10

Walter T. Gross,  
Sheriff.

By John Campbell,  
Special Deputy Sheriff.

\$3.62 Sheriff fees.

I hereby depute and appoint John Campbell to execute the within writ. Witness my hand and seal this 23 day of September A. D. 1927.

20

(Seal)

Walter T. Gross,  
Sheriff Camden Co.  
By J. Daniel Tilba,  
Under Sheriff.

Received

September 22, 1927, 11.09 A. M.

Walter T. Gross,  
Sheriff.

30

ANSWER.

(Filed October 13, 1927.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

ADA M. LENNON, adminis-  
 tratrix *ad prosequendum*  
 of the Estate of DEWITT  
 L. LENNON, deceased;  
 ADA M. LENNON, admin-  
 istratrix *ad prosequen-*  
*dum* of the Estate of  
 MARION DEWITT LEN-  
 NON, deceased; OLIVER  
 LENNON and JOHN GRA-  
 HAM,

*Plaintiffs,*

v.

ATLANTIC CITY RAILROAD  
 COMPANY,

*Defendant.*

Action at Law. 20  
 Answer.

30

Defendant, Atlantic City Railroad Company, an-  
 swering the plaintiff's complaint, says that:

1. It has no knowledge of the facts alleged in  
 paragraph 1 of the first count and paragraph 2 of

the second count of the complaint, and, therefore, demands proof thereof.

2. It admits paragraph 2 of the first count.

3. It denies all the other allegations of plaintiff's complaint.

## AFFIRMATIVE DEFENSE.

Defendant, further answering, says that:

1. At the time complained of, the decedents, DeWitt L. Lennon and Marion DeWitt Lennon, and plaintiffs, Oliver Lennon and John Graham, undertook to cross defendant's tracks despite the fact that the approaching train was ringing its bell and had blown its whistle in the way required by law.

2. Decedents, DeWitt L. Lennon and Marion DeWitt Lennon, and plaintiffs, Oliver Lennon and John Graham drove upon defendant's tracks and stalled their car, without any negligence on the part of the defendant.

3. Said decedents and said plaintiffs undertook to drive their car across defendant's tracks at a place which was not a public crossing.

4. Said decedents and said plaintiffs undertook to drive their car across defendant's tracks at a place which was not a private crossing.

5. Said accident was caused without any negligence on the part of defendant, and without any

failure on the part of defendant to comply with its full duty in the premises.

6. Said accident was caused wholly through the negligence of said decedents and said plaintiffs.

THOMPSON & HANSTEIN,  
*Attorneys for Defendant.*

10

20

30

## REPLY.

(Filed October 25, 1927.)

## NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

20	ADA M. LENNON, adminis- tratrix <i>ad prosequendum</i> of the Estate of DEWITT L. LENNON, deceased; ADA M. LENNON, admin- istratrix <i>ad prosequen-</i> <i>dum</i> of the Estate of MARION DEWITT LEN- NON, deceased; OLIVER LENNON and JOHN GRA- HAM, <div style="text-align: right;"><i>Plaintiffs,</i></div>	Action at Law. Reply.
	v.	
	ATLANTIC CITY RAILROAD COMPANY, <div style="text-align: right;"><i>Defendant.</i></div>	

30

The plaintiffs deny each and every affirmative allegation in the answer of the defendant, and join issue thereon.

BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Plaintiffs.*

RULE DIRECTING ENTRY OF JUDGMENT  
UPON POSTEA.

(Filed January 17, 1930.)

NEW JERSEY SUPREME COURT. 10  
CAPE MAY COUNTY.

---

ADA M. LENNON, adminis-  
tratrix *ad prosequendum*  
of the Estate of DEWITT  
L. LENNON, deceased;  
ADA M. LENNON, admin-  
istratrix *ad prosequen-*  
*dum* of the Estate of  
MARION DEWITT LEN-  
NON, deceased; OLIVER  
LENNON and JOHN GRA-  
HAM,  
*Plaintiffs,*

v.

ATLANTIC CITY RAILROAD  
COMPANY,  
*Defendant.*

Action at Law.  
Rule Directing Entry  
of Judgment Upon  
Postea.

20

30

---

It appearing that judgment has not been entered upon the attached postea within ten days after the first day of the term next after which the trial was

16      *Rule Directing Entry of Judgment  
                 Upon Postea*

had in said cause, and satisfactory cause having been shown to the Court therefor;

It is upon consent of the attorneys for the respective parties, ordered this 16th day of January, 1930, that said postea be filed within ten days hereof and judgment forthwith entered, in accordance with the terms thereof.

LUTHER A. CAMPBELL,  
*Justice of Supreme Court.*

10

It is hereby stipulated by and between the attorneys for the plaintiffs and the defendant that judgment may be entered upon this postea, despite the fact that more than ten days have elapsed after the first day of the term next in which said trial took place.

BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Plaintiffs.*  
THOMPSON & HANSTEIN,  
*Attorneys for Defendant.*

20

30

POSTEA.

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

---

ADA M. LENNON, adminis-  
tratrix *ad prosequendum*  
of the Estate of DEWITT  
L. LENNON, deceased;  
ADA M. LENNON, admin-  
istratrix *ad prosequen-*  
*dum* of the Estate of  
MARION DEWITT LEN-  
NON, deceased; OLIVER  
LENNON and JOHN GRA-  
HAM,

*Plaintiffs,*

v.

ATLANTIC CITY RAILROAD  
COMPANY,

*Defendant.*

Action at Law.  
Postea.

10

20

---

This action was tried before Circuit Court Judge, 30  
Hon. William F. Sooy, and a jury at the Cape May  
County Circuit, on April 10, 1929. Plaintiff moved  
to amend the complaint in said cause by the adding  
of the following additional statement, to be known  
as paragraph 8c:

“It failed to protect a crossing or condition

which was in the nature of a dangerous trap, near and adjacent to a public thoroughfare, by a fence, signs or other device to give warning of the danger existing thereon to lawful users of the adjacent public highway, namely, Liverpool Avenue."

Said motion was granted and the complaint ordered to be amended accordingly. After the impan-  
10 eling of the jury and the oath of office was duly administered, the attorneys for the plaintiffs opened the case of the plaintiffs to the jury. Thereupon, a motion for a non-suit at the instance of the defendant was made. After due consideration thereof, the Court granted said motion. An exception to the Court's action was prayed by and allowed to the defendant.

The opening of the attorneys for the plaintiffs and the reasons assigned on the motion of the non-suit  
20 by the attorneys for the defendant are attached hereto.

W. F. Sooy,  
*Judge of Cape May County  
Circuit Court.*

30

---

PLAINTIFF'S OPENING.

Mr. Burling: With the permission of the Court, I would like to present Mr. John Williams, of the Philadelphia Bar, who is associated in this matter.

The Court: Mr. Williams, we are glad to have you with us.

Mr. Burling: With the permission of the Court, ladies and gentlemen of the jury:

This is a cause of action commonly known to the Court and attorneys as a tort action. It grows out of what we allege was misconduct in the non-performance of duties that the defendant, the Atlantic City Railroad Company, a corporation of this State, owed to the parties who are plaintiffs in this cause. It is a suit that arose out of an accident that occurred in the Township of Galloway in the County of Atlantic, 10 in the State of New Jersey, on the 18th day of October, 1925. The suit was instituted on the 21st day of September, 1927.

The accident occurred in this fashion, and I will endeavor to outline it to you according to the status of the parties plaintiff and the respective positions they occupy and the claims that they make and the relief they ask at your hands.

The accident occurred on a Sunday, about 6.30 at night, Eastern Standard Time. A party by the name of DeWitt Lennon, living at Whitesboro, Cape May County, New Jersey, a place that you folks are no doubt familiar with, had driven a Ford, a tudor sedan, to Atlantic City to meet his brother, Oliver Lennon, who resided at Atlantic City. It was DeWitt Lennon's intention to take his brother, Oliver Lennon, from Atlantic City to his, DeWitt's, home at Whitesboro. He arrived at Atlantic City, obtained his brother, and started back to Whitesboro. DeWitt Lennon continued to drive the automobile and had 20 alongside of him on the front right-hand seat his son, Marion DeWitt Lennon, who was about three or four years old, and in the rear left-hand seat, directly in back of the driver, was Oliver Lennon, and alongside of him on the rear seat was a passenger, a friend of DeWitt Lennon's, namely, John Graham. In returning to Whitesboro, they, by mistake, turned 30

from Pleasantville to the White Horse Pike, instead of proceeding directly on the road to Mays Landing. When they arrived at a point in Egg Harbor on the White Horse Pike, they stopped and inquired as to the proper road to take to reach Mays Landing. They were informed to take the first road to the left and continue on across the railroad to Mays Landing. They passed what was known on the plans as Philadelphia Avenue, and came to a street which is known  
10 as Liverpool Avenue that runs at right angles to the White Horse Pike, and beyond that, in the direction toward Camden, was the road that they should have taken to Mays Landing, but by mistake they made their left-hand turn at the wrong street. After they made the left-hand turn from the White Horse Pike into Liverpool Avenue, which was a public highway, they continued on in the direction of Mays Landing, crossed over the Pennsylvania Railroad, which  
20 passed Liverpool Avenue at a grade crossing, and they continued on down Liverpool Avenue, and they reached a point on Liverpool Avenue where the tracks of the defendant, Atlantic City Railroad Company, intersect the same. They were strangers to this general locality, and they proceeded on their way and passed over what afterwards developed to be the first and second tracks of the railroad company that intersect Liverpool Avenue, and onto a third track, which was the main northbound track, and immediately as they got onto that track, a speeding  
30 express train going to Philadelphia, ran into and struck the automobile. The result of the impact was that the driver, DeWitt Lennon, was almost instantly killed, after having been carried up the tracks some two or three hundred feet, and his young son was likewise killed. The two men in the back seat were thrown in some fashion out of the tudor sedan and were not struck the full force of the blow of the

engine that struck the forward part of the automobile, and they fortunately survived, although they both sustained injuries that will be outlined to you in a few moments.

