INDEX,

PAGE.

Rule to Show Cause 1
Summons 2
Complaint 3
Answer 5
Amended Answer 6
Reply to Amended Answer 8

TESTIMONY.

FOR PLAINTIFF:

CLAIRE BIRCH:—
Direct 10
Cross 14
Re-Direct 15
Recalled:
Direct 53

JOHN KILEY:—
Direct 16
Cross 18
Re-Direct 20
Re-Cross 21

PHILOMEN E. HUMMEL:—
Direct 24
Cross 26
Re-Direct 29

GEORGE WALSH:—
Direct 29
Cross 30
Recalled:
Direct 54

PAGE.

JOHN HIERSPIEL:—

Direct 31

Recalled:

Direct 54

Cross 54

ELIZABETH HIERSPIEL:—

Direct 32

Cross 34

FOR DEFENDANT:

FRANCIS GORMLEY:—

Direct 37

Cross 40

Re-Direct 47

HENRY COHENDET:—

Direct 48

Cross 49

HIRAM REED:—

Direct 52

Cross 52

Motion for Direction of Verdict 55

Charge 63

Reasons 79

Exhibit D-1—Ordinance relating to roller skating. Admitted in evidence at p. 53; printed at 78

Postea on Verdict 81

Postea on Rule to Show Cause 82

Notice of Appeal to Court of Errors and Appeals 83

Reasons for Reversal 84

Rule to Show Cause.

New Jersey Supreme Court.

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HUDSON COUNTY.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased, *Plaintiff*, *v.* FRANCIS GORMLEY, *Defendant.*	Action at Law.

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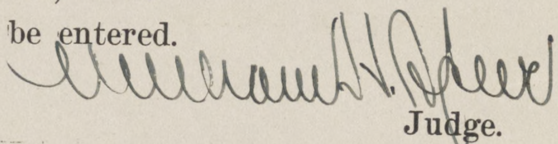
Application having been made to me within six days after the rendering of the verdict in this cause, now on motion of Mark Townsend, Jr., attorney for, and of counsel with the defendant,

It is ordered that the plaintiff show cause before the Supreme Court at the next term, why the verdict in this cause should not be set aside and a new trial granted.

30

It is further ordered that the objections of the defendant with respect to the pertinency of the Ordinance of the Mayor and Aldermen of Jersey City against roller skating are hereby reserved, and the granting of this order to show cause, shall not operate as a waiver to such objections. Dated January 9th, 1919.

Let this rule be entered.



Judge.

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Summons.

The State of New Jersey to Francis Gormley:

You are summoned to answer the annexed Complaint of John Hierspiel, Administrator *ad prosequendum* of the estate of Frank Hierspiel, deceased, in an action at law in the Supreme Court. And take notice that unless you file your answer to said Complaint with the Clerk of the Supreme Court, at Trenton, within 20 days after service upon you of this writ and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

(SEAL)

10

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 8th day of November, 1918.

ENOCH L. JOHNSON,
Clerk.

20

MARSHALL VAN WINKLE,
Attorney.

30

40

Complaint.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased, *Plaintiff,* *v.* FRANCIS GORMLEY, *Defendant.*	Action at Law.

10

Plaintiff, who resides at 259 Fairmount Avenue, Jersey City, in the County of Hudson, says that:

1. He is administrator ad prosequendum of the estate of Frank Hierspiel, deceased, and brings into Court Letters of Administration granted to him upon said estate by the Surrogate of the County of Hudson.

20

2. That on the 21st day of September, 1918, Defendant was the owner of a certain automobile.

3. That at said time said automobile was being operated by defendant, and for the defendant, on Bergen Avenue, near Duncan Avenue, Jersey City, Hudson County, New Jersey.

30

4. That at said time and place it became the duty of defendant to operate his said automobile in a reasonably careful manner so as to avoid injury to persons lawfully upon said avenue, the same being a public avenue in the said City of Jersey City.

5. That at said time and place Frank Hierspiel was on said Bergen Avenue and in the exercise of due care for his safety.

40

6. That at said time and place the said defendant so negligently and carelessly neglected his aforesaid duty that he drove his said automobile on, against and over the said Frank Hierspiel, injurying him so that he thereafter died.

7. That the negligence of the defendant consisted in this: He did not use reasonable care to operate said automobile at a rate of speed safe to persons on said Bergen Avenue, but propelled the same at an excessively high rate of speed; that he did not use reasonable care to give any warning of the approach of the said automobile; that he did not use reasonable care to keep a lookout for persons and vehicles in the vicinity of said automobile; that he did not use reasonable care to keep and maintain control of said automobile so that it might be stopped to avoid injury to persons in the vicinity thereof; that he drove said automobile on the wrong side of Bergen Avenue in violation of the statute and carelessly and unnecessarily.

8. The intestate of the plaintiff left him surviving, who have suffered pecuniary injury by reason of his death, the following next of kin:

John Hierspiel, his father, and Elizabeth Hierspiel, his mother, and brothers and sisters as follows:

Henry	aged	31 years
Phillip	"	27 "
May	"	26 "
Royal	"	21 "
Raymond	"	19 "
John, Jr.	"	18 "
Loretta	"	14 "
William	"	10 "

9. This action is commenced within two years after the death of the said Frank Hierspiel.

Plaintiff demands $10,000 damages.

MARSHALL VAN WINKLE,
Attorney of Plaintiff.

Answer.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased, *Plaintiff,* v. FRANCIS GORMLEY, *Defendant.*	Action at Law.

10

The defendant, Francis Gormley, answering the complaint filed herein, says:

1. He admits the contents of paragraphs 1, 2, & 3 of said complaint.

20

2. He denies the contents of paragraphs 4, 5, 6 & 7 of said complaint.

3. He has no knowledge of the facts alleged in paragraph 8 of said complaint, and for lack of such knowledge, denies the same.

DEFENDANT'S FIRST DEFENSE OF SAID ACTION.

Plaintiff's intestate was guilty of contributory negligence, which was the approximate cause of said accident, and of the injuries resulting in his death.

30

MARK TOWNSEND, JR.,
Attornoey of Defendant.

40

Amended Answer.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased, *Plaintiff*, *v.* FRANCIS GORMLEY, *Defendant*.	Action at Law.

10

The defendant, Francis Gormley, answering the complaint filed herein, says:

1. He admits the contents of paragraphs 1, 2,

20 & 3 of said complaint.

2. He denies the contents of paragraphs 4, 5, 6 & 7 of said complaint.

3. He has no knowledge of the facts alleged in paragraph 8 of said complaint, and for lack of such knowledge, denies the same.

DEFENDANT'S FIRST DEFENSE OF SAID ACTION.

Plaintiff's intestate was guilty of contributory negligence, which was the proximate cause of

30 said accident, and of the injuries resulting in his death.

DEFENDANT'S SECOND DEFENSE OF SAID ACTION.

Plaintiff was guilty of contributory negligence in that at the time of the accident complained of, he was roller skating upon Bergen Avenue, between Communipaw Avenue and Fairmount Avenue, Jersey City, county and state aforesaid, in

40

violation of the provisions of a certain ordinance of the Mayor and Aldermen of Jersey City, passed April 15th, 1907, as follows:

> "An ordinance prohibiting roller skating on a portion of Bergen Avenue.
>
> "The Mayor and Aldermen of Jersey City, by the Board of Street and Water commissioners for and on behalf of the municipality of said city, do ordain as follows: 10
>
> "Whereas it has been satisfactorily evidenced that the certain form of sport known and designated as roller skating, has in its practice on a part of Bergen Avenue, become a source of damage and nuisance to owners and occupants of property abutting thereon, therefore be it ordained
>
> "Section I. That roller skating on Bergen Avenue between Communipaw Avenue and Fairmount Avenue, is hereby prohibited, and that any violation of this ordinance shall 20 subject the offender thereof on conviction before a Police Magistrate to a fine of not exceeding five ($5) Dollars."

That the proximate cause of the accident complained of, and of the injuries resulting in the death of plaintiff's intestate, was the violation of the provisions of the ordinance aforesaid.

MARK TOWNSEND, JR.,
Attorney of Defendant.

I hereby consent to defendants amending his 30 answer as above set forth, and to the filing of the same as within time.

MARSHALL VAN WINKLE,
Attorney of Plaintiff.

40

Allen vs. Jay, 60 Me. 124, 11 Am. Rep. 185;

Guilford vs. Chenango County Supers, 13 N. Y., 143;

Brewster vs. Syracuse, 19 N. Y,. 116;

Baldwin vs. New York, 2 Keyes, 387;

Weismar vs. Douglas, 64 N. Y. 91, 21 Am. Rep. 586;

10 Re Jacobs, 89 N. Y. 98, 50 Am. Rep. 636;

Re Burns, 155 N. Y., 23;

Marion Twp. Board of Education vs. State, 51 Ohio St., 531, 25 L. R. A., 770.

An attempt through the guise of the taxing power to take one man's property for the private benefit of another is void. An act of spoilation and not a lawful use of legislative or municipal functions.

Cole vs. La Grange, 19 Fed. Rep. 871.

20 People vs. Morris, 13 Wend. 328.

Of course the Legislature cannot levy taxes for anything but public purposes as, for instance, to assist a private person in his business or even to aid him in misfortune from fire or flood or other casualty. It will be insisted that the declared burden is for a public purpose in that it is levied for the benefit and compensation of those and the families of those whose lives have been or may be imperiled or lost in pursuing the arduous and dangerous duties of policemen, that the public de-
30 mands the highest degree of skill, diligence and good faith from these servants, and that this degree is best attained by holding out to them the certainty of care when injured and family supported when age, disease or death comes upon them.

This theory, however, has not been adhered to.

Henderson v. London & Lancashire Ins. Co. 20 L. R. A. 827.

While this insistment may, with some degree of
40 logic be addressed to the granting of a pension to

the widow of a policeman, who looses his life while in the performance of his duty, it cannot be used where the policeman dies from ordinary causes such as confront and must be met by all persons. Death from natural causes disconnected with the performance of the public duty or death even connected with the violation and abuse of the public duty, will not confer any legal or equitable claim against the city. The plaintiff has no greater claim against the city than has the widow of any official servant or employee of the city, or in fact any widow has, whose husband dies from natural causes. The sorrow we have for every widow, whom the grim reaper has visited will not justify a pension to be raised by taxation.

Legislation of this character has often been questioned in the Courts and quite uniformly condemned.

Faber vs. Erie Co. Supers, 131 N. Y. 432.
Perkins vs. Milford, 59 Me. 315.
Moulton vs. Raymond, 60 Me. 121.
Freeland vs. Hastings, 92 Mass. 570.
Mead vs. Acton, 139 Mass. 341.
Kelly vs. Marshall, 69 Pa. 548.
Ferguson vs. Landrum, 1 Bush. 548.

Payment of a claim for injuries to a person in the employ of the State occasioned by negligence of his superior officer for which the State is not liable on general principles of law or under any prior statute is a "gift" within the prohibition of Const. Art. 4, Sect. 31, 32, against making gifts of public money.

Brown vs. Hart, Cal. Sup. Ct. 15 L. R. A. 431.

A legislative appropriation for the benefit of sufferers from a flood is in violation of Const. Art. 4, Sect. 31, prohibiting the gift of public money or thing of value to any individual.

Patty vs. Colgan, Cal. Sup. Ct. 18, L. R. A. 744.

CLAIRE BIRCH, sworn.

DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. What is your business? A. Fireman.

Q. What position in the fire department do you hold? A. Captain.

Q. Captain of what company, located where?
10 A. Number nine engine, Duncan and Bergen Avenue.

Q. What is your age, Captain? A. Fifty.

Q. And how long in the fire department? A. Twenty-four years.

Q. Did you know this boy Frank Hierspiel before the day of the accident? A. I did not.

Q. Did you see any part of the accident? A. I was standing on the corner of Duncan and Bergen
20 Avenue facing north and I just turned around in time to see just before the automobile struck the boy, I should say two or three seconds or so. I saw the machine hit him and knock him down, and I saw one of the wheels run over him, and I could not say whether it was the forward wheel or left hind wheel; I think it was the rear wheel.

Q. Where do you say you were standing exactly? A. On the northwest corner of Duncan and Bergen Avenue.

30 Q. That is in front of the firehouse? A. In front of the firehouse.

Q. Were you out on the sidewalk near the street, near the curb? A. I was right near the fire hydrant, near the curb; I was talking to Doctor Hummel; I was facing north.

Q. How far away from you was the automobile when you saw what you have described? A. I should judge probably eighty or ninety feet.

Q. Was it daylight? A. Yes.

40 Q. What time in the afternoon? A. About half past five.

Q. Anything in the way of your seeing the automobile at all? A. No.

Q. Street clear? A. Yes.

Q. Did you see any other automobile there? A. No; not on that side.

Q. What side of the street—you say not on that side—what side of the street was Gormley's automobile on at the time he struck the boy? A. He was on the left hand side going north. 10

Q. That is the west side of Bergen Avenue? A. West side of Bergen Avenue.

Q. How far is Bergen Avenue from curb to curb at that point? A. I believe it is a forty foot street.

Q. And how wide is Duncan Avenue there where it meets Bergen Avenue, from curb to curb? A. About the same, I think.

Q. How close to you was Doctor Hummel standing? A. Within two or three feet. 20

Q. Did you see anything, anybody in the neighborhood at all anywhere near there except Doctor Hummel and Gormley's automobile and the boy? A. No.

Q. Now, what was it that first attracted your attention, Captain, to the automobile? A. That I could not say, what attracted my attention, whether it was Doctor Hummel when he may have made some—he saw the thing, he was facing the other way; I could not say what attracted my attention, but I just looked around in time to see, as I say a few seconds before the boy was struck and knocked down. 30

Q. Which way was the boy facing when you looked around just before he was struck? A. He was across the street toward the brick row; he was facing west toward Duncan Avenue.

Q. Was he going toward the west side? A. Yes. 40

Q. And you say you saw no other car in sight there? A. I could not say; I know there was nothing in the way on the right hand side. Of course, my attention was taken up with the accident of course; I could not tell you how many automobiles were on the street.

Q. Before the boy was struck did you hear any
10 warning from the automobile, any horn or whistle or bell or anything like that? A. No, I could not say that I did.

Q. Any cry from the boy or anything of that sort did you hear? A. I did hear a cry when he was under the car.

Q. What was that? A. He cried for his mother.

Q. How far, if you can tell us, as closely as you can tell us, how far from the west curb was the boy at the time he was struck, the west curb
20 of Bergen Avenue? A. Well, I should judge about eight or nine feet.

Q. What can you say, if anything, respecting the speed of Gormley's car? A. I could not give any idea about the speed because as I say I turned around just before the accident occurred and I could not give any idea of the speed at all. I would not want to say.

The Court: How far did the car go after the wheel ran over the boy?
30

A. Well, the sliding marks were probably about five feet behind the car. That is probably where the brakes were applied.

Q. The surface of the street is asphalt, isn't it? A. Yes.

Q. Did you go back and look to see with respect to any tracks of the wheels of the automobile on the asphalt surface? A. I did, yes.

Q. What did you see? A. I saw the sliding
40 marks. I took fireman Walsh with me. Fireman

Walsh helped put the boy in the machine and we went back after the machine had gone around to the hospital with the boy and we saw where the sliding marks were, probably about five feet behind the car.

Q. By sliding marks do you mean marks on the asphalt behind, where the wheels had slid along the surface? A. Apparently where the brakes had been applied. 10

Q. Now, what part of the street, the west side or the east side or the centre, did you notice the marks on? A. On the west side, the west side going north.

Q. And about how far from the west curb? A. Well, around, I should judge, seven or eight feet, as near as I can figure.

THE COURT: The car was still there at the time you made the inspection? 20

A. Just left with the boy.

Q. You did not go around to the hospital with the boy? A. No.

Q. Who did, if you know? A. A young man, Mr. Daly, one of our neighbors, and Mr. Gormley; they were the only two I believe in the car.