The suit that has been brought in this matter contains four counts, and represents the claims of Ada M. Lennon, as administratrix *ad prosequendum* of the estate of DeWitt L. Lennon, deceased, against the defendant for damages growing out of the death of DeWitt L. Lennon; the second count of Ada M. Lennon as administratrix *ad prosequendum* of the estate of Marion DeWitt Lennon, for damages growing out of the death of said Marion DeWitt Lennon; the third count being the complaint of John Graham for damages that he sustained as the result of the negligence of the defendant for injuries and losses to be later referred to; and the fourth count of Oliver Lennon for damages for injuries which he sustained and other losses to be later referred to.

It is our contention in this matter that the plaintiffs are entitled to recover under the following state of facts: It will develop from the evidence to be presented in this case that at the time of the acquisition by the railroad of its right of way, there was a plan indicating Liverpool Avenue as a continuous street intersecting a street known as Alloes Avenue. The defendant in this case acquired as part of its own right of way what was known as Alloes Avenue, by deed. The map indicates Liverpool Avenue as being a continuous street intersecting Alloes Avenue, and continuing to the southwest thereof. No act of vacation or relinquishment of the rights of the public to treat Liverpool Avenue as a continuous street intersecting Alloes Avenue, as set forth on said plan, seems to have ever been made by the municipality having jurisdiction over said highways. For several years, however, no attempt has been

made by the railroad to maintain this intersection as a public crossing, nor upon the part of the public to utilize it as such. At this intersection, there are four tracks maintained by the railroad company, the easterly two of which are maintained as sidings for the purpose of loading and unloading freight by those interested in this respect, and these tracks were maintained at the same level and of the same nature of material (dirt) as Liverpool Avenue. The  
10 remaining two tracks to the west of those immediately referred to, were the main line tracks for express and local travel between Atlantic City and Camden, and are constructed on stone ballast and the bed of the road of these is maintained at a level with the cross ties leaving the rails entirely exposed. In the space between the second track of the siding and the first (or easterly) of the main lines, there was a gradual slope of the level of the ground  
20 to the base of the stone ballast for the main line tracks.

The distance between the rails of the most easterly track (one of the sidings) was five feet, three inches. The distance between the western rail of the first track and the eastern rail of the second track was five feet, one inch. The distance between the rails of the second track, likewise five feet, three inches, and the distance between the western rail of the second track and the eastern rail of the third  
30 track, or the northern-bound track on the main line was eighteen feet.

No warnings of any kind were maintained by the railroad company, indicating to the public that it construed the situation as a private crossing or private land. No lights, fences or guards were maintained at that particular time either by the railroad or the municipality to warn of this point of

danger, into which a stranger could be easily lured. These persons travelling along Liverpool Avenue, not having knowledge of the situation, the first two tracks being level with the top of the rails, and in the space between the second track of the siding and the first (or easterly) of the main lines, there being a gradual slope of the level of the ground from a grade equivalent to the top level of the rail to the base of the stone ballast for the main line tracks, proceeded on until they came to the track which was not level (third track) which stalled their car and left them in the path of immediate danger from the train coming from Atlantic City to Philadelphia. 10

Eliminating the question as to whether the railroad company did not owe to the public a duty to maintain the intersection of its tracks with Liverpool Avenue as a public crossing, it is submitted, first, whether the defendant did not, by implied invitation, invite the public by its conduct and treatment of the rails that have been heretofore described, on to its tracks and thereby owed a duty to maintain such tracks in good repair and free from any dangerous condition into which unsuspecting persons making use of said tracks, might be lured. As a result of the failure of the performance of such duty, the automobile of the plaintiff, DeWitt Lennon, became stalled and the deaths and injuries ensued hereinbefore referred to. Second assuming that the tracks of the Atlantic City Railroad Company were upon its own private property, its own right of way, and that it was not required to maintain Liverpool Avenue as a public grade crossing, still the defendant is liable to the plaintiffs in this matter, because it created and maintained this place of danger upon its own property so near to the termination of Liverpool Avenue and 20 30

in such a manner as to endanger those who passed along the way in the exercise of ordinary caution, which resulted in the automobile in which these parties were riding, being ensnared into this dangerous condition that the railroad maintained, thereby stalling the automobile of the plaintiff, DeWitt Lennon, and resulting in the damage, deaths and injuries hereinbefore referred to. We contend that by the permissive use which the railroad allowed of  
10 tracks one and two (the sidings) and the maintenance of the road bed thereof at the grade level of Liverpool Avenue, it created a trap and an alluring condition which, without notice and without any knowledge of the conditions, persons using Liverpool Avenue would be led into. Plaintiffs in this case, as a result of the failure of the defendant to protect and guard against this condition, sustained the disastrous result hereinbefore referred to.

It will also appear in this case that there was  
20 failure on the part of the railroad company to either ring a bell continuously or sound a steam whistle beginning at a distance at least three hundred yards from the intersection. There was no notice brought to the attention of the folks who were driving happily across this intersection of this pitfall that existed and which caused the death of two of these parties.

We believe that if we can satisfy you under these several phases or one of them, of the duties as we consider them to rest upon the railroad company in  
30 this matter, that we will be entitled to a verdict at your hands for its failure to perform according to law the obligations it owed to the parties that are involved in this suit.

The man who was killed was a man with a family of four small children. He was a tailor by trade; as I say, a resident of this county for I think a number of years at Whitesboro. At times he also

tried to earn some additional money by doing some building work in that particular community. He was the bread earner of the widow and these four children at that time. Of course, one of them was taken by death, leaving the widow and three children surviving, who have no other means of support, no other means of income than that which he was able to produce. The widow subsequently was required to go to her home in the south and have aid and comfort and support from her immediate family because of the fact that her bread earner and support were removed as the result of this particular accident. 10

There is a second count growing out of the death of this child of four years of age, by the administratrix *ad prosequendum*, through the machinery set up by the law for the pecuniary loss and deprivation by the death wrongfully of that child. There are also two other counts, each by one of the two men who were in the back of the car and who were injured as the result of the accident. 20

One of these men was a bell-hop at one of the hotels in Atlantic City, and he was injured to such an extent that he was deprived of following an occupation that netted him considerable; because in addition to his salary at the hotel, of course he had, as you know, the tips which were lucrative, and he was deprived of his earnings there at that hotel for some time. He has returned to his employment now, I understand, and I think the medical testimony will probably show that he does have permanent injuries as the result of the situation. 30

Graham, the other occupant of the car, was not so seriously injured. He has brought suit for such injuries as he sustained in the car, but I think he makes no contention of a permanent nature as an outcome of the situation. That will be developed,

of course, by his testimony and the aid of medical people who attended him at the time.

If we can satisfy you of the premise in this matter of our right to recover, we shall ask at your hands a verdict for these respective plaintiffs for such sums as you feel proper under the law of this State to compensate those who have been deprived of the person whose death has occurred, and of the child in the matter, and as to the others for such sums as  
10 the injuries, pain and suffering, and their loss of income warrant at your hands in consideration of the evidence in the case.

20

30

MOTION FOR NON-SUIT ON PLAINTIFFS' OPENING.

(Filed January 17, 1930.)

NEW JERSEY SUPREME COURT.

10

CAPE MAY COUNTY.

ADA M. LENNON, administratrix *ad prosequendum* of the Estate of DEWITT L. LENNON, deceased; ADA M. LENNON, administratrix *ad prosequendum* of the Estate of MARION DEWITT LENNON, deceased; OLIVER LENNON and JOHN GRAHAM,

*Plaintiffs,*

v.

ATLANTIC CITY RAILROAD COMPANY,

*Defendant.*

20

Action at Law.  
Motion for Non-Suit on Plaintiffs' Opening.

30

Defendant moves for a non-suit on the following grounds:

1. The plaintiff does not offer to prove any negligence on the part of the defendant.

2. The plaintiff does not offer to prove that the defendant failed to perform any act which it was obliged to perform, nor does the plaintiff offer to prove that the defendant did anything which it was not legally justified in doing.