Q. Now, when you got over to the automobile, who, if anybody, did you see there except Gormley, Doctor Hummel, fireman Walsh and yourself—anybody? A. And George Daly, the young man I speak of. That is about all I remember. 30

Q. You do not remember anybody else, Captain? A. Nobody else.

Q. Was Mr. Gormley driving the car? A. Yes.

Q. Anybody in the car with him? A. I do not think there was.

40

CROSS EXAMINATION BY MR. FALLON:

Q. Captain, this street, Bergen Avenue, at the point of the accident, is only thirty feet wide, is it not? A. I believe it is forty.

Q. You never measured it? A. No. I think it is sixty feet from the sidewalk, that is including the sidewalks; the roadway is forty feet.

10 Q. You are not prepared to swear that without measuring it; you did not measure it, did you? A. No; I say about.

Q. Might you not be mistaken; is it not thirty feet? A. It is not thirty.

Q. You are sure of that? A. Pretty sure.

Q. Isn't it a fact that the only time the boy said "Mother" was after he was picked up? A. No.

20 Q. Isn't it a fact that you were seated with your back to the boy at the time of the happening? A. I was not seated; I was standing up.

Q. Mr. Gormley spoke to you after the happening, didn't he? A. Yes.

Q. Didn't you tell him you did not see anything of it until after it happened? A. Certainly not; positively not.

Q. Do you remember him talking to you? A. Yes.

30 Q. Bergen Avenue at that point is a street that is traversed very much by automobiles, is it not? A. Yes.

Q. Is it a jitney route along Bergen Avenue at that point? A. Oh, yes.

Q. About how frequently do automobiles pass there at that point? A. It is hard to say; they are on the go almost all the time.

Q. Every few minutes? A. Yes; every few minutes.

40

Q. Would you say that automobiles would pass that point hundreds of times during the day? A. Well, there are hundreds and hundreds of machines pass the place; I will say that.

Q. Aside from the jitneys, there are other cars pass there? A. Oh, yes.

Q. Did you tell Mr. Gormley that when the happening took place you were seated with your foot up on the fire hydrant and your back toward where the accident happened? A. Yes, I had my foot on the opening of the hydrant and I had just taken my foot down and turned around in time to see the accident.

10

Q. Where was this Doctor Hummel you speak of? A. Doctor Hummel was facing me. I was facing north, up Bergen Avenue and Doctor Hummel facing toward the accident.

Q. What did Doctor Hummel say that attracted your attention? A. I could not tell you. We both started over for the boy, that is to do what we could.

20

Re-Direct Examination by Mr. Van Winkle:

Q. Captain, frequently it is the case, is it not, that there are no automobiles in sight on a given block on Bergen Avenue where you are there? A. Yes; there are odd times.

30

40

John Kiley, sworn.

Direct Examination by Mr. Van Winkle:

Q. How old are you? A. Twelve.

Q. Where do you live? A. 226 Monticello Avenue.

Q. You live there with your father and mother?
10 A. Yes.

Q. Do you go to school? A. Yes.

Q. What school do you go to? A. Number 18.

Q. Did you know Frank Hierspiel? A. I know him.

Q. And did you see Frank on the Saturday of September 21st last that he was killed? A. Yes.

Q. Where did you see him first that afternoon? A. I saw him the morning before, Friday morn-
20 ing; he was in school with me.

Q. Yes; but on Saturday afternoon, the day that he was run down, did you see him? A. No, sir.

Q. Well, did you see him up near Bergen Avenue in the afternoon? A. I was coming up Reid Street.

Q. You were going up Reid Street—you mean going towards Bergen Avenue? A. Yes.

Q. And what were you doing, John? A. I was taking orders.

30 Q. Delivering for some store? A. Butcher store.

Q. How far were you going along Reid Street; were you going to cross Bergen Avenue? A. I was going to Bergen Avenue when I saw the boy go from the sidewalk to go to the other side of the street and the automobile came along and it hit him.

Q. You say you saw Frank start to cross the street? A. Yes.

40 Q. And crossed the street when the automobile hit him? A. Yes.

Q. Was he on roller skates? A. Yes.

Q. Do you know whether he got to the other side or not before he was hit? A. He was not to the other side yet.

Q. How straight was he going across the street? A. He was going like a little south, going over towards south.

Q. Like a little south across the street? A. Yes. **10**

Q. And did he have any basket or bundles with him? A. No, sir.

Q. Any other boy with him? A. No, sir.

Q. All by himself? A. Yes.

Q. Any other boys roller skating in that street? A. No, sir.

Q. Now, did you see Mr. Gormley's automobile before it struck Frank? A. No, sir.

Q. Did you see how fast the automobile was going before it hit the boy? A. He was going pretty fast, but I did not see him before that; just saw him coming along and hit him. **20**

Q. You saw it come along and hit him; how fast was it going, can you give us any idea? A. No idea.

Q. Where were you when you saw the automobile on the avenue—on Reid Street? A. Yes, sir.

Q. And anything between you and the automobile; could you see it clearly? A. Yes, sir; I could see it clearly. **30**

Q. Did you see any other automobiles there except Mr. Gormley's automobile? A. No, sir.

Q. And how near were you, John, to the corner of Reid Street and Bergen Avenue when you saw the automobile go by? A. I was about three quarters down from Monticello up there—three quarters away.

40

Q. Three quarters from Monticello over towards Bergen Avenue? A. Yes, sir.

Q. And did you hear any warning from the automobile? A. No, sir.

Q. How fast was it going, if you can tell us? A. It was going faster than a horse can trot.

Q. Did you see what part of the street the automobile was on? A. It was more to the left hand side.

Q. More to the left hand side? A. Yes.

Q. The west side? A. Yes.

Cross Examination by Mr. Fallon:

Q. It was the right mudguard of the car that struck the boy, wasn't it? A. I could not tell you what mudguard hit him, but I just saw him come right along and hit him; I could not tell you what mudguard hit him.

Q. And you did not see the car before it struck him either? A. No, sir.

Q. So you do not know how fast the car was going before it struck him, do you? A. No, sir.

Q. Why did you say it was going faster than a horse could trot? A. It was going faster yet.

Q. Why do you say that if you did not see the car before it struck the boy? A. I saw it right coming from Reid Street; I did not see it before that.

Q. How far was the car away from the boy when you first saw it? A. About a foot.

Q. You mean you just saw the car at the very time it struck the boy, don't you? A. Yes.

Q. And you do not know what part of the car struck the boy? A. No, sir.

Q. Now, wasn't the boy riding on his roller skates up along the same side of the street that the car was operated on? A. The boy was going

across the street, and when the automobile—and the automobile come right along and hit him.

Q. Do you mean that the boy undertook to cross the street right in front of the automobile? A. Yes, sir.

Q. Which attracted your attention first, the automobile or the boy? A. The boy.

Q. And what attracted your attention about the boy; why did the boy attract your attention? A. Because I saw the automobile come along and hit him. 10

Q. The fact is the boy attracted your attention because he undertook to cross in front of the automobile; isn't that the fact? A. Yes, sir.

Q. Then when he undertook to do that the automobile struck him and knocked him down? A. Yes, sir.

Q. Now, that all took place within a second or a few seconds, didn't it? A. Yes. 20

Q. How far were you away from the corner of Reid Street at that time? A. I could not tell you how many feet, but I was about three quarters of the way; I could not tell you how many feet I was away.

Q. You were between Reid Street and another street south or north? A. There is Monticello and then Bergen; I was about three quarters from Monticello. 30

Q. Then you had not reached Bergen Avenue yet at all? A. No, sir.

Q. What part of the block on Bergen Avenue between Duncan Avenue and Reid Street was the automobile and the boy located on when you saw this happening? A. I just saw it come along and hit him. I did not see where he was knocked down or anything like that.

Q. If you were only three quarters of the block between Monticello and Bergen Avenue how could 40

you see this happening? A. There is a house right in front there.

Q. It did not occur in front of the house, did it? A. No; there is a house on the side there and there is a gate there, you can see right through the gate; but I saw right straight up through Reid Street. I came straight up through
10 Reid Street and saw the automobile coming along and hit him.

Q. Had you reached Bergen Avenue when you saw this happening, or were you only about one quarter of the block down below Bergen Avenue? A. About one quarter block down.

Q. Weren't there houses there that prevented your view of Bergen Avenue? A. Not quite of Bergen Avenue; there is a gate right there near Bergen Avenue.
20
Q. This occurrence took place somewhere near the fire house, didn't it? A. No; it hit him at Reid Street.

Q. Why do you say at Reid Street; do you mean at the corner of Reid Street? A. Right at the corner.

Q. Didn't the happening take place somewhere down the block a little bit? A. No, sir.

Q. Was it right at the corner? A. Yes, sir; it was the side I was on.
30
Q. Are you quite sure it was at the corner of Reid Street? A. Yes.

Q. It was not below Reid Street toward Duncan Avenue? A. No, sir.

Re-Direct Examination by Mr. Van Winkle:

Q. On the corner of Reid Street and Bergen Avenue there is an open yard there, isn't there? A. Yes, sir.
40
Q. So where you were on Reid Street you could see across Bergen Avenue and you could see up Bergen Avenue a little ways, couldn't you? A.

Yes; but I did not look through the gate; I dropped my basket and I ran—I ran—I dropped the basket.

Q. Did you see the automobile when it first came past Reid Street going along Bergen Avenue? A. Yes; then I saw it hit him.

Q. Did you see it going past Reid Street as it came along Bergen Avenue? A. I saw the top of it. 10

Q. Was it going fast then? A. It was going fast after it hit him.

Q. Before it hit him; was that the time it was going fast? A. Yes.

Q. And that is at Reid Street you say? A. Yes.

Re-Cross Examination by Mr. Fallon:

20

Q. You are after saying to Mr. Van Winkle before it hit him it was going fast and yet you told me you did not see the car before it hit him. A. It was going fast when it hit him.

Q. But you do not mean the car was going fast before it hit him, do you? A. It was going fast before it hit him.

Q. You did not see that car operated before it struck that boy, did you? A. No.

Q. Do you mean that that boy was on roller skates at Reid Street and Bergen Avenue, right at the corner? A. Yes, sir. 30

Q. And you mean he was not down in the Street of Bergen Avenue between Reid Street and Duncan Avenue? A. Yes—he was more to the left side—he was going to the other side of the street, the boy was.

Q. Do you say he was not on Bergen Avenue between Reid Street and Duncan Avenue? A. No, sir; not between.

40

Q. You say he was right at the intersection of the streets there, the corner of Reid Street and Bergen Avenue? A. He was going a little south.

Q. Where was the car when it stopped; wasn't it on Bergen Avenue just south of Reid Street? A. It was going north.

10 Q. But when you saw the car stopped after the boy was struck, wasn't the car located south of Reid Street? A. Not south. He was coming north, and when he hit the boy he stopped up a little ways.

Q. Where was the car when it stopped; what part of the street? A. Right near Duncan Avenue.

Q. Which is the street furthest south Duncan Avenue or Reid Street? A. Reid Street is south.

20 Q. And this car was coming north, wasn't it? A. Yes.

Q. So that the car passed Reid Street and was coming towards Duncan Avenue? A. Yes.

Q. How far had the car gone along Bergen Avenue after it passed Reid Street? A. I could not tell you how far.

Q. A couple of houses? A. There is brick houses in rows there, there is a row of brick houses.

30 Q. Did it pass beyond the row of brick houses? A. No, sir.

Q. How many of them? A. Right near the last one.

Q. How many are in the row? A. I do not know how many are in the row; I did not count them.

Q. Can you give us an idea; three or four? A. I will say five.

40 Q. And this car you say then was right about in front of the fifth of the brick houses which is above Reid Street; is that right? A. Yes.

Q. Now, is that the point where you saw the boy and the automobile collide? A. Yes.

Q. What did you mean before when you said that you saw the boy and the automobile collide right at the corner of Reid Street and Bergen Avenue? A. No; he was on the left hand side of the automobile; the automobile was on the left hand side. 10

Q. I am not asking you about that. You said a moment ago that the happening between the boy and the automobile took place right on the corner of Reid Street and Bergen Avenue. A. Yes.

Q. Well, you are telling me now the happening took place opposite— A. No; it threw him to there.

Q. Wait a minute. I understood you to say just now the happening took place in front of the fifth brick house which is north of Reid Street. A. That is where he was knocked; it knocked him there. 20

Q. That is what I am asking you; that is where the boy and the automobile struck each other? A. No; he was struck right at Reid Street and he was thrown to the fifth house.

Q. The automobile stopped at the fifth house, you said. A. It stopped when it hit him.

Q. You heard the captain say the automobile only went five feet after it hit him. Did you hear this fire captain testify just now? A. Yes. 30

Q. Did you hear him say the car only went five feet?

Mr. Van Winkle: I object.

The Court: I will sustain the objection.

Q. Now, how far do you say the car went after it struck the boy? A. After it struck the boy it stopped around about the fifth house. 40

Q. How many feet is that, about? A. I cannot tell you how many feet.

Q. Where was the car when it struck the boy? A. Right by the corner of Reid Street.

Q. How far away from the corner? A. On the left hand side; I cannot say how many feet; I did not count them.

10 Q. Was it opposite the fifth house? A. No, sir.

Q. Was it opposite the fourth house? A. No, sir.

Q. Was it opposite the third house? A. The first house, right across.

Q. If you do not know where it was, why do you say it was not the fifth or fourth and you say it was the first? A. He was thrown to the fifth house when the automobile hit him.

20 Q. Where was he thrown from; at what part of the street did the automobile strike him? A. The left hand side.

Q. I mean how far away from the corner? A. About a foot from the corner.

Q. How much? A. From the left hand side, a foot, about a foot from the curb on the left hand side.

Q. Oh, I guess that is all.

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30 Philomen E. Hummel, sworn.

Direct Examination by Mr. Van Winkle:

Q. Where do you live? A. 689 Bergen Avenue.

Q. You live in one of these brick houses this boy has been talking about? A. I live in the row there.

Q. How near to where Reid Street comes into Bergen Avenue do you live, about? A. About

40 thirty foot, I guess.

Q. Now, with reference to your own house,

about what part of the street was this boy struck —anywhere near your house? A. It was below my house.

Q. About how many feet, as well as you can give it? A. About thirty-five or forty foot.

Q. Are you the Doctor Hummel who was talking to Captain Claire Birch? A. Yes, sir.

Q. You are a medical doctor? A. Yes, sir. 10

Q. And have practised in Jersey City—how many years? A. About twenty-five years.

Q. Did you see the boy before he was struck, on the avenue? A. Yes, he was struggling to get out of the way of the automobile driven by Mr. Gormley and before he could do so he was knocked down, that is by the front of the automobile; I do not remember whether it was the mudguard or fender; nevertheless he went down on the pavement, and almost immediately the front 20 wheel passed over the thorax and I then rushed immediately to his assistance, but before I got there he had been placed in Mr. Gormley's automobile and rushed to the hospital.

Q. Now, at the time you stood with Captain Claire Birch on Bergen Avenue at Duncan, did you see anyone else around there at all—any other persons? A. No.

Q. Did you see any other automobiles on the avenue at the time that Gormley came along in 30 his car? A. No, not on the side he was driving.

Q. What side was he driving on? A. On the left side, west side.

Q. He was going north? A. Yes, sir; going north.

Q. About how far from the west curb was Gormley's automobile when the boy was struck? A. I should think eight or nine feet.

Q. And do you know the width of Bergen Avenue from curb to curb? A. I have never mea- 40 sured it, but I should judge about forty feet.

Q. Was there anything between you and Captain Birch and the automobile when you both looked that way, could you see it clearly? A. All clear.

Q. Broad daylight? A. Yes, sir.

Q. And did you hear any sounds or noises before the boy was struck? A. No, no sound.

Q. Any automobile horn or warning of any kind? A. No, sir.

Q. What can you say, Doctor, with respect to the force with which the boy was struck, if you know about that? A. Well, evidently when the brake was applied that auto stopped five or six feet from where the boy was run over.

Q. What do you know about the brakes being applied; what did you see, if anything on the pavement; did you look? A. Yes; there seemed to be some marks on the pavement; I looked at them afterwards, where the auto had slid in the attempt to stop it.

Q. And those marks, about how far was the most westerly of those tracks from the west curb, about how far? A. About eight—eight or nine feet.

Q. Did you see anybody in the automobile with Gormley? A. No.

Q. Was he driving it himself? A. Yes.

Q. Did you see Fireman Walsh there at all? A. I saw some fireman, but I did not know whether it was Walsh or not.

Cross Examination by Mr. Fallon:

Q. Doctor, how far from Duncan Avenue is your house situated? A. Well, there are six houses in that row. I am the fourth house: About twenty feet front; that would make about eighty feet I should think.

Q. From Duncan Avenue? A. Yes.

Q. And this happening you say took place be-

tween Duncan Avenue and Reid Street, did it? A. Yes, sir.

Q. It did not take place right at the corner of Reid Street and Bergen Avenue? A. Oh, no, no.

Q. How many houses is your house beyond Reid Street—north of Reid Street? A. I guess about two houses. Are those twenty-five foot houses? I don't know—I guess about twenty- 10 two or twenty-three foot front.

Q. So that your house then would be either forty-four or forty-six feet away from the corner of Reid Street, wouldn't it? A. It would be more than that—oh, I guess it would.

Q. Was it you that called the fire captain's attention to the happening? A. Oh, no, no. We both saw it together. His attention was attracted south at that same moment. 20

Q. But his back was to the happening just before it happened, was it not? A. Oh, no, no.

Q. Wasn't he seated with his foot up on the— A. Oh, no; he was standing up the same as I was standing on the corner, about eight feet from the corner of Bergen Avenue on Duncan Avenue.

Q. But he has testified that his foot was on the piece of the fire hydrant. A. Well, that might be possible; maybe I did the same, standing there.

Q. Do you know what you were doing? A. Sir? 30

Q. Do you know whether you were or not standing in that position? A. Who?

Q. You. You say you might have been doing the same. A. Why, occasionally a man might put his foot on a fire hydrant.

Q. I am only directing my attention to your particular action at the time. A. I was standing right there at the corner. Whether I had my foot on the fire hydrant at that moment I cannot remember. I do not think you could either. 40

Q. When you stated to Mr. Van Winkle in an-

swer to his question that you did not hear any automobile horn blown or any warning sounded, you do not mean that it was not sounded or that a horn was not blown, do you; you mean you did not hear any? A. It was not sounded, absolutely; there was no sound.

Q. There are hundreds of automobiles pass
10 there, are there not? A. There was none passing on that side of the street at that moment, and those that happened to be passing on the other side there was no noise.

Q. Wasn't there a car right behind Gormley's car? A. Not that I remember.

Q. Well, your recollection is pretty good of what happened, is it? A. I do not remember there was any car behind Gormley.

Q. Well, you do not know whether there was
20 or not, if you do not remember? A. I know there was not.

Q. Why do you say you know there was not if you do not remember, if you do not recollect? A. I did not say I did not remember. I said positively there was no car behind Gormley.

Q. Didn't you tell me that you did not recollect whether there was not or not? A. I did not say that.

(Testimony repeated).
30

Q. I am calling your attention to what you stated to me first, yet you say now you are positive there was no car behind him; what do you mean by that? A. That question there is all right.

Q. I ask you again now, was there a car behind Gormley's car? A. No, there was not.

Q. When I asked you before whether there was or was not, why did you say not that you remem-
40 ber? A. Well, that was a mistake.

Q. Have you made any other mistakes? A. I do not think so, no.

RE-DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. Doctor, Reid Street runs from Monticello Avenue west to Bergen; it is a short block, isn't it? A. Yes.

Q. It does not cross Bergen Avenue? A. No.

Q. And on the west side of Bergen Avnue just a little north of where Reid Street would intersect if it crossed is your house? A. Yes. 10

Q. And a person standing on Reid Street where this boy says he was standing, by the corner, by the open yard, could see from that place to in front of your house, could he not? A. Very surely. That is across Meyers' yard there; there is quite a yard in front of the house; diagonally he could see that entire road right to the end of Duncan Avenue. 20

Q. Standing down Reid Street one may have vision across to where your house is; indeed, see the whole brick row? A. Take in the whole row down to the corner.

GEORGE WALSH, sworn.

DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. What is your business? A. Fireman. 30

Q. And you are attached to what fire company? A. Nine Engine Company, Bergen and Duncan.

Q. Captain Birch, who has been a witness, is your captain? A. Yes.

Q. Do you recall the Saturday afternoon in September, September 21, when this boy was struck? A. Yes.

Q. What were you doing at the time of the accident? A. At that time I was playing ball against the side of the fire house. 40

Q. Handball? A. Yes, sir.

Q. With whom were you playing? A. Mr. Daly.

Q. Did you see the accident? A. No, sir.

Q. What did you see just after the accident, if anything? A. Well, at the time I was playing ball. Doctor Hummel and the Captain at the corner; and they shouted; that drew my attention, and I turned around and I seen the machine. I ran across and I seen the boy back
10 of the machine, and I picked him up and gave him to Mr. Daly and told him to take him to the hospital.

Q. Where was the machine when you saw it first? A. On the left hand side of Bergen Avenue about four houses from Duncan.

Q. Pointing north? A. Pointing north.

Q. Where was the boy at that time? A. He was in back of the machine when I picked him up.

20 Q. About how many feet behind the machine? A. Right close behind it.

Q. And you picked the boy up? A. Yes.

Q. Was the boy conscious? A. Yes; he says "Mama!"

Q. And Daly took him to the hospital? A. Daly took him to the hospital.

Q. And you went ahead about your business there? A. Yes, sir.

Q. Did you see any tracks on the surface of
30 Duncan Avenue where the car had passed—over which it had passed? A. Yes; after I put him in the machine and the machine went to the hospital with the boy the captain and I noticed the tracks in the asphalt; they were about five feet.

Q. What kind of tracks were they? A. Tracks that the machine slides, you know.

Cross Examination by Mr. Fallon:

40 Q. When you say Daly took him to the hospital you mean he took him to the hospital in Mr. Gormley's car? A. Yes.

JOHN HIERSPIEL, sworn.

DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. What is your age? A. 55.

Q. What is your business? A. Letter carrier.

Q. In Jersey City? A. Yes, sir.

Q. How many years have you been a letter carrier? A. Going on twenty-six years—twenty-seven. 10

Q. How many? A. Twenty-six years.

Q. Is your wife living? A. Yes, sir.

Q. What is her name? A. Elizabeth Hierspiel

Q. You and she live together? A. Yes.

Q. How many children have you and she? A. Well, we have eight living now.

Q. What are their names and ages? A. Well, the oldest is Henry 31, I believe it is; and Mary, she is 28; Philip is 26, and Royal 21; Raymond, 20; John 18; Loretta, 14, and William, 9. 20

Q. And the boy Fank— A. And Frank was 12.

Q. What can you say with respect to the boy; was he a healthy boy? A. Yes; he was a good healthy boy.

Q. Did he go to school? A. Yes.

Q. What school? A. The school on Storms Avenue. 30

Q. Public school? A. Public school.

Q. Did you see the boy the night of the day he met his death? A. Yes; I went down to the hospital and identified him.

Q. What time were you there? A. Around eleven at night.

Q. He was dead then? A. He was dead, yes.

(No cross examination).

Admitted that the intestate died because of contact with defendant's automobile. 40

Elizabeth Hierspiel, sworn.

Direct Examination by Mr. Van Winkle:

Q. You are the mother of Frank Hierspiel, who died on September 21, 1918? A. Yes.

Q. What is your age, Mrs. Hierspiel? A. I am 58.

10 Q. How many living children have you? A. Nine—eight.

Q. This boy Frank lived with you and your husband? A. Yes.

Q. On Fairmount Avenue? A. Yes.

Q. Had the boy gone to work yet or was he going to school? A. He went to school but he had odd jobs after school.

Q. He had worked at odd times after school?

20 A. Yes.

Q. Delivering goods from stores? A. Yes, sir.

Q. Had he gone about his work and delivered goods from stores while he was on roller skates? A Oh, yes, lots of times.

Q. What can you say respecting the boy's strength and makeup; was he a strong boy? A. A good, strong, healthy boy.

Q. Anything the matter with him at all physically? A. No, sir.

30 Q. Good condition? A. Yes, sir.

The Court: How old do you say he was?

A. Twelve years.

Q. Now, this day that he met his death, what time did he leave you at the house? A. At a quarter to five.

Q. And where was he going? A. He was going with the intentions to go to a fruit store on Monticello Avenue where he was to get a place to take out orders.

40 Q. That night and that afternoon, Saturday?

A. Yes; he was to start in that afternoon—that night—as the boy was leaving at six o'clock.

Q. No other boy was with him? A. Not as I know of.

Q. As far as you knew, he went to go to work? A. Yes, sir.

Q. When did you next see him? A. I did not see him until he was brought home Sunday night. 10

Q. I mean he did not come home that night, and what did you do? A. Why, I thought he had the job and when he did not come in to supper of course we did not mind it because you know sometimes they don't come in to supper when they are out on those orders.

Q. Well, did you go to the police station? A. Yes, sir.

Q. What time was that? A. Around eleven o'clock. 20

Q. No one sent you any word at all? A. No, sir; I went down to this place then and found out; I sent down and I found out he was not there.

Q. You found out he was not working? A. Yes, sir.

Q. Then you went to the police station? A. Yes.

Q. And the police would not let you go to the hospital, would they? A. No, sir. 30

Q. They did not let you go to the hospital? A. No, sir.

Q. But you found out he was dead? A. I did not find out he was dead at the time, but they told me I had to send my husband, I would not be allowed there.

Q. But no one brought you any word of any kind? A. No, sir.

40

CROSS EXAMINATION BY MR. FALLON:

Q. Mrs. Hierspiel, you know as the mother of children that it is quite an expense for you to maintain a family these times, do you not? A. Yes, sir.

MR. VAN WINKLE: I will admit it is very 10 expensive and wages are very high too; we will admit that.

MR. FALLON: I ask to have the latter statement of counsel stricken out.

THE COURT: All right.

MR. VAN WINKLE: I consent that it be stricken out.

Q. How many suits of clothes would this boy use up in a year? A. Well, quite a good many, if 20 you want to keep him up respectable looking.

Q. And you of course wanted to keep him respectable? A. I certainly did.

Q. About how much would each of those suits cost that you used for the boy? A. The way things are now it was quite expensive. You have to pay about eight or nine dollars for any suit whatever.

Q. Was that the price you used to pay for this boy's suits? A. That was the last I got, except 30 the one he was buried in; that cost me more.

Q. I assume he used up a considerable number of shoes in a year too, didn't he? A. Yes, sir.

Q. How much a pair would you pay for his shoes? A. We paid three dollars for his shoes.

Q. And about how many pairs of shoes would he use up in a month? A. He had a new pair every month. He was terribly hard on shoes, terribly hard on shoes.

Q. Then his underclothing; did you buy much 40 underclothing for him in a year? A. Oh, yes.

Q. About how often? A. Summer and winter.

Q. And about how many suits of summer underclothing would you buy for the boy? A. I always had each of them three suits.

Q. And about how much would you pay for a suit of underclothes? A. I usually paid half a dollar a piece for them.

Q. And did you have a different suit of underclothing for him in the winter? A. Yes, heavier. 10

Q. How many suits would you buy for him in the winter? A. I had three for the winter.

Q. About how much a piece would you pay for the underclothing? A. I paid fifty cents; the last I bought him I paid a dollar for.

Q. When was that that you bought him the underclothing last? A. Just before he was killed. I have three suits now. 20

Q. When you say a dollar a piece do you mean a dollar for the shirt? A. A dollar for the shirt and a dollar for the drawers.

Q. Stockings, he used a great many of those too, didn't he? A. Yes.

Q. How much would you pay for the stockings? A. Thirty-five cents a piece.

Q. About how many pairs of stockings would he use up in a month? A. About four pairs a month.

Q. And waists, he was hard on waists, was he? 30 A. He was not so very hard on waists.

Q. About how many waists would you buy him, a great many? A. I had five waists a piece because I put a clean waist on every day when he would go to school.

Q. About how many new waists would you buy him in a year? A. I bought him almost a dozen waists a year.

Q. About how much a piece would you pay for 40 his waists? A. The last I paid eighty-five cents for plain waists.

Elizabeth Hierspiel—Cross.

Q. Did he wear a hat or a cap? A. He always wore a cap.

Q. About how many caps would he use up in a year? A. I guess about three a year.

Q. About how much a piece for the caps? A. At the time I bought them I paid fifty cents a piece for them; I could not go no higher.

10 Q. Now, it cost considerable to feed people these days, doesn't it? A. Oh, yes.

Q. About how much would you say it cost to feed a boy such as your boy, who was twelve years of age and in good physical condition at the time of his death? A. The way times are now it costs in the neighborhood of twenty-five dollars a week, because I had awful eaters.

Q. I mean for the one boy, how much would it cost to feed that boy? A. Taking a proportion

20 of the meat, vegetables and everything it would come to twenty-five dollars, the way things stand now.

Q. You mean for the family? A. No; for the one boy, because I use an awful lot of meat.

Q. You mean twenty-five dollars for a week or a month? A. A week anyway—or a month anyway—taking the proportion of a month.

Q. You misunderstand me. It has just been suggested to me that you mean twenty-five dollars

30 a month for the care of this boy. A. Yes.

Q. You did not mean a week? A. No, sir.

Q. Did you have a doctor for the boy at times too? A. No, sir; only in confinement.

Q. Did you have him going to public school or private school? A. Public school.

Q. Where was your boy born; was he born in Jersey City? A. Yes. sir; 259 Fairmount Avenue.

Q. The same place where you lived at the time

40 of his death? A. Yes, sir.

Mr. Van Winkle: I offer the letters of administration entitling the plaintiff to prosecute.

(Marked P-1.)

Plaintiff Rests.

Francis Gormley, sworn. 10

Direct Examination by Mr. Fallon:

Q. You were the operator of the car that had the mishap with this boy? A. Yes.

Q. Will you state to the court and jury just what took place and how it occurred?

Mr. Van Winkle: I prefer the question and answer method if you do not mind.

20

Q. Were you driving this car on Bergen Avenue on the day of the happening? A. I was.

Q. In what direction were you driving the car, north or south? A. North.

Q. On what street did the happening take place? A. It took place about eight feet east of the westerly line of Bergen Avenue between Reid and Duncan.

Q. On what side of the street were you operating your car as you were going north on Bergen Avenue? A. On the right hand side. 30

Q. Where did you first notice this boy? A. At Reid Street.

Q. What attracted your attention? A. I think he came out of Reid Street. I was about—I noticed him when I was about thirty feet south of Reid Street, and I believe he came out of Reid Street. At first, however, at the time I saw him, was at the corner of Reid and Bergen; I was thirty feet or so further south, and I blew my 40

horn and the boy paid no attention to it but he continued skating on. At Reid Street, just as I passed Reid Street, I blew the horn again and the boy paid no attention. He skated on. He was skating pretty rapidly, and then I turned to the left of the boy to pass him, and when I was within I should say three feet in the rear of the boy, both
10 of us going parallel, he suddenly turned to his left and dashed in front of the car. I turned my car to the left to avoid hitting him with the radiator and put on the brakes and he came over and he struck my car at the right fender, and the skates I presume threw him under the car.

Mr. Van Winkle: I ask to have that stricken out.

The Court: I think I will strike that out.

20 Mr. Fallon: About the presumption?

The Court: Yes.

Mr. Fallon: All right.