10

3. The plaintiff does not offer to prove that the alleged accident took place at a grade-crossing on a highway.

20

4. The offer of testimony by the plaintiff is that the plaintiff, or plaintiff's intestate, drove along Liverpool Avenue in the direction of the defendant's railroad tracks, and then went upon the defendant's tracks, at a point where there was no crossing, the point at which the plaintiff's intestate undertook to cross the tracks being a pile of ballast upon which was laid a row of ties to which the railroad tracks were fastened. All of which was well above the grade of the adjacent land, and all of which was obviously the right of way of the railroad.

30

5. The defendant had no duty to the plaintiffs, except to ring a bell and blow a whistle at a public crossing, and the opening shows that the point of the accident had not been maintained as a public crossing, nor did the public utilize it as such.

6. The plaintiff, or plaintiff's intestate, crossed two siding tracks of the defendant company before entering upon the main line, at which point the accident took place.

JUDGMENT.

NEW JERSEY SUPREME COURT.

ATLANTIC CITY RAILROAD Co.,	}	Action at Law. On Postea.	10
<i>Defendant,</i> ads.			
ADA M. LENNON, Admrx. <i>ad pros.</i> etc., of DEWITT L. LENNON, decd., ADA M. L. LENNON, Admrx. <i>ad</i> <i>pros.</i> , etc., of MARION DE- WITT LENNON, decd., OLIVER LENNON and JOHN GRAHAM,	}		20
<i>Plaintiffs.</i>			

It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiffs, Oliver Lennon and John Graham, with costs to be taxed *nisi*.

Entered January 17, 1930. On motion of 30  
THOMPSON & HANSTEIN,  
*Attorneys.*

Costs against plaintiffs, O. Lennon  
and J. Graham \$

A true copy.

FRED L. BLOODGOOD,  
*Clerk.*

IN SENATE

19

Mr. [Name]

20

... of the ...  
... of the ...  
... of the ...  
... of the ...  
... of the ...  
... of the ...  
... of the ...  
... of the ...  
... of the ...  
... of the ...

It is ordered that judgment of nonsuit be and  
he be in out of favor of defendant and against  
the plaintiff, with costs and disbursements with  
costs to be taxed.

30

On motion of

Johnson & Hartman  
Attorneys

Wm. [Name]  
[Name]  
[Name]  
[Name]  
[Name]

NOTICE OF APPEAL AND GROUND.

(Filed January 20, 1930.)

NEW JERSEY SUPREME COURT.

CAPE MAY COUNTY.

10

ADA M. LENNON, adminis-  
 tratrix *ad prosequendum*  
 of the Estate of DEWITT  
 L. LENNON, deceased;  
 ADA M. LENNON, admin-  
 istratrix *ad prosequen-*  
*dum* of the Estate of  
 MARION DEWITT LEN-  
 NON, deceased; OLIVER  
 LENNON and JOHN GRA-  
 HAM,

*Plaintiffs,*

v.

ATLANTIC CITY RAILROAD  
 COMPANY,

*Defendant.*

Action at Law. 20  
 Notice of Appeal and  
 Ground.

30

*To Thompson & Hanstein, Attorneys of Defendant,  
 or to whom it may concern,*

Sirs:

Please take notice that the plaintiffs in the above

entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit:

1. Because the Supreme Court erred in giving judgment to the defendant, pursuant to the defendant's motion for non-suit, based upon the plaintiffs' opening of their case to the jury, to which an exception was prayed by and allowed to the plaintiffs.

Respectfully yours,  
BLEAKLY, STOCKWELL & BURLING,  
*Attorneys for Plaintiffs.*

Service of the within notice of appeal and ground thereof is hereby acknowledged this 18th day of January, 1930.

THOMPSON & HANSTEIN,  
*Attorneys for Defendant.*

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ADA M. LENNON, adminis-  
 tratrix *ad prosequendum*  
 of the Estate of DeWITT  
 L. LENNON, deceased;  
 ADA M. LENNON, admin-  
 istratrix *ad prosequen-*  
*dum* of the Estate of  
 MARION DeWITT LEN-  
 NON, deceased; OLIVER  
 LENNON and JOHN  
 GRAHAM,  
*Plaintiffs-Appellants,*  
 v.  
 ATLANTIC CITY RAILROAD  
 COMPANY,  
*Defendant-Appellee.*

Action at Law.  
Stipulation.

10

20

Counsel for the respective parties hereto stipu- 30  
late as follows:

(1) That a map prepared by servants of the de-  
fendant on July 27, 1926, be and the same is hereby  
agreed to be added as a supplement to the State of  
the Case in this cause.

(2) Plaintiffs claim that the street light shown at the intersection of Liverpool Avenue with defendant's right of way upon said map, was not there located at the time of the alleged accident, the map in question having been made some time after the accident.

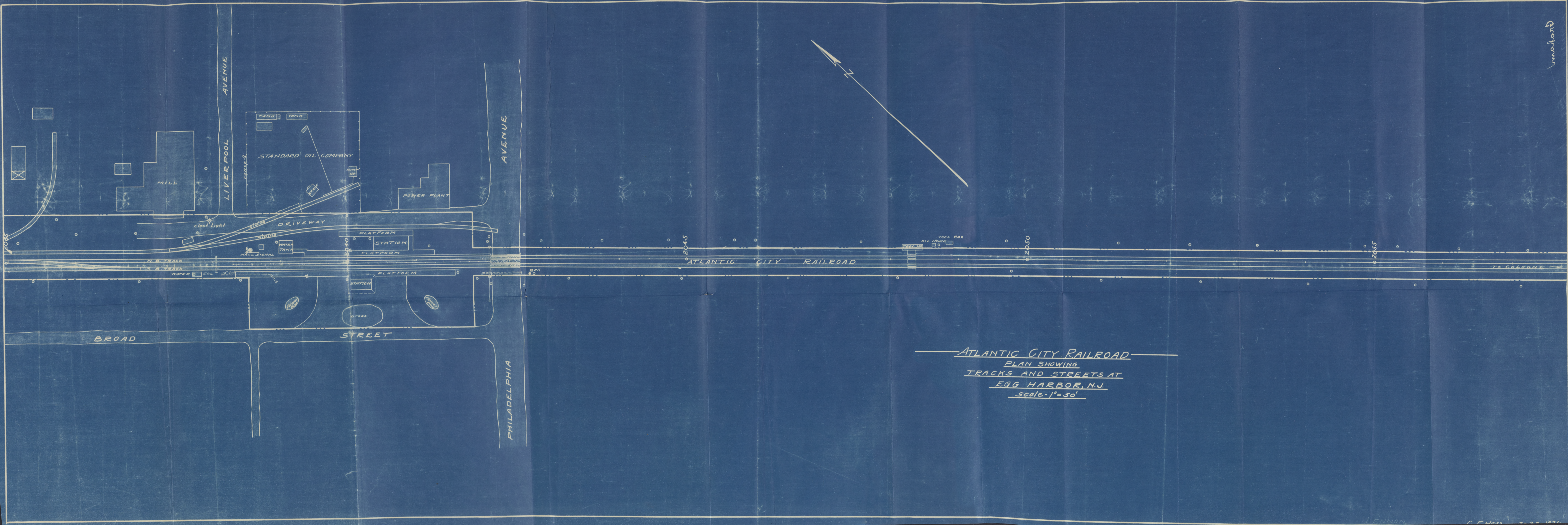
10

BLEAKLY, STOCKWELL & BURLING,  
*Solicitors for and of Counsel  
with Plaintiffs-Appellants.*

THOMPSON & HANSTEIN,  
*Solicitors for and of Counsel  
with Defendant-Appellee.*

20

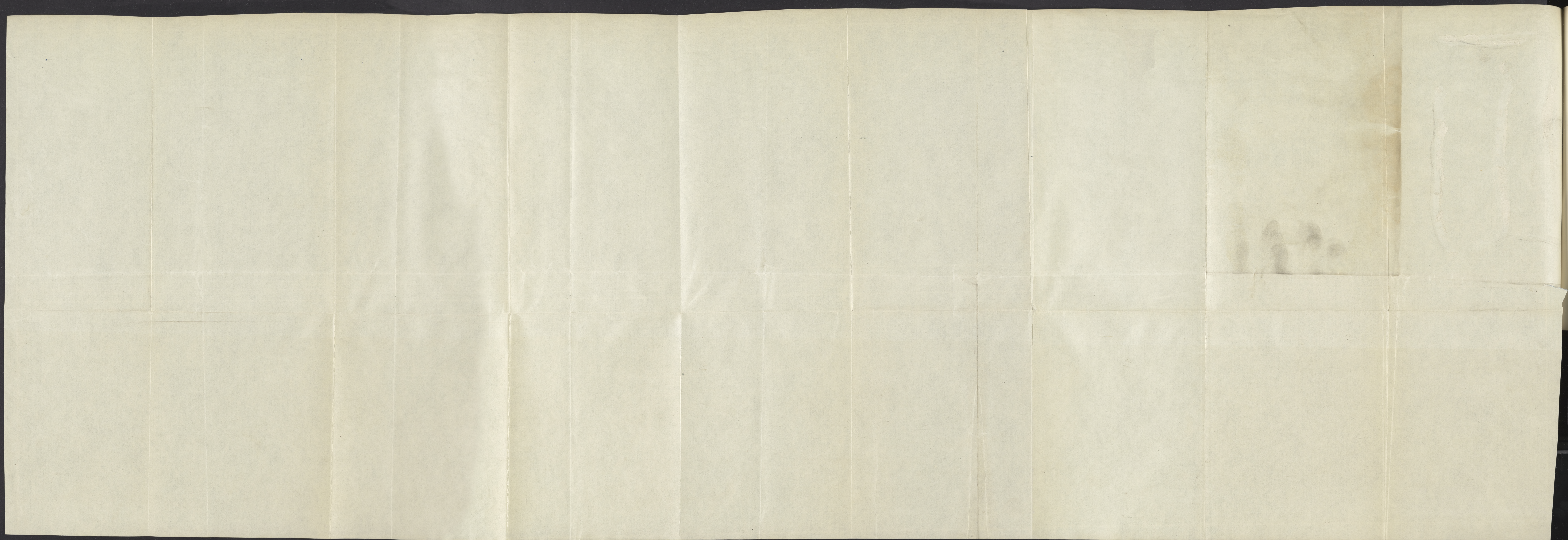
30



ATLANTIC CITY RAILROAD  
 PLAN SHOWING  
 TRACKS AND STREETS AT  
 EGG HARBOR, N.J.  
 scale - 1" = 50'

G. F. HARRIS  
 1926

LENNON  
 G. F. HARRIS  
 1926



*Stipulation*

STIPULATION.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

---

ADA M. LENNON, adminis- tratrix <i>ad prosequendum</i> of the Estate of DEWITT L. LENNON, deceased; ADA M. LENNON, admin- istratrix <i>ad prosequen-</i> <i>dum</i> of the Estate of MARION DEWITT LENNON, deceased; OLIVER LEN- NON, and JOHN GRAHAM, <i>Plaintiffs-Appellants,</i>	}	Action at Law. Stipulation.	10
v. ATLANTIC CITY RAILROAD COMPANY, <i>Defendant-Appellee.</i>			20

---

Counsel for the respective parties hereto stipulate as follows:

It appears by inadvertence that in the preparation and printing of the State of the Case in this cause, the judgment record was not made a part thereof. Consent is hereby given that the same may be at this time added to and made a part of the State of the Case in this cause. 30

THOMPSON & HANSTEIN,  
*Solicitors for and of Counsel  
with Defendant-Appellee.*

BLEAKLY, STOCKWELL & BURLING,  
*Solicitors for and of Counsel  
with Plaintiffs-Appellants.*

THE HISTORY OF THE UNITED STATES

10

of the

23

30

of the

of the

of the

of the

of the

of the

of the

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

---

ADA M. LENNON, *Administratrix ad prosequendum*  
of the Estate of DEWITT L. LENNON, deceased,  
ADA M. LENNON, *Administratrix ad prosequendum* of the Estate of MARION DE-  
WITT LENNON, deceased, OLIVER  
LENNON and JOHN GRAHAM,  
*Plaintiffs-Appellants,*

v.

ATLANTIC CITY RAILROAD COMPANY,  
*Defendant-Appellee.*

---

ACTION AT LAW.

---

ON APPEAL FROM SUPREME COURT.

---

BRIEF FOR PLAINTIFFS-APPELLANTS.

---

This appeal reviews a judgment of the Supreme Court entered at the Cape May Circuit in favor of the defendant, upon defendant's motion for a non-suit granted at the conclusion of plaintiffs' opening.

## STATEMENT.

The action below is one for personal injuries, arising out of a collision between a train of the defendant and an automobile in which were riding DeWitt L. Lennon, actually killed in the accident, Marion DeWitt Lennon, also killed in the accident, and Oliver Lennon and John Graham. The accident is to recover for the deaths of the two persons who were killed and for personal injuries to the two other plaintiffs, who survived the accident. The place of the accident was in Egg Harbor, Atlantic County, and at the end of a street known as Liverpool Avenue. There was no established public crossing at Liverpool Avenue, but the circumstances justifying this action were recited in plaintiffs' opening and are substantially as follows:

The occupants of the automobile were unacquainted with Egg Harbor in general and Liverpool Avenue in particular. The accident occurred at 6:30 P. M., Eastern Standard time. The occupants of the car, excepting Oliver Lennon, lived in Cape May County and had on this Sunday gone to Atlantic City to visit Oliver, a brother of DeWitt Lennon, and to take Oliver back to DeWitt's home in Whitesboro, Cape May County. In returning to Cape May County in the late afternoon or early evening, by a misunderstanding, the occupants of the car proceeded from Atlantic City on to the White Horse Pike and then learning of their mistake inquired in Egg Harbor as to the location of the road which would take them from Egg Harbor to Mays Landing and then into Cape May County. They were directed by the person from whom they inquired to

“take the first road to the left and continue on across the railroad to Mays Landing.”

This they endeavored to do and after passing one street entered the second street, which is known as Liverpool Avenue, turned to the left and proceeded in a southwesterly direction along this public street, crossing over the tracks of the Pennsylvania Railroad at the public crossing at Liverpool Avenue and continuing on Liverpool Avenue toward the tracks of the Atlantic City Railroad. Liverpool Avenue is not only a street, as shown upon the maps of that municipality, but is graded and houses and other buildings are located on either side of it. Liverpool Avenue runs approximately at right angles to the right of way of the defendant railroad at that point. While it developed after the accident that there was no recognized public crossing of the defendant's tracks at Liverpool Avenue, there was nothing in the character of the surroundings or in the appearance of the street or of the crossing, indicating to a stranger approaching that crossing, that Liverpool Avenue ended at the defendant's tracks. Before defendant acquired its right of way, there was a street known as Alloes Street, which ran at right angles to and connected with Liverpool Avenue. The bed of Alloes Street later became a part of defendant's right of way. This part of defendant's right of way was graded and was used for loading and unloading freight in connection with two spur tracks of defendant. To a stranger approaching the defendant's tracks along Liverpool Avenue at an hour and under the conditions shown in this case, the situation indicated that Liverpool Avenue extended over defendant's tracks.

The tracks of the defendant are four in number at this point. The northernmost track is a siding or

spur and the second track is also a siding track, and tracks 3 and 4 are the eastbound and westbound main tracks of the railroad.

On the evening in question, Liverpool Avenue merged into what is claimed by defendant as a part of its right of way, but which gave to those unacquainted with the locality every appearance of being a public graded street. The grading, which was similar to that of Liverpool Avenue, was extended right up to and over the first spur track, covered the space between the rails of that track and space between the first spur track and space between the rails of track No. 2. The gravel or sand grading then sloped gradually until it reached the base of the stone ballast of the main tracks, to wit: Nos. 3 and 4. In other words, to these plaintiffs who were strangers to the location, Liverpool Avenue appeared to continue as a public street to and over the defendant's tracks. There was no sign placed anywhere on the company's property or in this vicinity to warn users of Liverpool Avenue that it did not extend to and across the defendant's tracks. There was no light maintained at that point to show up the real conditions.

DeWitt Lennon, one of the two persons killed, was driving the car. The car approached what was supposed by its occupants to be a public crossing, proceeded without warning upon and over the first and second tracks, the spaces between the rails being graded with materials similar to that of Liverpool Avenue, over which they had approached the crossing. Then the wheels of the car came down upon the first rail of the northbound main track and the shock stalled the engine. Before they could extricate themselves from this predicament, they were struck by defendant's locomotive proceeding from Atlantic City to Philadelphia.

There was no bell at Liverpool Avenue, there was no gate, fence or other obstruction or warning which would have put the occupants of the car upon their guard or which would have prevented them from entering upon defendant's tracks at the end of this public street. Nor was this dangerous location lighted.

By plaintiffs' opening, it was also claimed that there was no bell rung and no whistle blown by defendant's engine at least 300 yards from this intersection.

Upon counsel for the plaintiff concluding his opening, defendant counsel made his motion for a nonsuit (found on page 28 of the Record), the gist of defendant's contention being that there was no public crossing at Liverpool Avenue and that for that reason defendant owed no duty to the plaintiffs to ring a bell or blow a whistle or otherwise.

On the other hand, plaintiffs contend:

1. That the plaintiffs, upon implied invitation of the defendant, continued along Liverpool Avenue to the point where it merged with the right of way of the defendant and, by the same implied invitation, crossed the intervening tracks and on to the north-bound main track of the railroad.

2. That the defendant created, maintained and left exposed a place of danger adjoining or so near to a public road, to wit, Liverpool Avenue, as to be dangerous to persons lawfully using it in the exercise of ordinary care; in short, that plaintiffs were lured by the acts of the defendant into a place of great danger upon defendant's property, while they were using, lawfully, a public highway and exercising ordinary care.