Q. How long have you been driving a car, Mr. Gormley? A. About twelve years.

Q. And have you driven along Bergen Avenue at times? A. I drive along Bergen Avenue every day pretty near.

Q. Are there many automobiles traverse that street in the day time? A. Very, very many, yes;
30 it is a very active street with automobiles and jitney service.

Q. Well, after the happening did your car take the boy to the hospital? A. I immediately jumped out of the car and assisted picking the boy up. He got up himself partially and a Mr. Daly and the fireman who testified here took the boy and Daly got in the car and the fireman and I lifed the boy in and put him on Daly's lap and then I rushed him to the hospital.

40 Q. Did you talk to the fire captain after the

accident? A. Why, I think that evening we had a general talk there.

Q. Did you ask him whether he had seen the accident? A. I did.

Q. What did he say? A. He said he had not seen it.

> Mr. Van Winkle: I object. The captain was asked about this, and I think you laid the foundation, and under the rule you should put the question to him in the same form. 10

Q. Did the fire captain say to you when you spoke to him that he did not see this happening and that his attention was not attracted until after the happening? A. He said that he had his foot up on the fire hydrant with his back toward the south, he was not looking in the direction of the accident, and when his attention was called by some one standing there he turned around and he saw the boy under the car—to my recollection. 20

Q. He says that he believes it was the left rear wheel of your car that went over the boy; is that so? A. I could not say; I think it was the right front wheel I do not know which wheel went over him; in fact I did not know I was—I felt very sorry for the boy and I did not pay much attention to it. I was trying to get him to the hospital. 30

Q. Now, how wide is that street; have you measured it? A. It is about thirty feet. I measured it; not with a tape measure, but I measured it by stepping, and it is about ten steps of three feet a piece; that is thirty feet; it may be thirty-one.

Q. How far away from the curb was this boy skating when you saw him? A. At first?

Q. Yes. A. Why, he was within say five feet, I should say, from the curb. 40

Q. Which curb of the street? A. The right curb—the right hand side going north.

Q. That would be the east curb? A. The east curb, yes.

Q. How were you operating your car as to speed? A. Why, we were going very slowly. I should say around ten, maybe twelve miles an hour; not
10 over twelve—ten miles I should say.

Q. At any time before this happening was your car being operated on what they call the left side of Bergenline Avenue going north? A. Positively not.

The Court: Bergen Avenue, not Bergenline.

A. Bergen Avenue. Positively not. I was traveling on the right side.
20
Q. That is all.

Cross Examination by Mr. Van Winkle:

Q. Where were you going at the time this boy was struck? A. I was going to Highland Avenue and West Side, on my way there.

Q. On a matter of business or pleasure? A. A matter of business.

Q. Business, pleasure or politics—which? A.
30 A matter of business, I said.

Q. Was there a campaign on then? A. No, sir.

Q. Was there a campaign in prospect in which you were interested? A. There was.

Q. And you were passing along Bergen Avenue thinking of your plans for the coming campaign? A. No, sir.

Q. Where was your mind; was your mind on the car? A. My mind was on the car absolutely.

Q. What was the nature of your visit; didn't
40 you have your mind on that at all, where you were going? A. Oh, yes.

Q. What was it a social visit? A. No, sir; business, I said.

Q. In which you might have made or lost some money? A. No, no; neither one.

Q. Was it real estate business? A. No.

Q. You are in the real estate business? A. I should be glad to tell you if you want it.

Q. I do not want details, except I want a general statement. You are in the real estate business? A. Yes; I am in the real estate and insurance business. 10

Q. And you had an errand that did not have to do with business, did not have to do with politics, and you were thinking about your errand, were you not? A. Yes.

Q. And nobody in the car with you? A. No.

Q. You had no one in the car to talk to? A. No. 20

Q. Did you see any other automobiles on the street at all? A. No.

Q. So you had a clear street? A. Absolutely clear. There was no possibility of any near accident. It was the clearest case one could imagine; no reason for it.

Q. No reason why you could not go as fast as you wanted to; the street was all clear? A. The reason was this boy in front of my car thirty or forty feet; I was watching him. 30

Q. Then the only reason that appealed to you why you should go slower than you ordinarily go was the presence of the boy on the street? A. Yes.

Q. How fast do you ordinarily go along Bergen Avenue? A. About fifteen or eighteen miles.

Q. Do you mean fifteen miles an hour or twenty? A. I said about fifteen miles an hour on Bergen Avenue. 40

Q. What? A. On Bergen Avenue about fifteen miles an hour.

Q. Is that your usual speed? A. That is my usual speed.

Q. And with that speed can you keep up with the moving train of automobiles or do you have to get out of the line? A. It is impossible to
10 maintain that speed.

Q. You cannot go as fast as that? A. Not all the time; it is a very congested street.

Q. But it was not congested at the time you had this accident, was it? A. Not at all.

Q. What reason was there, if any, for you not to go fast except this boy on the street—any? A. No other reason, no.

Q. Where did the boy first go on the street? A. I believe he came on at Reid Street. I would not
20 be sure. I noticed him at Reid Street.

Q. This thing all happened very suddenly to you, didn't it? A. Why, no, not at all. I saw the boy when I was thirty or forty feet south of Reid Street, and this accident was nearer Duncan Avenue.

Q. Nearer does that mean very much. How far north of Reid Street on Bergen Avenue was it that the boy was struck? Not where your car was after the accident; I do not mean that; but
30 where the boy was struck. A. How far north of Reid Street? I would say fifty or sixty feet.

Q. That is where he was struck? A. Yes, sir.

Q. And he was struck on what we call the wrong side of the road, the left side of Bergen Avenue? A. Well—

Q. Never mind why. A. I turned out of his way.

Q. Is that where he was struck?

40 Mr. Fallon: I object to the use of the word wrong side of the road.

The Court: I sustain the objection because the "wrong" side is often the right side.

Mr. Van Winkle: I know that. I will withdraw the question.

Q. You say that the boy was struck eight feet from the west curb? A. About that.

Q. And at that time you were going so fast, Mr. Gormley, you had to apply your brakes with great strength, didn't you? A. Oh, I applied my brakes right away just as soon as I could possibly do it. 10

Q. How far did your car slide after you put on the brakes? A. A very short distance; I did not measure that.

Q. You do not know? A. I could not say how far; a very short distance.

Q. Did you make any examination afterwards to see what marks of sliding there were on the pavement, whether the tracks were straight behind your car or across the street? A. My only thought was, Mr. Van Winkle, to get that boy to the hospital. I did nothing else. I knew that if there were any witnesses there, they would know it was absolutely unavoidable on my part. 20

Q. Did you see any witnesses there? A. Not one at the time of the accident, but a crowd gathered almost immediately. 30

Q. Didn't the boy tell you his mother's name before he became unconscious? A. The boy did not say who his mother was. He did say to Mr. Daly call up some number, and Mr. Daly had forgotten to; he was rather excited, and the police looked up the father and mother all the afternoon and could not find them. The police could not find out who the boy was. I made inquiries and I could not find it.

Q. I do not understand how you got over on the 40

west side of the street to pass the boy. A. You do not understand it?

Q. No. Tell us. A. Why, a very simple proposition. We were going—he was directly in front of my car on the right hand side. I gave him the horn that I was to pass him, and then I turned to the left to pass him. I was then about the
10 middle of the street, and when my car was about two or three feet in the rear and to his left he suddenly turned at right angles and darted west across the car. In order to avoid hitting him with the radiator I turned my car to the left, which brought me on the left hand side of the street. That is how that happened.

Q. Well, the boy must have— A. The boy ran into the right mudguard.

Q. Then the boy was going very slowly, wasn't
20 he? A. The boy was going faster than the car.

Q. I do not quite understand you. You say you saw the boy when your car was thirty feet south of Reid Street—about thirty feet. A. Yes.

Q. And the boy was then apparently crossing the avenue at about Reid Street? A. He was at Reid Street about.

Q. He was on the pavement then of Bergen Avenue? A. Yes.

Q. When you saw him first? A. Yes.

30 Q. And you then were thirty feet south of Reid Street plus the thirty feet as the distance from Street? A. Yes.

Q. And that would make the width of Reid you to him, wouldn't it? A. About that.

Q. How much would that be altogether? A. Reid Street is I should say about twenty foot street.

Q. As narrow as that? A. Very narrow, yes. I did not measure that. It is about twenty feet
40 I should say.

Q. Twenty plus thirty; that is fifty? A. About fifty feet when I first gave warning to the boy.

Q. How near then was the boy to the east curb of Bergen Avenue? A. About five feet.

Q. And which direction was he going in? A. North.

Q. And going slowly? A. He was skating pretty rapidly. 10

Q. And when did you get up with the boy or near him? A. Just about Doctor Hummel's house, which he says is about the fourth house, I think, from Duncan Avenue.

Q. Where was the boy then? A. On the right hand side.

Q. How far over on the right side? A. About the same distance, about five or six feet from the curb. 20

Q. And you then went over to within eight feet of the other curb? A. No, I did not. I turned to pass him the same as I would pass any vehicle, on the left hand side, and just before reaching him he dashed acriss the front of my car; then I turned to the left, which brought my car over on the left hand side of the street, and if I did not do that I would have hit him with the radiator. I was trying to avoid hitting him.

Q. You say you sounded your horn twice? A. I sounded it three or four times. 30

Q. And you got no response? A. He paid absolutely no attention to it. He kept skating right straight ahead.

Q. You did not see any sign from the boy that he heard your horn? A. No; I presumed that he did and he was going right ahead.

Q. And presuming that he did you kept on the same rate of speed, didn't you? A. The same rate of speed, yes. 40

Q. So from the time you first saw the boy

until the time you hit him you did not change your speed? A. Well, I would not say that. I always in passing slow down.

Q. Did you on this occasion? A. I think I did, yes.

Q. You cannot say you did; you think you did? A. Oh, I believe I did. I always do.

10 Q. Now, as a matter of fact the entire car passed over the boy, didn't it, the front wheel and the rear wheel? A. No; that is not the fact. The fact is the boy was under the car when we picked him up.

Q. Did you move the car before Mr. Walsh and Mr. Daly came over there? A. No, sir.

Q. And you are quite sure the boy was not in the rear of the car where they say they picked him up, where Mr. Walsh said he was? A. They
20 picked him up from under the rear of the car—under the rear of the car, in the rear; that is what I said.

Q. Which of the wheels do you say went over him? A. I could not say that.

Q. Do you think he got under the middle of the car? A. I could not say.

Q. You could not tell which part of the car hit him or how many wheels went over him? A. I know where he was hit; he ran into the right
30 mudguard.

Q. But in such a way that the front of your car went over him? A. I could not say whether he got under the front or rear, but it was the front wheel because he was under the car when he was picked up.

Q. Are you pretending that the boy ran against your car and ran in between your wheels and got hurt that way? A. I am not pretending anything. I am giving you the facts as I know them.
40 Q. The front of your car struck the boy, didn't

it? A. He struck my car I did not strike the boy.

Q. Well, you came in contact with the boy, the front of your car? A. The right mudguard—do you say the front?

Q. Call it the front if you like. A. On the side of the mudguard, the right mudguard.

Q. How did the boy get under your car? A. I presume—it was stricken out—that his roller skates threw him under there. In other words, I believe if he were walking or running he could have gotten away; but it was the skates that threw him under the car. That is my theory.

Q. Yes; you figure if the boy was walking he would have gotten away? A. Yes.

Q. How do you figure that out? A. Because he was running into the car.

Q. Did the boy go into it himself? A. The boy was going west.

Q. And you were going north? A. I was going northwest to avoid him.

Re-Direct Examination by Mr. Fallon:

Q. Was there any mark on your car after this happening that was not there before? A. Why, the right mudguard was a little bit bent almost at the tip of it, a little bit to the right.

Q. You say you made some efforts to locate the parents of the boy. What effort did you make? A. We made an inquiry from one of the fireman, I do not know who it was, I think it was the captain, I would not be sure about that.

Q. When did you first find out who the parents of the boy were? A. I first found out the next morning when the lieutenant called me up and said he located the parents.

Q. Did you then go to see the parents? A. No,

I did not go. Mr. Townsend advised me, on account of my condition—

Q. Did you send someone there? A. I sent Mr. Townsend. He agreed to go rather.

By Mr. Van Winkle:

Q. Your attorney? A. My attorney, yes.

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10 Henry Cohendet, sworn.

Direct Examination by Mr. Fallon:

Q. Where do you live? A. 36 Fairview Avenue.

Q. Did you see this happening? A. I did.

Q. Will you state to the jury just what you saw? A I was walking along Bergen Avenue with my little boy within about four feet of the corner of Reid Street and Bergen Avenue and I 20 saw Mr. Gormley coming from the south, going north, and I said hello to him, and he did not pay any attention to me, and then the first thing I knew he was blowing his horn, and that attracted my attention down Bergen Avenue, as he was blowing his horn; I saw him edging over towards the west side of the street, and finally I saw him hit the boy and stop right there in the middle of Bergen Avenue.

Q. Just before he hit the boy what direction 30 was the boy going in, do you know? A. The boy was going north with his back towards Mr. Gormley.

Q. How far was the boy away from the car at that time? A. When I saw him?

Q. Yes. A. I should judge about thirty feet.

Q. Did you see the actual happening; did you see the car and the boy collide? A I did.

Q. In what direction was the boy going at the time of the happening? A. He was going north 40 and his left side would hit the edge of the mudguard.

Q. Which mudguard? A. The right hand mudguard.

Q. Will you tell the court and jury how far from the easterly curb the boy was at the time the Gormley car was behind him? A. He was about six feet away from the curb.

Q. How far was the Gormley car away from the curb, would you say? A. He was as you usually travel along the road that way, on the right hand side, more toward the centre. 10

Q. Was he immediately behind the boy or a little bit to the left of the boy? A. He was to the left of the boy.

Q. Do you know what the width of Bergen Avenue is at that point? A. I should say about thirty feet.

Q. How far from Reid Street was it that the happening took place? A. I should judge about seventy-five feet or one hundred feet. 20

Q. Did you observe the boy immediately before the car and he collided—did you observe in what direction the boy was then going? A. He was going north at the time when the horn was blowing, and he kept edging away over toward the machine. Naturally if he kept—

Q. Never mind that.

Mr. Van Winkle: Let him answer. 30

A. I say if he had kept going he would have driven Mr. Gormley over onto the sidewalk.

Cross Examination by Mr. Van Winkle:

Q. What is your business? A. Plumbing business.

Q. You drive an automobile, do you not? A. I do.

Q. You are a friend of Mr. Gormley's, are you not? A. Oh, no. 40

Q You call him Frank, don't you? A. I do, yes.

Q. And this day you say you waved to him as he went past in the car? A. Yes.

Q. And he was so intent on something he did not see you? A. No.

Q. Made no response? A. No.

10 Q. Anybody else on the street besides yourself? A. I was on the sidewalk.

Q. We call that the street in Jersey City. You were on the sidewalk and he was in the roadway? A. Yes.

Q. And did not see you at all when you called out to him? A. He just gave me a nod.

Q. Now you did not tell us that before. A. I meant he gave me a nod.

20 Q. Which is right, that he gave you a nod or did not give you a nod? A. Gave me a nod.

Q. I am calling your attention now to your answer in response to Mr. Fallon's question where you said Mr. Gormley did not see you, and ask you which is true. A. He gave me a nod.

Q. And he gave you the horn too, didn't he? A. Yes.

Q. You were on the east side of Bergen Avenue? A. Yes, sir.

Q. And how far north of Reid Street were you?

30 A. How far north? About four feet, standing right near a tree there.

Q. When he came right along there, going north of Reid Street, he looked to the sidewalk to the east and saw you and spoke to you? A. Just gave me a nod of the head.

Q. Yes, and the boy was in the roadway ahead of him? A. Way up in the center of the block.

Q. While he was looking toward you he was looking away from the boy, wasn't he? A. He

40 just gave me a glance, that is all.