## ARGUMENT.

No testimony was taken. A motion for non-suit was made and that motion was granted immediately upon the conclusion of plaintiffs' opening. We submit that that judgment of non-suit was erroneous, plaintiffs believing that the evidence which would have been produced by them within the limits of the opening of their counsel raised questions which should have been submitted to a jury.

## I.

THE FACTS, WHICH COULD HAVE BEEN ESTABLISHED BY LAWFUL TESTIMONY FROM THE PLAINTIFFS, WOULD HAVE SHOWN THE PLAINTIFFS TO HAVE ENTERED UPON DEFENDANT'S TRACKS AND INTO THE PLACE OF DANGER BY IMPLIED INVITATION OF THE DEFENDANT.

The defendant, by its conduct with reference to the intersection of its right of way and tracks with Liverpool Avenue, maintained this portion of its right of way, tracks and the approach thereto in a condition having all the appearance of a public crossing to one unfamiliar with the locality. The public road merged into the highway without anything to indicate where the public road ended or the right of way began and that condition continued to and over the intervening tracks until one came upon the main northbound track. The plaintiffs were not supposed to consult a map and ascertain where the

public highway ended. That highway had come from a main thoroughfare, to wit, White Horse Pike, over a public crossing of the Pennsylvania Railroad tracks and the natural inference would be, to one unacquainted with this particular location, that the public street likewise continued and crossed over the defendant's tracks. The two tracks, immediately adjacent to the end of the public road, were used as side tracks or spurs and the ground was levelled off not only within the limits of Liverpool Avenue as projected, but along what was formerly known as Alloes Street. This presented a situation which brings it within the principle of that rule of negligence, known as implied invitation.

*Furey v. New York Central & Hudson River Railroad Co.*, 67 N. J. L. 270, &c. This Court, in the cited case, states the rule in the following language:

“Implied invitation is part of the law of negligence by which an obligation to use reasonable care arises from the conduct of the parties; its essence is that the defendant knew, or ought to have known, that something that he was doing or permitting to be done might give rise in an ordinarily discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended.” Page 275.

*Black v. Central Railroad*, 85 N. J. L. 197, &c. The plaintiff, in the cited case, was driving along a way which,

“if not a street, had very much the appearance of one. It was a continuation of a city street. It was paved like a street, etc.”

The Court then said:

“If, therefore, the way in question presented the appearance of being a street, the defendant had created such appearance and was, therefore, responsible for the consequences, one of which was that persons generally might use the way in the belief that it was what it appeared to be. As to such users the liability of the defendant, arising out of the appearance so created by it, would be the same as if such street actually was what it appeared to be, under the rule that ‘one who holds out a way as a public street is liable.’ Such liability is based not upon the land owner’s dedication of the street and its acceptance by the public, but upon the appearances he has created, so that the question for the jury is not whether such acts of the owner were proof of an intention to dedicate a public street, but whether they had created an appearance calculated to induce the public to use the way in the belief that it was what it appeared to be” (Page 200).

And further:

“Although the fundamental principle that underlies this doctrine is that of estoppel, it is generally treated under the head of implied invitation, thereby distinguishing it from express or inferred invitation, which is limited to those having business with the owner of lands or upon his premises” (Page 200).

And further:

“Under the doctrine of implied invitation the negligence of the defendant, as also that of the plaintiff, were clearly for the jury” (Page 202).

The same principle is dealt with in the following:

*Webb v. West Jersey & Seashore Railroad*,  
100 N. J. L. 204 (Sup. Ct.);

*Van Noordt v. D. L. & W. Railroad* (E. &  
A.), 95 N. J. L. 219;

*Phillips v. Library Co. of Burlington* (E. &  
A.), 55 N. J. L. 307.

*Nolan v. Bridgeton and Millville Traction Co.* (E.  
& A.), 74 N. J. L. 559, where this Court again states  
the rule:

“By the settled law of this State, an owner  
or occupier of lands, who, by invitation, express  
or implied, induces persons to come upon the  
premises, is under a duty to exercise ordinary  
care to render the premises reasonably safe for  
such purposes.”

And further:

“The gist of the liability in such cases con-  
sists in the fact that the person injured did not  
act merely on motives of his own, to which no  
sign of the owner or occupier contributed, but  
that he entered the premises because he was led,  
by the acts or conduct of the owner or occupier,  
to believe that the premises were intended to be  
used in the manner in which he used them, and  
that such use was not only acquiesced in, but  
was in accordance with the intention or design  
for which the way or place was adopted and  
prepared or allowed to be used” (Page 561).

Plaintiffs' offer of proof in the present case ten-  
dered to show that the intersection in question, to  
wit, the intersection of defendant's right of way with  
Liverpool Avenue, had all of the indicia of a con-

tinuation of a public street and of a public crossing and such as would lead a traveller upon that highway to believe that it was a continuation of the highway over the railroad. Liverpool Avenue is a graded street of gravel or dirt and this material extended not only up to but across the two spur tracks and then gradually sloughed off to meet the rock ballast of the main tracks. There was a space of only 18 feet between the second spur track and the northbound main track and, as indicated, a part of that space was covered by the gradual slope of the sand and dirt similar to that of the public street. The inference is plain that the extension of Liverpool Avenue as a public highway into the right of way was made by the defendant for the purpose of facilitating its own business upon and in connection with its spur tracks. There was no line of demarcation between public property and private property. There was no barrier or sign or warning of any kind to put the plaintiffs upon their guard in passing along Liverpool Avenue toward and upon the Railroad's right of way. The accident was in the evening and this location was unlighted. Defendant had given to this location and to a stranger approaching the railroad along Liverpool Avenue every appearance of a public crossing.

The remarks of this Court in *N. Y. & L. B. R. R. Co. v. Drummond*, 46 N. J. L., p. 647, are pertinent:

“Now, I think that, where one owning lands at the end of a public street does or suffers acts indicative of an intent to carry such street over such lands, the strong presumption against him and in favor of the public would be in favor of uniformity and against the intent to cut down the dimensions of the extended road. It would be highly reasonable to attribute to him such design in the absence of some

unequivocal sign disclosing a different purpose.”

Also the following statement from *Sweeney v. Old Colony, etc., Rwy. Co.* (1865) 10 Allen (Mass.) 368:

“The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, *using due care, if he has held out any invitation, allurements or inducement, either expressed or implied, by which they may have been led to enter thereon.*”

The Connecticut Supreme Court, in *Croghan v. Schiele* (1885) 53 Conn. 186, dealt with a situation where the defendant had made an extension of a brick sidewalk over the space intervening between its factory and the public street of about ten feet. This space was paved with brick on the same grade as that of the brick sidewalk, the paving was of the same material and there was nothing to indicate where the public walk ended and the defendant's property began. The plaintiff, in walking along this sidewalk at night, walked from this space on to the premises of the defendant and was injured. In that situation, the Court said (page 202):

“We understand the law to be that if a person is induced or allured upon another's premises; the owner or occupier of such premises owes a duty to such person to see that his premises are in a reasonably safe condition, and that this duty attaches to the defendant in reference to the personality of the allured individual.”

And continuing (p. 203):

“If the plaintiff was induced by the defendant

to come, or allured, upon the defendant's land, it is not necessary for the plaintiff to claim that a highway existed, either actual or imputed, as against this defendant. But if the defendant had dedicated to the public a right of passage, or had so constructed his sidewalk as to induce people to believe that the public right of way existed, and, therefore, as to a person so supposing and acting thereon, that public right should be held to exist, this condition would have a very material bearing upon the question of allurement or inducement. For if there was an apparent public way, a person, though not strictly a traveler, has a right to proceed upon the assumption that guards against dangers are provided co-extensive with the apparent purpose and use of the way."

## II.

PLAINTIFFS' CASE SHOULD HAVE BEEN SUBMITTED TO THE JURY ALSO UPON THE THEORY THAT THE DEFENDANT CORPORATION HAD CREATED AND MAINTAINED A HIGHLY DANGEROUS CONDITION ADJOINING A PUBLIC HIGHWAY OR SO NEAR THERETO THAT A PERSON LAWFULLY AND WITH ORDINARY CAUTION USING THAT HIGHWAY MIGHT FALL OR BE ALLURED INTO IT TO HIS INJURY.

Plaintiffs contend that the defendant created and maintained upon its own property, but near to Liverpool Avenue, what was virtually a trap to a stranger in the community and unacquainted with the surroundings. We have already shown that defendant

had given to this intersection every appearance of a public thoroughfare and crossing. By plaintiffs' opening it was shown that defendant had by deed acquired the bed of Alloes Street, which at one time, at least on the map, occupied the space to the south of Liverpool Avenue and connected with it. But the defendant, railroad company, had acquired this Alloes Street, so that its right of way brought Liverpool Avenue to a dead end at the property line of defendant's right of way. However, instead of placing a sign or similar warning to the travelling public that Liverpool Avenue ended at that invisible and unmarked division line, it graded and maintained what appeared to be a continuation of Liverpool Avenue right up to and across the first two tracks of its railroad. By this false appearance, plaintiffs were led on to the northbound track and into a place of imminent danger.

The general principle involved is thus laid down in 14 A. L. R. 1409-10:

"If unusual conditions exist, so that a traveller on the highway is likely to be confused or deceived, and to wander upon adjoining premises thinking he is following the line of the highway, the adjoining property owner, according to some of the authorities, may be held liable for injuries due to the condition of the adjacent premises, even though the traveller must have wandered some distance from the highway before the injury occurred.

The true test, it has been said, is not the distance from the highway of the dangerous object or place, but whether the traveller in passing along the highway and exercising ordinary care would be subjected to such imminent danger that it would require a barrier to make the highway safe."

The real condition of the intersection was concealed. That real condition came as a startling and disastrous surprise. Plaintiffs were lured into a trap from which they were not able to escape before being struck by defendant's locomotive.

The language of *Latham v. Johnson* (1913), 1 K. B. 415, is applicable:

“A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger.”

The space within the limits of Liverpool Avenue extending from the unmarked property line of defendant's right of way to and over the first two tracks of the defendant was at the same level and made of the same materials as Liverpool Avenue proper. The spaces between the rails of each of the first two tracks and the space between the rails of the first track were graded to the level of the top of the rails, and then from the south or west rail of the second track this material sloped down toward the ballast of the main track. The distance between the rails of the most easterly track (one of the sidings) was 5 feet, 3 inches. The distance between the west rail of the first track and the east rail of the second track was 5 feet, 1 inch. The distance between the rails of the second track, likewise 5 feet, 3 inches, and the distance between the west rail of the second track and the east rail of the third or main track was 18 feet. Plaintiffs' car passed over Liverpool Avenue, crossed the spur tracks at grade and in the fraction of a second had dropped down to the rail of the northbound track, thus stalling the car and placing it and its occupants in the path of defendant's train.

The facts as they were recited in plaintiffs' open-

ing bring this case within the authorities cited below:

*Temperance Hall Association v. Giles*, 33 N. J. L., page 260 (Supreme Court).

The principle is laid down in this case as follows:

“An area, opening into a public footway, or so near thereto that a person, lawfully using the way, with ordinary caution, might, by accident, fall into it, is, per se, a nuisance; and only ceases to be such, when proper means are adopted, either by enclosing it, or maintaining a light to warn persons of danger, to guard against the occurrence of such accidents.”

(Citing

*Barnes v. Ward*, 9 M., G. & S. 392;  
*Housell v. Smythe*, 7 C. B. N. S. 731;  
*Hardcastle v. The S. G. & R. D. Co.*, 4 H. & N. 67;  
*Binks v. The same*, 3 B. & S. 244;  
*Hadley v. Taylor*, L. R. 1 C. P. 53  
*Durant v. Palmer*, 5 Dutcher 544).

In *Vanderbeck, et al. v. Hendry*, 34 N. J. L. 467, the same Court distinguished the facts of the cited case from cases like the one now before the Court, in the following language (P. 471):

“The public duty could arise, if at all, only by reason of the proximity of the falling lumber to Wayne Street or to the gangway. Wayne Street is a public highway; the gangway is not. The place of the injury was fifty-four feet from the street, and, besides, the plaintiff did not reach it directly from the street. The case cannot, therefore, be brought within the principle

governing excavations and places of danger, made and left exposed on land adjoining a legally existing public way, so near thereto as to be dangerous to persons lawfully using it in the exercise of ordinary care."

And again, in *State v. Society, etc.*, 42 N. J. L. 506:

"On the other hand, many cases establish or recognize the doctrine that an excavation adjoining a public highway, or so near thereto that a person, lawfully and with ordinary caution, using the way, might, by accident, fall into it, is per se a nuisance, and only ceases to be such when proper means are adopted to guard against the occurrence of such accidents."

*Daneck v. Penna. R. R. Co.* (E. & A.) 59 N. J. L. 415, at page 417:

"The doctrine invoked is that an unguarded excavation upon land outside a public highway, but so near it as to endanger those who pass along the way in the exercise of ordinary caution, is a public nuisance from which may spring a right of action to one who suffers individual injury therefrom. The doctrine appears to be recognized by the weight of authority."

The Court used (at page 418) the following language:

"What is meant by such proximity is well defined in the following quotation from the opinion in *Harcastle v. South Yorkshire Railway Co.*, 4 Hurlst. & N. 67; 28 L. J. Exch. 139: 'When an excavation is made adjoining a public way, so that a person walking on it might, by making

a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage, who might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different.' "

The present case is plainly distinguishable from the Daneck case last cited. While this Court in the cited case upholds the principle which we believe should rule the present action, yet the facts in the Daneck case were altogether different. In the cited case, the plaintiff was a trespasser. He, of necessity, had to be a trespasser even on the lands of a third party before reaching defendant's property. The character of the ground over which plaintiff had to travel should have shown him that he was off the public highway. It was different in character and grade from that of the highway. The plaintiff had to travel up-grade from the highway and the ground over which he had to travel from the highway to the point of danger was entirely different from the character and level of the ground within the highway. In the present case, however, the accident was at the end of and not off the side of a public highway. There was no visible point of division between the end of the highway and defendant's property. Plaintiff was proceeding along at the same level, over the same kind of material, and within the limits of the highway if it had been technically extended. The plaintiffs were travelling by automobile and not by horse, and a fraction of a

second took that automobile from the level grade of the roadway, as it existed at and over the spur tracks, to the ungraded and unprotected main track. Darkness had just fallen and there was no light on the highway or adjacent to the tracks to show up the point of danger.

We direct the Court's attention to the outstanding fact in the present case, namely, that the point of danger was *not* off to the side of the street, but at the end of a street and upon ground to all appearances a continuation of that street. In short, a public highway always has a limited *width*, but is supposed to continue in length to some point and not to be abruptly cut off without some warning given to the travelling public of the place where the road actually ends.

The principle laid down in *N. Y. & L. B. R. R. Co. v. Drummond*, 46 N. J. L. 647, and previously cited in this brief, is also applicable here:

"Now, I think that, where one owning lands at the end of a public street does or suffers acts indicative of an intent to carry such street over such lands, the strong presumption against him and in favor of the public would be in favor of uniformity and against the intent to cut down the dimensions of the extended road. It would be highly reasonable to attribute to him such design in the absence of some unequivocal sign disclosing a different purpose."

*Beck v. Carter*, 68 N. Y. Reports, page 283:

"If the owner of land make an excavation thereon adjacent to a highway, or so near as to make the use of the highway unsafe or dangerous, he will be liable to a traveller who, while using ordinary care, falls into it and is injured.

So, also, where the owner of land expressly or by implication invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who at the time is exercising ordinary care, such owner is answerable for the consequences."

*St. Louis & S. F. Ry. Co. v. Ray*, 65 Okla. 214, 165 Pac. Rep. 129.

There, the railway company had suffered a pit, created by the burning down of a grain elevator, to remain unguarded on a portion of its right of way in the City of Perry, Oklahoma. Before the elevator burned, spur tracks from the main tracks nearby had been run up to where the elevator stood and a path or roadway led from the public street to this point. The plaintiff wandered off of the main road adjoining this pit, on to the extension which led to the pit, and fell into it. The evidence tended to show that the night was dark and that the plaintiff mistook the extension of the highway which had been made by the railroad company for the main highway. The result was that he walked directly into the pit and was injured. The Court said (p. 130):

"It was the theory of the plaintiff that both the railroad company and its tenant, Miller, were guilty of negligence in permitting this pit or excavation to remain open and unguarded, and that the path or roadway leading from the street to the property was an invitation or lure to the plaintiff, or any other traveller on the street, to pass upon this property, and in so doing they were liable to fall into the pit and be injured, and that such an accident was liable

to happen, and ought to have been contemplated by the railroad company and Miller, and that it was negligence not to do so, and such negligence was the proximate cause of his injury."

The Court then lays down the rule as follows (as shown by the headnote):

"Where a cause of danger to public travel exists on private land adjoining a public highway, the liability of the owner of the land for the injury from it *depends on its dangerous character with reference to public travel, rather than to its exact location. The question whether it endangers public travel is as a general rule one of fact and not of law.*"

It then cites numerous authorities in support of the principle sustaining the judgment in favor of the plaintiff. Among the authorities cited in the last mentioned case are the two next mentioned:

*Young v. Harvey*, 16 Ind. 314, where defendant dug and left exposed a pit on his uninclosed lot near the street. Plaintiff's horse fell into the pit and was killed. In holding the owner liable, the Court said:

" 'If the probability' that such an accident might happen from thus leaving the pit exposed 'was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard that community from the danger to which the pit exposed its members, in person and property, he is liable to an action for loss occurring through his neglect to perform that duty.' "

*Wharton on Negligence*, par. 349:

"Nor am I justified in making excavations

either in the path which I have permitted other persons to traverse, or so near a public road that travelers in the ordinary aberrations or casualties of travel may stray or be driven over the line and be injured by falling into the excavations."