Q. While he gave you the glance he was looking away from the boy, wasn't he? A. No.

Q. Why not? A. You can turn in the twinkling of an eye; you do not have to take your eye off the roadway.

Q. You were on the east side of Bergen Avenue just north of Reid Street? A. Yes.

Q. When you gave this man the high signal, whatever it was? A. Yes. 10

Q. And you gave it to him in such a way that he saw you? A. For a second, yes.

Q. Did he blow the horn for you or for the boy, do you know? A. I do not know because I was not in his mind.

Q. Then he looked toward you and recognized you, didn't he? A. For a second, yes.

Q. Never mind how long. A. Yes; all right; yes. 20

Q. And in looking toward you, even for a second, he was looking away from where the boy was, wasn't he? A. I do not know whether he would or not.

Q. How could he look otherwise? A. Your eyes can work quicker than your hand.

Q. No matter how quickly they work. For a second or a moment call it, you cannot look in two places at once, can you? A. You can, yes.

Q. How do you do it? A. How can you do it? 30

Q. How can you see the jury and see this court officer at the same time? A. You can look at the jury now and have a focus twelve feet away from there. I can look at you and see the jury.

Q. See them all? A. Yes.

Q. Look steadily at me now. A. I am looking at you. I can see right from here.

Q. Where has the foreman got his hands? A. I do not see the foreman.

Q. You cannot even see the foreman? A. No. 40

Q. What I am trying to find out from you is how Gormley could look over on the sidewalk and see you, recognize you, give you a sign of recognition, and at the same time he was doing that see the boy in the street ahead of him; can you tell us? A. No, I cannot tell you.

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10 HIRAM REED, sworn.

DIRECT EXAMINATION BY MR. FALLON:

Q. Where do you live? A. 54 Danforth Avenue.

Q. Do you recall the happening between this boy and Mr. Gormley's car? A. Why, yes; I was driving a car right behind Mr. Gormley.

Q. On what side of the street was Mr. Gorm-
20 ley driving? A. He was driving on the right side of the street just a little to the centre.

Q. Going towards the north—going north? A. Yes; going towards the north.

CROSS-EXAMINATION BY MR. VAN WINKLE:

Q. What kind of car were you in? A. I was in a Buick.

Q. In a jitney? A. No, sir; 1914 Buick.

Q. I did not mean to reflect on the car by
30 calling it a jitney. A. It wasn't a jitney.

Q. I meant you are not in the jitney business? A. No.

Q. Who was in the car with you? A. A young party by the name of Ewan and three other men from Port Newark.

Q. You say Mr. Gormley was on the right side of the street, on the right hand side? A. Up until the time he swerved.

40 Q. Yes; a time did come when he left the right hand side of the street? A. Yes.

Q. Did you see this man Cohendet on the sidewalk? A. I could not say that I did.

Mr. Townsend: I desire to offer the ordinance of Jersey City relative to roller skating. Mr. Van Winkle will consent to it.

Mr. Van Winkle: Without calling anybody from the city hall. I of course reserve my defense to it. 10

(Marked D-1.)

Defendant Rests.

Claire Birch, recalled.

Direct Examination by Mr. Van Winkle:

Q. Respecting the tracks of the shoes of the automobile on the pavement of Bergen Avenue, can you tell us whether those tracks were straight behind the car, the car pointing north, or were they across the street; how were they? A. Positively straight. 20

Q. Yes; the car on the left hand side of the avenue pointed north, and the space over which the brakes had worked, as shown by the shoes on the surface of the avenue, right straight behind the car? A. Positively.

30

(No cross-examination.)

40

George Walsh, recalled.

Direct Examination by Mr. Van Winkle:

Q. Walsh, respecting the tracks of the automobile over which apparently the brakes had been worked—you say you saw the tracks on the avenue there? A. Yes.

10

Q. Were they right behind the car, straight, or how were they? A. They were straight, right behind the car.

Q. Yes; and the car on the left hand side, about eight feet from the curb, pointed north, and the tracks straight behind it? A. Yes.

(No cross-examination.)

20

John Hierspiel, recalled.

Direct Examination by Mr. Van Winkle:

Q. Did you at my request measure the width of Bergen Avenue from curb to curb at the place where your boy was hit? A. Yes.

Q. You paced it, did you? A. I paced it. Thirty-nine and a little bit to spare.

Q. That is the width there? A. As I recall it, yes.

30

Cross-Examination by Mr. Fallon:

Q. You paced it with your feet? A. Yes, sir—steps.

Q. What do you mean? A. Three feet to a step.

Q. How many steps did you make across the street? A. I counted thirty-nine feet.

40

Q. How many steps did you make? A. I did not count the steps; I counted three, nine, twelve and so forth.

Testimony Closed.

Motion for Direction of Verdict.

Mr. Fallon: I ask for a direction of a verdict for the defendant in this case, first, upon the ground that no negligence has been shown against the defendant. Second, upon the ground that contributory negligence has been shown against the intestate. Third, upon the ground that no damage has been proven here upon which the jury could predicate a verdict. And also upon the ground with respect to contributory negligence that this boy in being upon this street at this time and at this place was there in violation of a city ordinance of Jersey City which has been offered in evidence.

Now, I submit that it would be contributory negligence for that boy to be upon that street at that time and place; the centre of the street, which is used for the operation of vehicles, is a place in which pedestrians ordinarily are not expected to be or permitted to be. Your honor will recall some years ago a determination of our supreme court with respect to a ferry date case, where there were exits for passengers and exits for vehicles, and the court held that if the passenger went from the ordinary exit provided for him as a passenger over to the exit for vehicles and while in that position sustained injury, that no recovery could be had. Now, I submit that the fact that this boy was on this street at this time and place, on roller skates, and in violation of the Jersey City ordinance, indicates clearly that he was not exercising that degree of caution that the law requires every person to exercise on the public street, and particularly on a street such as this was, Bergen Avenue, traversed, as the witnesses say, very much indeed by the operation of automobiles, some of which are called jitneys.

As to my request for a direction on the ground that no damages have been proven, I submit that

on the plaintiff's statement of the case as it appears before the court, nothing more than nominal damage could be awarded. We have the testimony elicited through the plaintiff's own witness, the mother of this boy, as to what it would cost to maintain this child. Now, we appreciate the rule of law applicable to a case of this kind in
10 this state, and we know the plaintiff is confined to the recovery of what the statute says to be pecuniary injury—the reasonable expectation in money to be derived from the continuance of the intestate's life; and not one bit of testimony has been offered here to indicate that there was expected or intended to be any recompense to its family from this child. The only testimony is that the boy did little odd jobs after school. There is
20 nothing to indicate that he earned any money by so doing, and if so the amount, and I submit—I think the case is May against somebody, where the court holds that in order to warrant a case going to the jury on the question of damages there must be some proved, and in the absence of proof all that the jury could render would be nominal damage. Now, as against the nominal damage we have the undoubted proof—

The Court: Have you thought of what the logical result of your argument is? Suppose the
30 child were five years old and had never done any work, your argument would result inevitably in every case logically in the result that no parent can recover any damages for the death of any child of that age, because there never would have been any demonstration that the child could earn anything. That is not the law in this state or in any state.

Mr. Fallon: I know the law in this state is so
40 peculiar that even the courts do not seem to follow it very closely.

The Court: I think this court does.

Mr. Fallon: I submit that the law of this state is that unless some damage is shown to the jury only nominal damage can be given—unless some special damage can be shown only nominal damage can be given.

The Court: No; that is not the law; some special damage. 10

Mr. Fallon: I submit, too, that the proof undoubtedly is in this case, elicited through the mother of this boy, that the cost of maintaining this child was so great and would be so great during his minority that it could not be reasonably said that any damage could be awarded by this jury.

The Court: What becomes of the right of the jury to say that after the child got so it could earn money the amount it would have earned would have overtaken the amount it cost to sustain it? 20

Mr. Fallon: There should be some proof then on which to base it.

The Court: If that were so the argument I made a moment ago would prevail.

Mr. Fallon: The Court appreciates that the law of this state is that it is purely a matter for determination by the jury as to what should be awarded. 30

The Court: Preeiscly; and in Demarest *v.* Little, in 18 Vroom, that is precisely the language of the court, that the jury must found their verdict on conjectures and uncertainties.

Mr. Fallon: Palmieri *v.* Erie Railroad also holds—it has been followed time and again, by the Graham case and other cases— 40

The Court: In the Graham case the child did not make any money at all.

Mr. Fallon: But there was some proof as to what they intended to do with the child.

The Court: But there was no proof that the child ever would have gotten a job.

10 Mr. Van Winkle: There was proof that that child could recite and sing.

Mr. Fallon: But there was no proof in this case that they intended to have this child go to work.

The Court: If this child were going to go to work in these days I would think there was some proof that it would be quite a profitable child. When I say a profitable child I mean it would make money, because wages are high, just

20 the same as living is high. We have the labor unions telling us now that we shall have neither the standard of living nor wages reduced—

Mr. Fallon: There is another case, I think Harper *v.* The Railroad Company, that where the intestate's negligence contributed to the occurrence and it was one of the proximate causes of the death, there could be no recovery.

The Court: That is not a correct statement of what the Harper case decides. The Harper

30 case is in 3 Vroom, isn't it? And the Harper case decided that where the jury cannot reasonably find from the evidence that the child's negligence did not contribute to it, then a non-suit is essential; but not the way you state it. In other words, there must be no reasonable ground upon which the jury, acting as reasonable men can find that the child was not negligent before there can be a non-suit.

40 Mr. Fallon: Mr. Townsend has suggested to me that he does not know whether or not the proof

in respect to the ordinance indicates clearly that this particular street on which this happening took place is embraced within the terms of that ordinance.

Mr. Van Winkle: There is no question about that.

Mr. Fallon: That is conceded by the plaintiff? 10

Mr. Van Winkle: Yes.

The Court: I think I must deny the motion that has been made in this case, and I think with respect to one phase of it only I will state my reasons for it. The others I think are so perfectly plain that there is no good reason for me to discuss them; and that is with respect to the matter of the ordinance. In the first place, I have had the advantage of reading the ordinance. The ordinance states on its face the reason for its passage. 20 The ordinance says the mayor and aldermen of Jersey City by the board of street and water commissioners for and on behalf of the municipality of said city do ordain as follows: Whereas, it has been satisfactorily evidenced that the certain form of sport known and designated as roller skating has in its practice on a part of Bergen Avenue become a source of damage and nuisance to owners and occupants of property abutting thereon, therefore be it ordained, and so on that 30 roller skating shall not be permitted. Well, manifestly the object of that ordinance was not to secure the safety of people who were traveling on the highway; the object of the passage of the ordinance as stated by the street and water commissioners who passed it was to benefit the abutting property owners, and consequently it did not create a duty on the part of the people who might skate there in favor of the travelers upon the highway; 40 it created a duty in favor of the abutting

owners; and it did not create a right in the travelers upon the highway as against the skaters upon the highway, but only in favor of the abutting owners. Now, that distinction is important to be borne in mind in determining what the effect of such an ordinance is in an action of negligence. I should have admitted the ordi-
10 nance, even if it had been objected to, in evidence, not because it was any evidence of negligence, but because it was something that should be taken into consideration in determining whether or not Mr. Gormley did not have a right to assume that the street would not be encumbered by people using the street for roller skating when an ordinance had prevented them from doing that; in other words, it was a fact that might
20 be taken into consideration in determining his conduct under the circumstances, but it did not constitute either prima facie evidence of negligence nor did it constitute conclusive evidence of negligence. It was merely a fact to be taken into consideration in the case. Now, that that is so is manifested by the decisions in our own state alone. I can go outside and read from textbooks, but we have two decisions in our own state which bear directly and immediately upon this point. One is Fielders *v.* North Jersey Street Ry. Co.,
30 reported in 39 Vroom; the portions which I shall read from that case are found on pages 348 and 349. The court there says—and it was the court of errors and appeals—that "there does not seem to be any distinction between a valid statute and a valid ordinance, in respect to the binding force of a duty created thereby. A lawful municipal ordinance is an exercise of the delegated power of legislation, and is the law of the place. When
40 adopted in the exercise of that power which is commonly called the 'police power', ordinances

frequently prescribe for persons subject thereto a rule of conduct, for the purpose of insuring the safety of others."

Now, of course, the object of this ordinance was not to insure the safety of others. It was to insure the adjoining property owners from damage and nuisance which the exercise of roller skating had been demonstrated to have caused to them before the passage of the ordinance. Now, having that in mind, we then turn to what is said by the court on page 349, and the court there said:

"Perhaps the doubts (as to whether it was prima facie evidence of negligence or conclusive evidence or whatever it was) have arisen from confusing the action for violation of a specially imposed duty with the action for violation of the common law duty of exercising care under given circumstances. It would seem that a correct definition of actionable negligence must include the notion that a legal duty has been violated; whether the duty arose from the common law or from a valid statute or municipal ordinance would seem immaterial."

Then here comes the operative part:

"Assuming the party injured in a given case to be one of a class for whose benefit a duty has been by statute or ordinance imposed upon the opposite party, and assuming that the evidence shows an actual breach of that duty, it would seem the sole remaining inquiries should be whether the violation of the imposed duty was the proximate cause of the injury, and if so, whether any faulty conduct on the injured party was a contributing cause."

In other words, Mr. Gormley was not one of a class for whose benefit this ordinance was enacted because it is expressly stated on the face of the ordinance for whose benefit it was enacted.

And then the other case which bears directly on the point is Kelly *v.* Henry Muhs Company, 42 Vroom, 358. This is the syllabus, and this is precisely what is decided by the court:

"In an action based upon a neglect of duty, it is not enough for the plaintiff to show that the defendant neglected to perform a duty, imposed by
10 statute for the benefit of a third person, and that he would not have been injured if the duty had been performed. He must show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection."

So that you see that case is immediately on the point and on all fours with the very thing that we are now discussing, so that with that decision standing in front of my face it would be mani-
20 festly absurd for me to hold that this ordinance was imposed for the benefit of Mr. Gormley or any traveler along the highway—when I say Mr. Gormley I mean the traveling public—that it was imposed for the benefit of the traveling public; and that being so it would be absurd for me to sit here and decide that it would be either prima facie or conclusive evidence in favor of one of the traveling public against a person who had been injured while he was engaged in the infraction of the ordinance.
30

I have thought it necessary to say that much because it *is* a nice point and I felt that it ought to be written down on the record, what the court thought in deciding the point and in passing upon that particular phase of the case, so I deny the motion for the reason which I have stated on that point and for reasons which are written down in the innumerable cases to which I might direct your attention now if it were necessary
40 on the other points.

Charge.

Gentlemen of the Jury: This suit is brought by John Hierspiel, administrator of the estate of Frank Hierspiel, deceased, against Francis J. Gormley, and the object of the suit is to recover damages for an accident which happened on Bergen Avenue at or near the intersection of that avenue with Reid Street in Jersey City on the 21st of September, 1918. The plaintiff says that the young boy who was his son was on the avenue on roller skates; he says that the boy while on the avenue was struck by Mr. Gormley who was running an automobile, and the claim made by the plaintiff is that Mr. Gormley should respond in damages for having caused the death of this boy in the accident because of any one or more of three grounds of negligence which plaintiff sets forth in his complaint and upon which he relies in this action.

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The first ground of negligence is that the defendant was driving on the wrong side, as the plaintiff calls it, of the road. The second ground of negligence is that he was running at an excessive rate of speed and did not therefore have his car under proper control; and thirdly, that he gave no warning by horn or bell or crying out or in any other way of his approach.

Now, if the plaintiff makes out by the greater weight of the evidence, first, that the young boy was killed by this collision with Mr. Gormley's automobile, and then shall establish that the collision resulted from the negligence of Mr. Gormley in any one or more of the three grounds of negligence which the plaintiff has set forth in his claim before you, then the plaintiff is entitled to have a verdict and to have you assess his damages if you shall find that any damages were

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suffered by him in this suit. (I do not mean the damages suffered in this suit, but if you find that he has established in this suit that any damages were suffered by him by virtue of this accident.)