We assume that the defendant will cite in support of its theory, *Pennington v. Director General Railroads*, decided by our Supreme Court, 1922, 97 N. J. L., p. 40. As we understand that authority, it in no way undertakes to overrule or impair the principles laid down by that Court and by the Court of Errors and Appeals in the cases already cited in this brief. In the cited case, plaintiff passed along a highway in West Collingswood, on a dark, foggy night, and instead of turning into an intersecting street which paralleled the right of way of the railroad, he made a mistake in the darkness and drove his car over an embankment and down onto the tracks of the defendant company. The opinion expressly states that plaintiff knew

"Grant Avenue did not cross the railroad but connected at its westerly end with a street or highway bordering the railroad right of way" (page 41).

And the opinion further states that plaintiff

"expected to turn parallel with the railroad into this other street, but miscalculated in the fog and the darkness, and his car ran partly down a slight embankment, the front wheels stopping about at the nearest rail and the hind wheels on the slope."

Here was no situation unknown to plaintiff. Plaintiff, for reasons undisclosed, failed to use his per-

sonal knowledge of the conditions at that intersection, and, whether intentionally or otherwise, became a trespasser upon the railroad company's property. There was no showing of a condition in the nature of a trap. Grant Avenue, to plaintiff's knowledge, ended without crossing the railroad and turned into a connecting street, paralleling the railroad. The Court, therefore, held that:

“In this situation plaintiff was a trespasser on the right of way; whether intentionally or not does not matter; and hence the defendant owed him no duty of care, in the legal sense of the word.”

All of the elements which are cited in this brief as making of this locality a trap and a snare to the plaintiffs and other members of the traveling public are absent from the cited case and, in addition, as already shown in the cited case, the plaintiff failed to use his own knowledge of the locality to guide him properly and keep him within the limits of the public highway.

In the present case, there is no fact or circumstance which can bring plaintiffs within the category of trespassers. They were upon defendant's property because of defendant's failure to mark the line between the public highway and its own right of way or to give any sign or warning of a change from a public way to private property.

Plaintiffs, therefore, respectfully submit that their offer of proof in this case was such as to require the submission of that case to the jury. The jury was entitled, upon plaintiffs' evidence when submitted, to determine:

(a) Whether the defendant had by its acts and conduct created an implied invitation to the public

to use this continuation of Liverpool Avenue over defendant's right of way at the point involved;

(b) Whether this invitation was acted upon by the decedent represented in this case and justifiably so;

(c) Whether the defendant had created or maintained an object or place of danger so near to the public highway as to cause one lawfully using that highway to be ensnared or allured into that place of danger to his damage;

(d) Whether or not plaintiffs were in the exercise of proper care at the time of the accident.

All of these questions should have been submitted to the jury. Therefore, we contend that in the ordering of a non-suit error was committed.

Respectfully submitted,

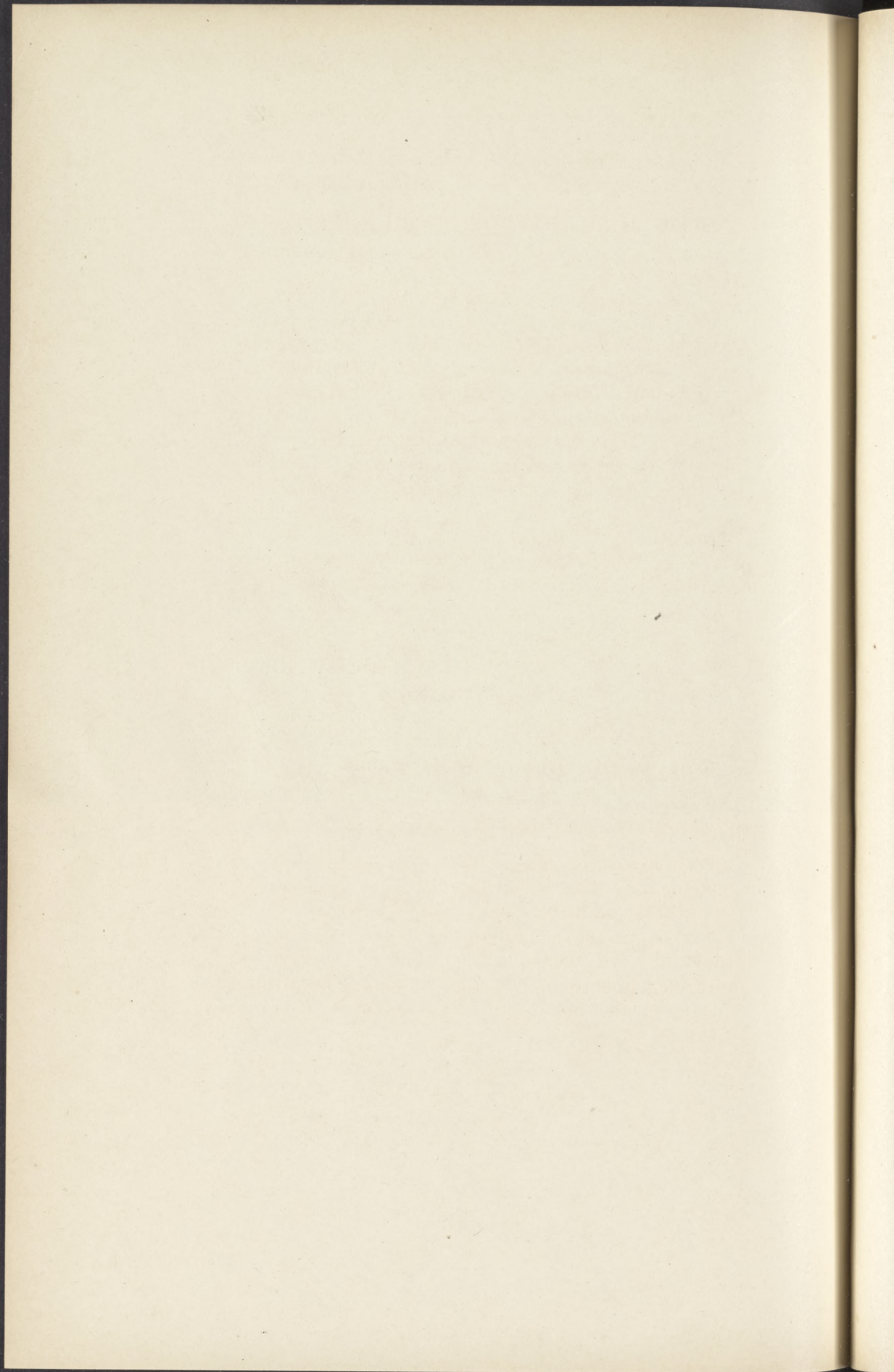
BLEAKLY, STOCKWELL &  
BURLING,

*Solicitors for and of  
Counsel with Plaintiffs-  
Appellants.*

#### SUPPLEMENT TO PLAINTIFFS- APPELLANTS' BRIEF.

By stipulation made between the parties since the preparation of appellants' brief, a map made by defendant and present at the trial, but not used, nor marked as an exhibit, is submitted to the Court to illustrate the location of the accident.

The plaintiffs claim that the street lamp, which is shown on this map at the intersection of Liverpool Avenue with defendant's right of way, was not present on the ground at the time of the accident. The map bears out the opening statement of plaintiffs' counsel to the effect that Liverpool Avenue ended at the intersection with defendant's right of way. This map clearly shows that there is no public highway parallel with the railroad intersecting Liverpool Avenue.



NEW JERSEY COURT OF ERRORS AND  
APPEALS.

---

ADA M. LENNON, *Administratrix ad prosequendum*  
of the Estate of DEWITT L. LENNON, deceased;  
ADA M. LENNON, *Administratrix ad prosequendum* of the Estate of MARION DE-  
WITT LENNON, deceased, OLIVER  
LENNON and JOHN GRAHAM,  
*Plaintiffs-Appellants,*

v.

ATLANTIC CITY RAILROAD COMPANY,  
*Defendant-Appellee.*

---

ON APPEAL.

---

BRIEF FOR DEFENDANT-RESPONDENT.

---

This appeal brings up for review a non-suit at the conclusion of the plaintiffs' opening in an accident case. The plaintiffs were granted permission by the Court to enlarge, as a matter of record, their opening and to have the non-suit stand as against the amended opening. The plaintiffs have accordingly prepared the opening which now appears in the State of the Case.

The respondent contends that the plaintiffs did not offer to prove a cause of action, and that the non-suit was properly entered.

---

STATEMENT.

The plaintiffs' offer, substantially, is to prove that during the night time on the 18th of October, 1925, while it was dark, the plaintiffs drove in their automobile down a street in Egg Harbor, Atlantic County, New Jersey, known as Liverpool Avenue, towards the tracks of the defendant company. Liverpool Avenue stops at the tracks of the defendant company, but meets, at right angles, another street or road, which runs parallel to and contiguous to the tracks of the defendant company. Instead of the plaintiffs making either a right or left turn at the street that is contiguous to the tracks, plaintiffs continued on and undertook to cross the tracks.