Of course there is another matter that must be brought to your attention, and that is that in any action of this kind the contributory negligence of
10 the deceased is a defense. The burden of its establishmnet rests upon the defendant, and if the defendant relies upon it it must appear in the case by the greater weight of the evidence that the young boy, the dead boy, was contributorily negligent under the rules which I will give you in a few moments, and if he makes that out, then the plaintiff can have no verdict what ever, even though he shall have shown that the defendant
20 was negligent in all the ways or in any of them that he has set out here against the defendant.

That brings us to consider more particularly what the law is with respect to a person running an automobile on the public highway in the particulars which the plaintiff has alleged the defendant was negligent in this accident. Now, the first ground was, as you recall I stated it to you, that the defendant was said to have been on the wrong side of the road; and therefore we have got to find
30 out what under the law is the wrong side of the road. That we ascertain from what is known popularly as the vehicular traffic act. That act provides, among other things, that "On all public roads, highways, turnpikes or streets the following rules and regulations shall be effective: A vehicle shall keep to the right, and when the improved portion of a road is of sufficient width the vehicle shall keep to the right of the centre of such road except when passing a vehicle ahead. A vehicle
40 meeting another shall pass to the right. A vehicle overtaking another shall pass on the left side of

the overtaken vehicle, and the vehicle overtaken shall bear to the right, and the vehicle overtaking the vehicle ahead, and in passing to the left, shall not, unless compelled to by the width of the road, pass to the left side of such road, but shall as far as possible keep to the right when passing the vehicle overtaken."

Now, that is the vehicular traffic act of this state, and that is the law which persons are obliged to observe in propelling their vehicles along the public highway. The essence of that rule is, so far as the party driving on the road and not either overtaking or meeting with a vehicle is concerned, that he shall keep to the right, and when the improved portion of the road is of sufficient width he shall keep to the right of the centre of such road. Now, does that mean that under all circumstances and at every time the person driving an automobile if he shall be on the left side of the road shall conclusively be presumed to be guilty of negligence? Does it mean that? It does not, because circumstances are conceivable when it would be the highest kind of negligence for a man to be on the right of the road. Let me give an illustration to you, for the sake of argument and illustration: Suppose one of you gentlemen should be driving a jitney, I do not mean to say that any of you would, but suppose one of you should be driving a jitney or be driving your own automobile in which were passengers, and you happened to be on the right side of the road, and suppose that coming in the opposite direction were a team of runaway horses on their left side of the road, bearing right down upon you; now, do you think you would be a careful and prudent man if you stayed on the right side of the road, or would you turn over to the left and let the runaway team have the right of way and escape accident? Or

suppose, if you please, that instead of meeting one vehicle you should meet two or more abreast on the highway and you had to pass them and in order to do so you went clear over to the curb on the left side of the road, would you be negligent? You would not. So that the underlying principle in all cases is this: that the duty of a
10 person driving a vehicle on a public highway is to use reasonable care for the safety of himself and all others lawfully using the public highway, and in most instances the exercise of reasonable care on his part would require him to be on the right side of the road, because that is the law of the road and that is what every reasonable man would be expected to do; but circumstances might arise when his presence on the left side of the road would not be a lack of reasonable care on his part
20 but on the other hand might be the exercise by him of the highest degree of care. So that the effect which this statute has in this case is that that being the law of the road you are to keep that in mind in determining whether under the circumstances of this case Mr. Gormley is shown to have been in the exercise of reasonable care before and at the time of the happening of this accident. If he was in the exercise of reasonable care, even if he were on the left side of the road,
30 he would not be negligent. It is only when he shall have been shown to have been not in the exercise of reasonable care that he could be held for negligence because he was on what has been called the wrong side of the road. To put that thing in a sort of epigrammatical way, or to put it in what sometimes is called a bull, sometimes the right side of the road is the wrong side of the road, and sometimes the wrong side of the road is the right side of the road; and whether the side
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of the road upon which you are is the right side or not depends upon whether you are in the exercise of reasonable care when you are there. If you are, then although you may be on the left side of the road it would be the right side of the road. Then if you are in the exercise of reasonable care although it may be the right hand side of the road it may be the wrong side. So that the sole test that you have to apply in applying this rule to the circumstances of any given case is this: Having the rule in mind as the one which is adopted by the legislature to promote the safety of the traveling public, having that in mind then you say to yourselves, did the person who is charged with negligence here exercise reasonable care at the time of the happening of the accident? If he did he was not negligent, no matter what side of the road he was on. If he did not, he was, and if that negligence was the proximate cause of the accident then of course the plaintiff would be entitled to have a verdict.

Now, what I have been trying to explain to you has been laid down in one of our cases in language which is very similar to that which I have used to you and which I have amplified in order to make it plain to you. The court says—and this is the highest court of our state—"For reasons of safety a traveler may use any part of a highway, having due regard to the rights of others and taking such care as prudence would require him to take in the position he assumes. If he thus uses the highway he may assume that others using it will use it with a due regard to his rights".

That is the law of this state, and I have tried to make it plain to you so that you may understand just what effect this rule of the road as it is called has in a case of this kind, and I hope I have made it plain to you.

Charge.

The second ground of negligence is, as it is charged by the plaintiff, that he was running at an excessive speed. Now, on the subject of speed we have a statute also. This statute is known as the motor vehicle act of the State of New Jersey, and that provides:

"The following rates of speed may be maintain-
10 ed, but shall not be exceeded, upon any public street, public road or turnpike, public park or parkway or public driveway or public highway in this state by anyone driving a motor vehicle: A speed of one mile in five minutes (that you will observe would be twelve miles an hour) where such street or highway passes through the built up portion of a city, town, township, borough or village." And by a built up portion is meant where the
20 houses are on an average less than one hundred feet apart. Where they are more than one hundred feet apart, in other words where the section is not a built up section, a speed of thirty miles an hour may be maintained. That, gentlemen, is the law which will govern with respect to the amount of speed that a party may maintain but shall not exceed. But just as in respect to the former rule that I directed your attention to, so underlying that is the rule of reasonable care, because the statute itself provides: "Provided, however, that
30 nothing in this section contained shall permit any person to drive a motor vehicle at any speed greater than is reasonable having regard to the traffic and use of the highways or so as to endanger the life or limb or to injure the property of any person." In other words, a man may maintain a speed of twelve miles an hour without being guilty of violating that section that I read you first, but nevertheless he may be responsible for
40 having injured or caused the death of a person

unless he used reasonable care to run his car at a reasonable rate of speed, having regard to the traffic along the highway. So that there too you see you apply the fundamental rule: Has the plaintiff made out by the greater weight of the evidence that Mr. Gormley did not use reasonable care in maintaining the speed that he did, whatever that was, when he ran his car along the highway? If he did not use reasonable care he was negligent, and if that negligence was the proximate cause of the injury and death of this boy the plaintiff if he has shown damage would be entitled to recover. If he is not shown to have been guilty of a lack of reasonable care, then of course the plaintiff cannot have a verdict on that ground, and so far as it is concerned the defendant would be entitled to a verdict.

Now, the next charge of negligence is that he did not give any warning. Our statute, the motor vehicle act, provides that "Every motor vehicle shall be provided with a plainly audible signal trumpet." That means, of course, that the trumpet is there to be sounded whenever reasonable care would indicate the propriety of sounding it to the person running the car; and therefore if Mr. Gormley did not sound a horn or give other warning when the circumstances of the case would have impelled a reasonable man in the exercise of reasonable care to do so, why then he would be negligent. If he did sound the warning, as he says he did, why manifestly if you are satisfied that that was a proper and sufficient warning he would not be negligent and there could be no recovery against him on that ground.

I have gone thus into detail with you with respect to the three grounds of negligence charged against Mr. Gormley because I want to make it

as plain as I can so that you may see just precisely what it is you are trying and under what rules and for what reasons you find a verdict. Now, to epitomize all that I have said in just a few words, it amounts to this: that the plaintiff must make out by the greater weight of the evidence that the defendant Gormley was negligent
10 in either one or more of the ways charged by him and that that negligence was the proximate cause of the death of the plaintiff's intestate before the plaintiff will be entitled to have any verdict whatever. If the plaintiff has made out that the defendant was negligent in any one or more of the ways charged by him and thereby proximately caused the death of the plaintiff's intestate, then he would be entitled to have a verdict and to have
20 you assess his damages, unless the defendant shall have made out that the plaintiff's intestate, the boy, was contributorily negligent.

Now, I will say just a few words upon that phase of the case. The plaintiff's intestate was what is known in the law as a minor, a person under the age of twenty-one years. He was, however obliged to use care for his safety while traveling on the highway, and what that care was has been stated in one of our cases as follows:

30 "Between the time in life when a person is incapable of exercising the care and judgment necessary to avoid and avert danger and the time when he is in law an adult and responsible as such, there is a transition period during which his responsibility depends upon matters of fact, and in this transition period he may or may not be guilty of contributory negligence. The degree of care required of a child old enough to be capable of negligence is such as is usually exercised by
40 persons of similar age, judgment and experience.

Charge.

In order to determine whether a child old enough to be capable of negligence has been guilty of contributory negligence it is necessary to take into consideration the age of the child, its experience and capacity to understand and avoid danger to which it is exposed in the actual circumstances and situation under investigation, and it is usually a question for a jury to determine whether the child has been guilty of contributory negligence." 10

Now then this child, therefore, under the rule which I have just read to you was obliged to use ordinary care, that is such care as persons of similar age, judgment and experience would use, for his own safety. And, therefore, you ask yourselves this question: Has the defendant shown, or does it appear in the case by the greater weight of the evidence, that this boy did not use such care for his own safety as a person of similar age, judgment and experience would have used for his safety? If it appears in the case that he has not used that degree of care, then he was contributorily negligent, if the neglect to use that care contributed either in whole or in part to the production of the accident which resulted in his death. If he is not shown by the greater weight of the evidence to have been contributorily negligent why then of course he would not be defeated of his right to recover on that ground. 20 30

Now, what is the duty of everyone when he approaches a highway crossing to look for approaching vehicles, and to exercise a reasonable judgment how and when to cross safely. This boy lived in Fairmount Avenue and had lived there from his birth. That is a short distance from the place where the accident took place, and he may therefore be presumed to have been familiar with 40

Bergen Avenue and the amount of traffic thereon. That was one of the facts which may be presumed to have been present in his mind at the time he attempted to cross or went upon that street. Now, then, if he knew there was a large amount of traffic there ordinarily, you ask yourselves whether a person of similar age, judgment and experience
10 would have encumbered himself, if it was an encumbrance, with roller skates before he attempted to cross the street, if he did attempt to cross it, and you will ask yourselves whether if he was not crossing the street but going along with the street, on the street, or was playing upon the street—then you ask yourselves whether or not a person of similar age, judgment and experience with the knowledge that he may be presumed to
20 have had of that place and the traffic upon the road, would have gone upon the street in that way for that purpose. If he would not, then he was contributorily negligent and the plaintiff could not recover no matter how negligent Mr. Gormley may be proven to have been; but the underlying rule with respect to the child, just as it was with respect to the defendant, is that he was obliged to use care for his safety. Nobody has a right to go out on a public highway and recklessly expose himself to danger. Our court of errors
30 and appeals has said in one of its leading cases that reasonable care is the duty of everybody on a public highway, and holding people to the exercise of that care is essential to the safety of everybody upon a public highway. You can see that; you may be never so careful of your safety, but if somebody else is careless of his he jeopardizes not only himself but you and everybody else, and therefore the safety of the public upon the
40 grounds of public policy requires that the people should be held to the exercise of that degree of

care which the law has cast upon them, the exercise of reasonable care for their own safety and the safety of others while they are crossing or traversing a public highway.

Now, gentlemen, I think that is all that I need to say upon the question of liability in this case. If you find under these rules that the defendant is liable you then, and only then, come to the question of the assessment of damages. If you come to that question you assess those damages under these rules: You will remember that this is not a case of mere injury; it is a case of death; and prior to 1848 in this state no action would have lain here to recover damages for having caused the death of a person; but in that year the legislature passed an act which is popularly known as the death act and created for the first time in the history of the jurisprudence of this state a right of action in favor of the next of kin of any person who was killed by the wrongful act, neglect or default of another person or corporation, and from that day to this that action has existed, and it is under that statute that this suit is brought. Our courts have laid down this rule with respect to the damages that are recoverable in an action of that kind:

"The action is created by statute, which supplies the sole measure of the damages recoverable therein. They are to be determined exclusively by reference to the pecuniary (that is the injury in a money sense) injury resulting to the next of kin of the deceased by his death. The injury to be thus recovered for has been defined to be the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is therefore the

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sole measure of damage in such cases. A difficult task is thereby imposed upon a jury for they are obliged to determine probabilities and must to a large extent form their estimate of damages on conjectures and uncertainties."

Now, some of those words are rather long and put together as they are they may not convey to
10 your minds as complete and adequate a conception of what the law has in mind in this action as I would like to have you entertain, and therefore if I may construe those words for you, interpret them more simply for you, I would say to you that what the statute has in mind is to give to the next of kin of the deceased in money what they have lost in a money sense from the death of the deceased, or in other words, what would
20 they have obtained in a money sense if the deceased had continued to live instead of having had his life cut off? That is what the statute means. That is what that case means. How much would he have been worth to the next of kin if he had lived instead of having had his life cut off? Now, you will see that cuts off at once all damage for satisfying wounded feelings, all damage to solace sorrow; it cuts off everything but the pecuniary loss, the loss in a money sense that the next of kin have sustained from the death of the de-
30 ceased, in other words, it cuts off all but what he would have contributed in a money sense to those next of kin if he had lived. Now, how much would that have been in a case like this? Counsel for the plaintiff hazarded a guess, but his guess, if I may use plain and homely language, does not amount to a hill of beans in this case; absolutely nothing. You are the ones; this jury, if there is to be any speculation on what the loss
40 has been, are to speculate, and it is very necessary that you should indulge that speculation untram-

meled and unhampered by any guesses of interested persons. You can readily see that if you are engaged on one side of a case your notion of how much you ought to get might be correspondingly exaggerated, honestly but nevertheless exaggerated; and if you were engaged on the other side of the case and were to hazard a guess your guess might be correspondingly diminished, and therefore the law very wisely says that what the counsel thinks you ought to give is irrelevant in this inquiry. You take the facts in the case and you say, yourselves, from the evidence, how much would this boy's life have been worth to the next of kin, during the continuance jointly of their lives, that is, of the deceased and of the next of kin, if he had continued to live instead of having had his life cut off. Now that involves a sort of a matter of bookkeeping when you stop to think of it. On the one hand this boy had to be supported. He was a minor. Until he reached the age of twenty-one years it was the duty of his father to support, educate and maintain him. That would cost money. In that aspect of the case he was a liability, not a pecuniary asset. On the other hand, until he reached the age of twenty-one years his father was entitled to his earnings, whatever they might be, unless he emancipated him, that is set him free to shift for himself and to take his earnings to himself, which the father might do. Therefore, one of our cases in stating the rule has laid it down very clearly in these words:

"There is a question for the jury whether the father suffers pecuniary injury by the death of his son by being deprived of his earnings during minority, during which period the father is entitled to such earnings though liable for his support and maintenance and by being prospectively

deprived of such contributions as his son might thereafter make (that is after he reached the age of twenty-one) to the father's support, either voluntarily or under the compulsion of the law, in case the father became necessitous."

Now, what does that mean? That means that on the one hand you say how much, so far as the evidence indicates, would it have cost the father to support, educate and maintain this boy? On the other side, how much would the boy have contributed in a money sense to the next of kin if he had continued to live for so long as he continued to live? And the difference between those two, if his contributions would be more than his support, when you have found the present value of it would be your verdict in this case if you find for the plaintiff.

You will take the case under these rules and decide it.

Mr. Townsend: May I have an exception to your honor's refusal to charge as requested?

The Court: Yes. The first one was charged. That you do not want an exception to?

Mr. Townsend: No.

The Court: I refuse to charge the second request to charge, which reads as follows:

"By reason of the ordinance of the mayor and aldermen of Jersey City it was unlawful for the plaintiff's intestate to be upon Bergen Avenue at the point of the accident upon roller skates".

Now, I refuse to charge that first of all because he may have been there lawfully. He may have been merely crossing the street at the corner, as he had the indubitable right to do, and this request requires me to assume that it was unlawful

for him to be upon the avenue in any way on roller skates, which the ordinance itself, even if it were applicable to this case, does not provide. It simply says he shall not indulge in, practically, the sport of roller skating. That is what it amounts to. He may not therefore have been engaged in the sport of roller skating but merely pursuing his way as a passenger from corner to corner across the street, and I cannot assume that as a matter of law, neither can I assume conclusively that his presence upon roller skates on the street there makes him guilty of negligence.

I refuse to charge the third request, which reads as follows:

"The fact that plaintiff's intestate was upon Bergen avenue between Reid and Duncan Avenue on roller skates in violation of the ordinance of the city of Jersey City can be taken into consideration by you in determining whether plaintiff's intestate was guilty of contributory negligence."

I refuse that first of all because the fact that he was violating the ordinance by being upon the street on roller skates is a matter that must be determined by the jury and not as a matter of law by the court, and yet this request indicates that I shall say that the fact was that he was there in violation of the ordinance of Jersey City; and furthermore even if he were there it will not permit the jury to predicate negligence upon the violation of the ordinance because the ordinance was not one which created a duty on the part of the intestate in favor of Mr. Gormley or any other traveler on the highway.

That raises the question right on the record.

Verdict $2,500.

Exhibit D-1.

AN ORDINANCE.

An Ordinance prohibiting roller skating on a portion of Bergen Avenue.

The Mayor and Aldermen of Jersey City, by the Board of Street and Water Commissioners for and on behalf of the municipality of said city, do or-
10 dain as follows:

WHEREAS it has been satisfactorily evidenced that the certain form of sport known and designated as roller skating, has in its practice on a part of Bergen Avenue, become a source of damage and nuisance to owners and occupants of property abutting thereon, therefore be it ordained:

SECTION I. That roller skating on Bergen Avenue between Communipaw Avenue and Fair-
20 mount Avenue, is hereby prohibited and that any violation of this ordinance shall subject the offender thereof on conviction before a Police Magistrate to a fine of nor exceeding Five ($5) Dollars.

Passed April 15th, 1907.

THOMAS F. ROONEY,
President.

Approved 1907.

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.. Mayor.

30 Attest:
George T. Bouton,
Clerk.

Returned by the Mayor with his objections, 4-22, 1907. Presented to the Board at meeting held 4-22, 1907, and laid over under the rules taken from the table at meeting, held 4-29, 1907, and passed notwithstanding the objections of the Mayor.

Copy sent to 190 ; Advertised
40 April 30th, 1907.

George T. Bouton,
Clerk.

Reasons.

NEW JERSEY SUPREME COURT.

Hudson County.

John Hierspiel, Administrator *ad prosequendum* of the estate of Frank Hierspiel, deceased, *Plaintiff*, *v.* Francis Gormley, *Defendant.*	Action at Law. On rule to show cause.

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The defendant in the above action hereby writes down the following reasons why the judgment rendered herein should be set aside, and a new trial granted:

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1. Because the verdict is against the clear weight of the evidence.

2. Because the plaintiff's intestate was guilty of contributory negligence, which was the approximate cause of the injuries resulting in the intestate's death.

3. Because the defendant was not guilty of negligence.

4. Because the jury found a verdict for the plaintiff, whereas in fact, they should have found a verdict for the defendant, since it appeared from the evidence, that the plaintiff's intestate was guilty of contributory negligence, and that the defendant exercised due care.

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5. Because the damages awarded by the verdict, are excessive.

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Reasons.

6. Because the verdict of the jury was the result of bias, prejudice and passion, and not in accordance with the evidence, and was rendered by the jury, without regard to the evidence produced before them.

Dated, Feb. 7th, 1919.

John J. Fallon,
Of Counsel with defendant.

Mark Townsend, Jr.,
Attorney of Defendant.

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Postea on Verdict.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased,

Plaintiff,

vs.

FRANCIS GORMLEY,

Defendant.

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This case was tried before Judge William H. Speer and a Jury, in the Hudson Circuit on January 6th, 1919.

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Jury rendered a verdict in favor of the plaintiff and against the defendant, in the sum of $2,500.00.

(Signed) WILLIAM H. SPEER,
Judge.

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Postea on Rule to Show Cause.

(Filed June 11, 1919.)

NEW JERSEY SUPREME COURT.

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JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased,
Plaintiff,
vs.
FRANCIS GORMLEY,
Defendant.

The rule to show cause heretofore entered in this cause having been discharged by this Court, it is thereupon

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ORDERED that judgment final be entered in favor of the plaintiff, John Hierspiel, Administrator *ad prosequendum* of the estate of Frank Hierspiel, deceased, and against the defendant, Francis Gormley, in the sum of $2,500.00, and costs to be taxed.

Rule entered June 11th, 1919, as of January 14th, 1919. On motion of Marshall Van Winkle, Attorney of plaintiff.

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Filed July 12, 1919.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased, *Plaintiff*, vs. FRANCIS GORMLEY, *Defendant*.	On Appeal.

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To:

MARSHALL VAN WINKLE, ESQ.,
Attorney of Plaintiff:

SIR:

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TAKE NOTICE that the defendant herein appeals from the judgment and every part thereof entered in the Supreme Court, Hudson Circuit, to the Court of Errors and Appeals of the State of New Jersey, and that he will, within the time required by law, file and serve upon you, his grounds of appeal in said case, as required by the law and statute of such case, made and provided.

Yours, etc.,

MARK TOWNSEND, JR.,
Attorney of Defendant.

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Dated July 10, 1919.

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Filed Aug 9th, 1919.

Reasons for Reversal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased, *Plaintiff*, *vs.* FRANCIS GORMLEY, *Defendant.*	On Appeal.

The above appellant, Francis Gormley, herewith sets down his grounds of appeal in the above entitled cause, as follows:

1. Because the Trial Court refused to charge as requested, by counsel for the defendant-appellant, as follows:

> "By reason of the ordinance of the Mayor and Aldermen of Jersey City, it was unlawful for the plaintiff's intestate to be upon Bergen Avenue, at the point of the accident, upon roller skates."

2. Because the Court refused to charge the following request made by counsel for the defendant-appellant:

> "The fact that plaintiff's intestate was upon Bergen Avenue, between Reed and Duncan Avenue, on roller skates, in violation of the ordinance of the City of Jersey City, can be taken into consideration by you in determining whether the plaintiff's intestate was guilty of contributory negligence."

3. Because the Trial Court declined to direct a verdict for the defendant-appellant.

MARK TOWNSEND, JR.,
Attorney of Defendant-Appellant.

Dated Aug. 8th, 1919.

8 3 NOV 7 1919

New Jersey Court of Errors and Appeals.

JOHN HIERSPIEL, Administrator *ad prosequendum* of the estate of FRANK HIERSPIEL, deceased, *Plaintiff*, v. FRANCIS GORMLEY, *Defendant*.	On Appeal.

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POINTS FOR PLAINTIFF.

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Statement of the Case.

On Saturday, September 21, 1918, at about a quarter to five in the afternoon, the deceased, a schoolboy twelve years old, who did odd jobs after school delivering goods from stores, left his home where he lived with his father, a letter-carrier, and his mother, on roller-skates, intending to go to a fruit store some blocks away "where he was to get a place to take out orders" (Mother's testimony, p. 32). "He had delivered goods from stores while he was on roller skates lots of times" (Ibid.). He was "a good, strong, healthy boy," The mother "never had a doctor" for the boy (Ibid., p. 36, l. 32).

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Shortly after the boy left home, and while he was crossing to the west side of Bergen Avenue, he was struck by defendant's automobile which was proceeding northerly on the left hand side of Bergen Avenue about 8 feet from the west curb

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of the avenue. Bergen Avenue, from curb to curb, is 40 feet wide (p. 11, l. 15, and p. 25, l. 41), or 39+ feet wide (p. 54, l. 28).

There were allegations and proof of negligence on the part of the defendant in three particulars: excessive speed, being on "the wrong side of the road," and failure to give any warning of the ap-
10 proach of the automobile.

A witness for the plaintiff testified that defendant "was going pretty fast" (p. 17, l. 22). The auto "was going fast when it hit him" (p. 21, l. 22). "It was going fast before it hit him" (p. 21, l. 25). "It was going fast after it hit him" (p. 21, l. 13).

The defendant called two witnesses, neither of whom was asked with respect to the speed at which the automobile was proceeding.

Bearing on the question of speed, and also as
20 showing that the automobile was on "the wrong side of the road," for some distance before it struck the boy, there were "tracks" on the asphalted surface of the street "positively straight" (p. 53, l. 25) behind the car about 8 feet from the west curb (p. 54, l. 17), indicating the sliding of the wheels after the brakes had been applied, for a distance of 5 feet behind the car (p. 12, l. 32, and p. 30, l. 34).

There were no autos on the street other than
30 that of defendant, nor was there any pedestrian on the street other than the boy. There was no warning (p. 26, l. 11, and p. 12, l. 11). "It was not sounded; absolutely; there was no sound" (p. 28, l. 8).

One of the witnesses for the defendant himself furnished an explanation of how the boy came to be struck. This witness knew the defendant and waved to him from the east sidewalk when the
40 boy was on the street ahead of the car. At first

this witness testified that the defendant had not seen his sign. Later in his testimony he stated that the defendant recognized him and looked toward him (p. 51) "gave me a nod" (p. 50, l. 21) and "gave me the horn" (p. 50, l. 27) both, apparently, in recognition of the witness's greeting. Then this witness was asked this question and gave this answer: 10

> "Q. What I am trying to find out from you is how Gormley could look over on the sidewalk and see you, recognize you, give you a sign of recognition, and at the same time he was doing that see the boy in the street ahead of him; can you tell us? A. No, I cannot tell you" (p. 52, l. 1).

The case was conspicuously one for the jury on the question of the negligence of the defendant and the negligence, if any, of the deceased.

The ordinance was passed during the time of 20 the roller-skating craze for the benefit of the abutting property owners. It was not designed in any way to prohibit a boy from traveling on or across Bergen Avenue on roller skates, in his work of delivering goods to or from a store, or in going to or from a store or his home or elsewhere.

Brief of the Argument.

The ordinance was enacted, and is expressly worded, to curb the "sport known and designated 30 as roller skating."

This ordinance was construed in the Supreme Court in the case of *Billington v. Miller,* 75 N. J. L., p. 415 (1907), where the Court, by Mr. Justice Swayze, said:

> "We think the language of the ordinance makes it clear that it was only the sport of roller skating that it was intended to reach and not mere travel upon roller skates * * *. 40

If we should assume that the ordinance pro-

vides as the defendant contends, the ordinance would be an invalid exercise of the City's police power. While the City might regulate in a reasonable way the use of the street by persons traveling on roller skates, it could not prohibit entirely the use of the street by persons so traveling. While the City might reasonably regulate, it could not absolutely prohibit, for the streets are for the public and for public travel, and there is nothing inherently legally objectionable in traveling on roller skates. Such traveling is, in general, perfectly lawful. The public may, subject to reasonable regulation, travel on the streets well-shod, barefoot, in vehicles, on roller skates, and in other conceivable ways.

The argument of defendant entirely ignores the potent considerations that "the sport known and designated as roller skating" is the mischief to be corrected by the ordinance, and that *this "sport" is the thing mentioned and ordained against in the ordinance itself.* This "sport" cannot be disassociated from the ordinance. *The enactment itself* is against "the sport known and designated as roller skating." The ordinance is based upon the "sport known and designated as roller skating." Because of this "sport" and its result to abutting property owners, "therefore" —as the ordinance expressly states—it is prohibited. Only because of this "sport" is there any enactment at all.

The argument of the defendant treats the part of the ordinance that expressly mentions "the sport known and designated as roller skating" as a "preamble." Apparently defendant so treats this part of the ordinance, only because the word "whereas" is used, which, ordinarily, introduces a preamble; but it is to be noticed that the "preamble," so called, is found *after* the words "do

ordain as follows." If we speak strictly, the ordinance has no preamble, and everything after the word "ordain" is the enactment. I think the word "whereas" misleads the defendant.

These familiar rules of construction are to be noticed: that certain words and phrases which are preceded by a specific enumeration, are usually limited by such particular descriptions; that an ordinance will be construed according to its reason and spirit; and that an ordinance penal in its nature is subject to a strict construction.

I submit that the Court was correct in dealing with the ordinance as it did.

There was no evidence at all that the boy was engaging in the "sport" of roller skating. The proof was distinctly the other way. There was no proof of any violation by the boy; and if there had been, the Court's treatment of the ordinance was correct, because the defendant was not one of the abutting property owners for whose benefit the ordinance had been passed; and he, therefore, could claim no benefit from its violation. The ordinance was admitted in evidence; but the Court refused to charge that because of the ordinance "it was unlawful for the boy to be on Bergen Avenue." Of course, this request was improper, even though the ordinance were passed for the benefit of the defendant.

And the Court refused to charge that the boy was on the avenue "in violation of the ordinance" which fact might be taken into consideration on the question of the boy's contributory negligence. As the Court said, the Court had no right to assume that the boy was violating the ordinance. There was no proof that the boy was engaged in the "sport" of roller skating.

The Court's treatment of the ordinance was a clear application of undoubted law.

The authorities in this country are substantially unanimous to the effect that in actions for failure to use ordinary care *a duty towards the complaining party must be shown to exist.* The principle is the same, whether the statute expressly declares that a person shall be liable for any damage sustained by reason of its breach, or merely imposes a duty with a penalty for its non-performance.

A violation of a statutory duty or one imposed by an ordinance can be made the foundation of an action only by a person belonging to the class intended to be protected by such regulation.

See note in 46 L. R. A. (N. S.) 1913, at p. 338.

> "In an action based upon a neglect of duty, it is not enough for the plaintiff to show that the defendant neglected to perform a duty, imposed by statute for the benefit of a third person, and that he would not have been injured if the duty had been performed. He must show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection."
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> *Kelly v. The Henry Muhs Co.,* 71 N. J. Law, page 358 (1904).

The ordinance was not designed for the safety of travelers upon the street as a class. There is nothing in the language to indicate that it was the intent of the municipal authorities, in passing the ordinance, that it should give rights to an action by any citizen aggrieved through a breach of its provision.

Billington v. Miller, 75 N. J. L., 415 (1907);
Fielders v. North Jersey Street Ry. Co., 68 N. J. Law, 343 (1902).

The only liability which rests upon an offender is the penalty provided by the statute or ordinance.

Fielders v. North Jersey Street Ry. Co., Ibid.;

Rupp v. Burgess, 70 N. J. Law, 9 (1903).

Only those for whom the duty exists can maintain an action for damages resulting from its breach.

Kaufman v. Bergen Turnpike Co. 71 N. J. Law, 34 (1904); 10

Shaw v. Thielbahr, 82 N. J. Law, 23 (1911).

A right to expect the observance of specific legal duties by others does not excuse a man from observing the specific duties imposed by law upon himself.

See

L. R. A. 1917-D—Note page 693.

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Moreover, disobedience of a law of the road (using the law of the road as an illustration) does not alone establish guilt of negligence; but to show negligence it must appear that the violation had some relation to the accident.