The tracks which the plaintiffs undertook to cross are the main line tracks of the railroad running from Atlantic City to Camden. This is a double line of tracks, built in the usual manner of all railroads. There is a bed of stone ballast upon which is a line of ties supporting the rails. There is nothing about the appearance of these tracks at the point where the accident took place to suggest that they are a crossing, either public or private; they are exactly like the tracks of all railroad lines at all open points.

The plaintiffs' car drove up over the ballast and ties, and got between the tracks where, naturally, the motor stalled, and the plaintiffs were unable to extricate it. A train approached shortly thereafter,

struck the car and did the damage for which the suit is brought.

The plaintiffs stress, in their opening, and in the brief, that the defendant had, extending from its main lines, two spur tracks, which bisected Liverpool Avenue somewhere near the tracks, and that these tracks were up to grade.

We submit that upon that offer of proof plaintiffs did not make an offer to show any liability on the part of the defendant.

---

ARGUMENT.

There was no implied invitation. The plaintiffs undertake to construct a case out of earlier adjudications in this State, which, in substance, held that if the defendant gives his private property the appearance of being a street, then he owes to a person upon that street, by that implied invitation, the same duty that he would have owed had there, in fact, been a street at the point in question.

The plaintiffs undertake to build up, under that doctrine, by showing that the two spur tracks which the plaintiffs crossed, were level, giving the appearance of a street. Granted that the plaintiffs did think that the spur tracks were a part of the street, and that they, therefore, concluded that they had a right to cross over them, it is difficult to see by what stretch of imagination, or reasoning, it could be said that that constituted an invitation to cross the tracks of the main line.

Had there been planks laid across the ties and between the tracks, as is often done at private, or other crossings, there would be force to the plain-

tiffs' argument, but regardless of the appearances that led the plaintiffs up to the main line, there was certainly nothing about the main line, or its appearance, to suggest invitation to the plaintiffs. They were exactly like the same lines that everyone sees wherever there are railroad tracks.

There is no novelty in roads running parallel to railroad tracks, and adjoining them, and there is nothing unusual in having streets turn off from such roads at right angles. To adopt the view plaintiffs are contending for here would impose upon every railroad in this State the duty of erecting fences, or other warning devices at the foot of every such street, as warnings to careless users of them.

Nowhere has such a duty been imposed upon railroads.

*Kershaw Motor Co. v. Southern Railway Co.*, 136 S. C. 377, 134 S. E. 377, 47 A. L. R. 858.

And cases cited in the annotation appearing in 47 A. L. R. 863.

A decision of the New Jersey Supreme Court, *Pennington v. The Director General*, 97 N. J. L. 40; 116 Atl. 777, is practically on all fours with the present case. There, as here, the avenue upon which the plaintiff was traveling "did not cross the railroad but connected at its westerly end with a street or highway bordering the railroad right of way." There, as here, the plaintiff mistakenly ran on to the railroad tracks. In this situation the Court said:

"Plaintiff was a trespasser on the right of way; whether intentionally or not does not matter; and hence the defendant owed him no duty of care in the legal sense of the word" (page 41).

It is submitted that the plaintiffs in the present case cannot distinguish their situation from the Pennington case. In the plaintiffs' brief an effort is made to dismiss the Pennington case on the ground that the plaintiff there knew that there was no crossing but made a mistake in judgment in not turning before he reached the point of danger. There are two answers to this argument. In the first place, the Supreme Court did not indicate any special reliance on the plaintiff's knowledge as a reason for its decision. In the second place, there is no substantial distinction between Pennington, who knew that there was no crossing but who, because of weather conditions, *could* not see where he was until it was too late, and Lennon, who did not know in advance that there was no crossing but who *did* not see where he was until it was too late. In both cases the plaintiffs simply made mistakes in failing to observe that they were leaving highways and entering upon railroad rights of way.

The greater excuse for his conduct lies with Pennington whose vision was actually impaired by fog and darkness rather than with Lennon who was driving along the road on a perfectly clear night with the headlights on his automobile lighted. Pennington had more reason to complain of having fallen into a "trap" than did Lennon.

An examination of the cases cited in the plaintiffs' brief will show that in every one holding a defendant liable on the ground of implied invitation, the defendant did something at the very spot where the accident occurred to make it look like a place where the plaintiff had a right to be.

In the Black case (appellants' brief, page 7), the place of injury although railroad property was a continuation of a city street, a complete road in it-

self, paved and maintained just like the street from which it lead. The Court held that these facts created a question for the jury as to whether plaintiff had not been impliedly invited to make use of the place where his injury occurred.

In the Webb case (appellants' brief, page 9), the plaintiff again was using a private road on railroad property and the spot where the injury was suffered was a part of this private road. In this case it was held that the proofs presented a question of fact on implied invitation and a verdict for the plaintiff was sustained.

In the Van Noordt case (appellants' brief, page 9), the plaintiff's injury occurred on a foot bridge maintained by defendant over its right of way. It was held that under these facts the plaintiff was an invitee in making use of the bridge over the railroad property and the defendant was liable for a failure to use due care in the maintainance of the bridge.

In the Phillips case (appellants' brief, page 9), plaintiff was using a path on the defendant's premises when she fell in a well dug by defendant across the path. It was held that a question for the jury was presented on the issue of implied invitation to use the path and a judgment of non-suit was reversed.

In the Nolan case (appellants' brief, page 9), plaintiff was using a road on defendant's premises and fell in a hole in the road. It was held that a jury question was presented on implied invitation and a judgment for plaintiff was affirmed.

In the Drummond case (appellants' brief, pages 10 and 18), the defendant placed planking across its tracks for the use of travelers and it was held that

this was evidence of an intent to dedicate a public passage over the track to the width of the planking.

In all of the above cases it is obvious that the defendants had created appearances of ways or passages where the injury was actually suffered that reasonably led the various plaintiffs to believe that they might lawfully use the apparent ways or passages. In the present case it is undisputed that the plaintiffs' injury was suffered on defendant's railroad tracks that were obviously railroad tracks and nothing more. There was not the slightest suggestion of a way over these tracks at the spot where the plaintiffs were hit.

As in the Pennington case, *supra*, the Kershaw case, *supra*, and the case of *Furey v. New York Central, etc., Railroad Co.*, 67 L. 270 (appellants' brief, page 7), there was nothing on or about defendant's tracks indicating a right of passage over them and under the authority of those cases the judgment of non-suit was proper.

THERE IS NO MERIT TO PLAINTIFFS' CONTENTION THAT THE DEFENDANT MAINTAINED A DANGEROUS CONDITION ADJOINING A PUBLIC HIGHWAY.

The basic proposition that the plaintiffs had to establish in order to give weight to this feature is that the defendant did maintain a dangerous condition. It is hardly likely that the mere existence of railroad tracks can be called a "dangerous condition." They were there by virtue of legal authority; they were there to be seen had the plaintiffs seen fit to look. Plaintiffs' contend that the real condition of the intersection was concealed, and that they

were lured into a trap. There was nothing concealing the situation, nor was there any allurement.

The leading case on this phase of the subject in this State seems to be *Daneck v. Pennsylvania Railroad Company*, 59 N. J. L. 415 (appellants' brief, page 16). At pages 418 to 420, the Court of Errors said:

“We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise, and if, in every case it was to be left, as a fact, to the jury whether the excavation was sufficiently near to the highway to be dangerous \* \* \*. The railway cut was 20 feet or more from the street—it is deemed that the cut did not substantially adjoin the highway, so that by false steps or in surprise at the sudden termination of the highway the plaintiff could have been thrown into it.”

A directed verdict for the defendant was affirmed.

The important words in the above opinion are the words *substantially adjoining*; and the Court holds that, as a matter of law, an excavation 20 feet from the highway cannot be said to be substantially adjoining the highway. The plaintiffs' opening in the present case (State of the Case, page 22), showed the following facts material on this point:

“There are four tracks maintained by the railroad company, the easterly two of which are maintained as sidings \* \* \*. The distance between the rails of the most easterly track (one of the sidings) was five feet, three inches. The distance between the western rail of the first track and the eastern rail of the second track

was five feet, one inch. The distance between the rails of the second track, likewise five feet, three inches, and the distance between the western rail of the second track and the eastern rail of the third track, or the northbound track, on the main line, was eighteen feet.”

The spot where the plaintiffs were struck was, therefore, 33 feet from the first railroad track which the plaintiffs crossed and more than 33 feet from the highway. The Daneck case, *supra*, is, therefore, a clear authority to the effect that, as a matter of law, the railroad tracks upon which plaintiffs were struck could not be said to be “substantially adjoining” the highway.

The plaintiffs drove onto the open tracks of the defendant at a place where they had no right to be. They were trespassers, and as to them, as trespassers, defendant owed no legal duty. The offer to prove that the defendant failed to ring a bell, or blow a whistle, which it is only required to do at highway crossings, was not sufficient to state a cause of action in favor of a trespasser. The nonsuit, therefore, was proper and should be sustained.

THOMPSON & HANSTEIN,  
*Solicitors for and of Counsel with Defendant-Respondent.*