In the case of *Taylor v. Thomas* (Me.), 92 Atl. 740 (1914) the Court said:

> "The trial judge was asked to charge that disobedience of the law of the road raises a presumption of negligence. The request ignores the specific principle upon which the rule of reasonable conduct rests. 'It is a rule of relation.' The fact of disobedience to the law may establish the party's guilt as between him and the state; but, until the act infringes the rights of other individuals it is not a wrong as to them. It must be made to appear that the act complained of has some relation to them; otherwise, the fact that a duty to the state was violated is immaterial. The individual must show not only violation,

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> but also that the violation was a cause of the wrong. This is a matter for proof rather than presumption."

To repeat, there was no attempt to prove that the boy was violating the ordinance, so that if we should assume that the defendant were entitled to benefit from the provisions of the ordinance on a violation, there was nothing to send to the jury, since no violation of the ordinance was proved, or could be inferred.

I contend that the judgment is right and should be affirmed, since no error appears.

Respectfully submitted,

MARSHALL VAN WINKLE,
Attorney for and of Counsel
with Plaintiff.

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8 3 NOV 1, 1919

New Jersey Supreme Court.

JOHN HIERSPIEL, Administrator ad prosequendum of the Estate of Frank Hierspiel, deceased, *Plaintiff*, *vs.* FRANCIS GORMLEY, *Defendant.*	On Defendant's Rule to Show Cause.

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BRIEF FOR DEFENDANT.

This action is one for damages under the death act arising out of a collision between the defendant's automobile and the plaintiff's intestate, a boy aged twelve years. The jury awarded the plaintiff $2,500.00 damages. It now comes before this Court on defendant's rule to show cause.

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Facts.

The intestate was roller skating on Bergen Avenue between Reed Street and Duncan Avenue, Jersey City, on September 21st, 1918, at about five P. M., when he was struck by defendant's automobile. The injuries received resulted in his death a few hours later.

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Bergen Avenue is an asphalt street about 30 feet wide, running North and South. Neither Reed Street nor Duncan Avenue extends across Bergen Avenue. Reed Street runs into the Easterly side of Bergen Avenue, while Duncan Avenue runs into the Westerly side of Bergen Avenue at a point approximately 170 feet North of Reed

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Street. Bergen Avenue is the main thoroughfare of Jersey City, for jitneys, and other automobiles.

Intestate had entered Bergen Avenue from Reed Street, and was proceeding in a Northerly direction, apparently intending to go West on Duncan Avenue, when he and the right front side of defendant's automobile collided, and he sustained the injuries resulting in his death.

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Issues.

The pleadings raised the customary issues of negligence and contributory negligence.

Evidence.

Claire Birch a witness sworn in behalf of the plaintiff testified that the defendant was operating his automobile on the left hand side of Bergen Avenue, going north (Case. pp. 1011). When asked whether he heard any warning from the automobile, any horn or whistle or bell or anything like that, before the boy was struck, he said "No, I could not say that I did". (Case p. 12.) He says that the defendant's automobile, at the time the boy was struck, was, he should judge, about eight or nine feet from the west curb of Bergen Avenue (Case p. 12). Bergen Avenue at the point where the boy was struck is a street that is traversed very much by automobiles. It is a jitney route along Bergen Avenue at that point. Automobiles pass at that point every few minutes (Case p. 14). Hundreds and hundreds of machines (automobiles) daily pass the place where the boy was struck (Case p. 15). This witness did not offer any testimony as to the speed of defendant's car.

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John Kiley, produced by the plaintiff, testified that the plaintiff's intestate was on roller skates (Case p. 17). He says the defendant's automobile was more to the left hand side of the street

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(Case p. 18). He did not know how fast the defendant's car was going before it struck plaintiff's intestate (Case p. 18). He only saw the car at the very moment it struck the boy and he does not know what part of the car struck him (Case p. 18). *He says the boy undertook to cross the street right in front of the automobile. The boy attracted his attention because he undertook to cross in front of the automobile* (Case p. 19). The happening took place within a few seconds (Case p. 19). He did not see the car operated before it struck the boy (Case p. 21). He testified that the happening took place at the corner of Reed Street and Bergen Avenue, but Hummel says (Case p. 27) that it did not, that it took place below Hummel's house and his house is located about thirty feet from the corner (Case, pp. 24-25). 10

Philomen E. Hummel, produced by the plaintiff, testified that (pp. 25-26) he was talking with Claire Birch when his attention was attracted by the intestate struggling to get out of the way of the automobile. He was struck either by the mudguard or fender; the automobile was eight or nine feet from the West curb of Bergen Avenue, when the accident occurred. He heard no automobile horn nor warning (p. 26). The automobile stopped about 5 or 6 feet from where the boy was run over. 20

Cross examination (p. 27). Accident did not occur at the corner of Reid Street and Bergen Avenue. 30

George Walsh, produced by the plaintiff, testified (p. 29) that he did not see the accident.

John Hirspiel, the plaintiff, testified (p. 31) that the intestate was twelve years of age, a good healthy boy, and attended the Public School.

Elizabeth Hirspiel, the mother of the boy, testified that he attended school but did odd jobs after 40

school delivering goods from stores. She says (Case p. 32) he had gone about his work and delivered goods from stores while he was on roller skates lots of times. She said her son was twelve years of age (Case p. 32). Her testimony (Case pp. 34-35-36) evidences that the cost of her said son's support and maintenance aggregated more than $400.00 per year. He used quite a good many suits of clothes each year and she estimated eight
10 or nine dollars for each suit. Assuming that "quite a good many suits of clothes a year" would justify a calculation of four suits per year, and taking eight dollars as the cost of each suit, it would appear that $32.00 per year would be spent for his suits of clothes. Her calculation for cost of shoes, underclothing, stockings etc. per year is as follows: shoes 1 pair a month at $3.00 per pair $36.00; summer underclothing 3 suits at 50¢ each piece $3.00; winter underclothing 3
20 suits at 50¢ each piece $3.00; stockings about 4 pairs a month at 35¢, $16.80; a dozen waists a year at 85¢ each $10.20; 3 caps a year at 50 cents $1.50; she estimated the cost of feeding her said son at $25.00 per month which in one year would make $300.00. The aggregate cost as estimated by her as aforesaid is $402.50 per year. This would make for the nine years of the boy's minority $3,622.50.

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Defendant's Testimony.

The defendant testified that he was operating his car on the right hand side of Bergen Avenue going north (Case p. 37). When the defendant was about thirty feet south of Reid Street he saw the boy at the corner of Reid Street and Bergen Avenue. He blew his horn and the boy paid no attention to it but continued skating on. He says the boy was skating pretty rapidly and the defendant turned his car to the left of the boy

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in order to pass him, and when defendant was about three feet behind the boy, both the automobile and the boy going parallel, *the boy suddenly turned to the left and dashed in front of the car* (Case, pp. 37-38). He says many automobiles traverse that street. It is a very active street with automobiles and jitney service (Case p. 38). When he first saw the boy he was skating within five feet of the east curb (Case, pp. 39-40). He says he was operating his automobile under twelve miles per hour and that at no time before the happening did he operate his car on the left side of the street going north (Case p. 40). He says "The boy ran into the right mud guard" (Case, p. 44). He turned to pass the boy the same as he would pass any vehicle on the left hand side, and just before reaching him *the boy dashed across the front of defendant's car* (Case, p. 45). He sounded his horn three or four times but the boy paid absolutely no attention to it, he kept skating right straight ahead (Case p. 45). Defendant says the boy struck his car; he did not strike the boy (Case p. 47).

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Henry Cohendet, a witness sworn in behalf of the defendant, testified (Case, p. 48) that he was walking along Bergen Avenue with a little boy and within four feet of Reid Street and Bergen Avenue he saw defendant coming from the south to the north, and the first thing he knew defendant was blowing his horn and that attracted his attention (Case, p. 48). He says defendant was operating his car on the right hand side of the road—more towards the center. The happening took place about seventy-five or one hundred feet from the corner of Reid Street (Case, p. 49).

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Hiram Reed, a witness sworn in behalf of defendant, testified that he was driving a car right behind the defendant's car. He says defendant was driving on the right side of the street just a little to the center, going north (Case, p. 52).

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Point I.

The verdict is against the clear weight of the evidence.

Point II.

The plaintiff's intestate was guilty of contributory negligence which was the proximate cause of the injuries resulting in intestate's death.

Point III.

The defendant was not guilty of negligence.

Point IV.

The jury found a verdict for the plaintiff, whereas in fact, they should have found a verdict for the defendant, since it appeared from the evidence that the plaintiff's intestate was guilty of contributory negligence, and the defendant exercised due care.

The above assigned reasons for reversal being practically identical, they will be discussed together.

The evidence, we respectfully submit, established the fact that the intestate was roller skating in a northerly direction on the easterly side of Bergen Avenue and when midway between Reed Street and Bergen Avenue, and while he and defendant's car were going in a parallel direction about 10 feet apart, he suddenly, and without making any observation for his own safety, swerved to his left in front of defendant's automobile, the latter being but a few feet away, and came into contact with the right front wheel or mudguard. Defendant, in compliance with the provisions of the Motor Vehicle Act, in overtak-

ing intestate, turned to his left in order to pass him; when intestate made the sudden turn, defendant, of course, turned abruptly to the left or to the westerly side of the street in order to avoid the collision. Counsel for the plaintiff in his pleadings and at the trial preferred to say that defendant was on the wrong side of the street and was therefore negligent. On the contrary, we submit, he was on the proper side of the street under the provisions of the Motor Vehicle Act and his action in thus making the turn which took him to the westerly side of Bergen Avenue, showed the exercise of due care. 10

It appears from the testimony that Bergen Avenue is a "Jitney" route, that automobiles pass along said street every few minutes throughout the day and "hundreds and hundreds of machines" daily pass the place where the intestate was struck (Case, pp. 14-15). The intestate, who possessed the average intelligence of a boy of his age, attended public school and had lived all his life directly around the corner from the scene of the accident. The congested condition of Bergen Avenue was known to him and he must have appreciated the danger of roller skating there. 20

While it is ordinarily imprudent for a pedestrian to make use of the roadway or the street at a place other than a street crossing, it is manifestly so for one to make use of it for the purpose of roller skating, and particularly a street such as Bergen Avenue, which is much traversed by automobiles. Intestate undertook to cross the street in front of the automobile (Case, p. 19); he suddenly turned to the left and dashed in front of the car (Case, pp. 37-38-45). He evidently chose to run in front of defendant's car, either without making the necessary observations for his own safety, or on his judgment that he could cross before the car reached him, in spite of the evident danger of the attempt, and he therefore took the 30 40

risk of failing in the attempt. His conduct, we submit, showed an utter disregard for his own safety and for that degree of prudence which could be reasonably expected from a boy of his years.

Fitz Henry v. Cons. Traction Co., 64 N. J. L., 674-8;
Solatinow v. N. J. S. Ry. Co., 70 N. J. L., 154;
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Conrad v. Green (N. J.), 94 Atl. Rep., 390;
Harbison v. C. & S. Ry. Co., 74 N. J. L., 252;
Brady v. Cons. Traction Co., 63 N. J. L., 25; 64 N. J. L., 374.

In the case of *Hoboken Ferry Company v. Feiszt*, 58 N. J. L., 198-200, it was held that where a person did not make use of ferry exits provided
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for foot passengers but made use of a passage provided for teams and vehicles, the latter places were regarded as obviously dangerous, and passage over them suggested and required a prudent watchfulness against the dangers attendant upon that use.

It appears from the proofs in this case (Exhibit D-1, Case, p. 78) that Jersey City had enacted an ordinance prohibiting roller skating on that part of Bergen Avenue where the intestate met with
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his injuries, thus manifesting more clearly the negligence of intestate in making use of said street for roller skating.

While the only testimony that no horn was blown was that of Hummel, the evidence of Cohendet (p. 49), defendant (p. 37), was to the effect that it had been blown. There was no evidence of excessive speed on the part of defendant, but on the contrary the evidence showed that the
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car stopped within 5 feet after the collision. It was not negligence for defendant to fail to antici-

pate that intestate while in a place of safety would turn suddenly in front of his automobile, it being very close to him.

Solatinow v. N. J. St. Ry. Co. (supra.)
Harbison v. C. & S. Ry. Co. (supra.)

There is nothing in the testimony of any of plaintiff's witnesses which charges the defendant with want of due care in the operation of his automobile, and the testimony of defendant and his witnesses clearly evidences that he was free from negligence in the operation of his automobile. 10

Point V.

The damages awarded by the verdict are excessive.

The testimony of intestate's mother evidences (Case, pp. 34-35-36), that the total yearly expense for clothing and feeding the intestate was $402.50 that might be considered as the cost of clothing and feeding him during his minority. Not one bit of testimony was offered in behalf of the plaintiff, or adduced at the trial, which would warrant more than nominal damages being awarded, if any at all. The plaintiff was only entitled to recover for the reasonable expectation in money to be derived from the continuance of intestate's life. The only testimony that was offered in behalf of the plaintiff that the next of kin might reasonably expect a contribution in money by the intestate was that after school hours he did little odd jobs; there is nothing to indicate that he earned any money by so doing and if so the amount thereof. Surely there must be some proof offered by plaintiff upon which a jury may conjecture as to the reasonable expectation in money which the intestate's next of kin might have received from

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his continuance of life. By what means could the jury determine what allowance should be made to intestate's next of kin? The statute says "The jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting to the wife and next of kin of such deceased person." As was said in *Telfer v. Northern Railroad Co.,* 30 N. J. L., 188 at 199, it is manifest that the language of the statute was
10 not designed to vest an arbitrary discretion in the jury, to give what damages they may think fair and just, without reference to any fixed standard by which to estimate them. The rule as to damages which was established in said case has ever since been followed and applied both in this court and in the Court of Errors and Appeals. (*Paulmier v. Erie Railroad Co.,* 34 N. J. L., 151; *Consolidated Traction Co. v. Hone,* 60 N. J. L., 444. In the case of *May, Adm'r, v. West Jersey &c. R.*
20 *R. Co.,* 62 N. J. L., 67, it appeared that a boy of fifteen years of age at the time of the accident which resulted in his death, who had been a farm laborer, earning about $20.00 per month, exclusive of his board, was awarded a verdict of $3000.00 by a jury, which award the court held to be excessive. In the case of *Cook, Adr. v. American, &c., Gunpowder Co.,* 70 N. J. L., 65-68-69, the court held that a verdict of $2500.00 damages for the death of a boy of thirteen years of age was
30 clearly excessive. It appeared in said case that the deceased was about thirteen years of age, was living with his mother and was earning fifty cents a day at the time of his death, and his circumstances were such as to render it extremely improbable that he would have been able to earn between the time of his death and his arrival at full age, anything more than would be barely sufficient for his own support. In the case now
40 under consideration we have the evidence of intestate's mother that it would cost approximately

$3,622.50 to clothe and feed her son (the decedent) during his minority. This is based upon present day prices. Is it not reasonable to assume that as the boy would grow older the expense of clothing him would become greater? See also the case of *Russo v. Rhode Island Co.*, 95 Atl. Rep., 666, a Rhode Island case in which the death act, under which suit was brought, was similar to the New Jersey act. Suit was brought for the death of an infant five and a half years of age, and the court set aside a verdict of $1200.00 *because there was no evidence in the case upon which a jury could be aided in determining the value of services or the cost of the child's support.*

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Point VI.

The verdict of the jury was the result of bias, prejudice and passion, and not in accordance with the evidence, and was rendered by the jury without regard to the evidence produced before them.

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To sustain this point the court has but to read the testimony in the case and consider that the jury had no evidence before them as to the probable earnings by the decedent which he might contribute to his parents during his minority or thereafter, and the testimony as to what it would cost to clothe and feed the intestate during his minority—a period of nine years.

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The rule to show cause should be made absolute and a new trial granted.

Respectfully,

MARK TOWNSEND,
Attorney for Defendant.

JOHN J. FALLON,
Of Counsel with Defendant.

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