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Summons

THE STATE OF NEW JERSEY TO:

Prudential Oil Company, a corporation of Delaware, and Robert
(SEAL) Brydon:

You are summoned to answer the annexed complaint of Joseph Kuczko, an infant, by John M. Kuczko, his next friend, John M. Kuczko, individually and John M. Kuczko and Mary Kuczko, as father and mother of Joseph Kuczko, jointly, in an action at law in the Supreme Court of New Jersey in and for the County of Essex. And take notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Newark, within twenty days after service upon you of this writ and the annexed Complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of said Court, at Trenton, this 3rd day of March, A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD,
Clerk.

DONALD B. MUNSICK,
Attorney. 30

Complaint

Filed March 3, 1931

Served March 6 and April 4, 1931

New Jersey Supreme Court

10

ESSEX COUNTY

JOSEPH KUCZKO, an infant, by
 JOHN M. KUCZKO, his next
 friend, JOHN M. KUCZKO, in-
 dividually, and JOHN M.
 KUCZKO and MARY KUCZKO,
 as father and mother of JOSEPH
 KUCZKO, jointly,

20

*Plaintiffs,**vs.*

PRUDENTIAL OIL CORPORATION, a
 corporation of Delaware, and
 ROBERT BRYDON,

*Defendants.**Action at Law.
Complaint.*

30

FIRST COUNT

Plaintiff, Joseph Kuczko, residing in the City of Newark, County of Essex and State of New Jersey, by his next friend, John M. Kuczko, residing in the City of Newark, County of Essex and State of New Jersey, says of Prudential Oil Corporation, defendant, a corporation of Delaware, having its registered office at Jersey City, New Jersey, that:

40 1. On or about the 16th day of March, 1929, said plaintiff, Joseph Kuczko, was an occupant or pas-

Complaint

senger of a certain bicycle which was proceeding along Hyatt Avenue in the City of Newark, in the County of Essex and the State of New Jersey, going in a westerly direction.

2. On or about the 16th day of March, 1929, defendant, Prudential Oil Corporation, was the owner of a certain automobile truck and said defendant, by its servant or agent, did drive and operate said automobile truck along said Hyatt avenue, in an easterly direction. 10

3. On or about the 16th day of March, 1929, on said Hyatt Avenue, said defendant, by its servant or agent, with reckless disregard for the rights and safety of said plaintiff, suddenly and without warning caused and permitted its said automobile truck to run into and strike with great force and violence the bicycle on which the said plaintiff was then and there riding as an occupant or passenger, and knock down the said plaintiff to his great pain, injury and damage. 20

4. It was the duty of the defendant, by its servant or agent, to operate its automobile truck at the aforesaid time and place in a careful and prudent manner with the automobile truck under control, and this duty said defendant, by its servant or agent, owed to the said plaintiff at the said time and place. 30

5. The defendant, by its servant or agent, was negligent in this:

(a) That said servant or agent was an incompetent driver.

(b) That said automobile truck was operated and driven by the defendant, by its servant or agent, at a high, excessive and unlawful rate of speed.

(c) That the defendant, by its servant or 40

Complaint

agent, in operating and driving said automobile truck did not control the motion thereof so as to avoid running into and striking vehicles on said street.

10 (d) That the defendant, by its servant or agent, did not keep a proper lookout for the presence of vehicles on said street.

(e) That the defendant, by its servant or agent, did not keep a proper lookout for the presence of infants on said street.

(f) That the defendant, by its servant or agent, did not keep to the right of said street.

(g) That the said automobile truck was not equipped with proper brakes.

20 6. As a result of the defendant's negligence, recklessness and carelessness, by its servant or agent, the plaintiff, Joseph Kuczko, was violently thrown off said bicycle and run over by the automobile truck of said defendant, and the plaintiff suffered grave injuries about the head, body and limbs; all the fingers of his right hand, except the thumb, were so mashed and mutilated as to require their amputation, rendering his right hand permanently and totally useless and deformed; he sustained injuries to the right arm and face and internal injuries the exact nature of which are as yet
30 unknown to the plaintiff.

7. As a result of the said negligent acts of the defendant, by its servant or agent, plaintiff suffered great pain and shock to his nervous system and great mental anguish.

40 8. By reason of the injuries caused as aforesaid, by the negligence of the defendant, by its servant or agent, the plaintiff lost a great quantity of blood.

Complaint

9. By reason of the injuries caused as aforesaid, by the negligence of the defendant, by its servant or agent, plaintiff was obliged to spend a considerable length of time confined to his bed in a hospital and after plaintiff's discharge from the hospital he was confined to his home for a long period of time.

By reason of which premises plaintiff claims judgment against the defendant in the sum of seventy-five thousand (\$75,000.00) dollars. 10

SECOND COUNT

Plaintiff, John M. Kuczko, residing in the city of Newark, County of Essex and State of New Jersey, says of defendant, Prudential Oil Corporation, that:

1. On or about the 16th day of March, 1929, said plaintiff was the father of Joseph Kuczko, who was then and there an infant under the age of twenty-one, to wit: eleven (11) years of age. 20

2. The said plaintiff, John M. Kuczko, repeats all the allegations contained in the First Count.

3. By reason of the injuries caused as aforesaid, to Joseph Kuczko, son of John M. Kuczko, by the negligence, recklessness and carelessness of the defendant, by its servant or agent, the plaintiff, John M. Kuczko, has necessarily paid or become liable to pay large sums for nursing, medical and surgical attention, aids, devices, medicines and bandages, and other necessary expenditures so occasioned. 30

4. By reason of the injuries caused as aforesaid, plaintiff will be deprived of the services and earnings of his son for a long period of time, and will in the future be deprived of the same, and said plaintiff will be compelled to support and maintain his son after he becomes twenty-one (21) years of age because his said son's deformity will render him incapable of ever securing employment. 40

Complaint

By reason of which premises plaintiff claims judgment against the defendant in the sum of twenty-five thousand (\$25,000.00) dollars.

THIRD COUNT

10 Plaintiffs, John M. Kuczko and Mary Kuczko, as father and mother of the plaintiff, Joseph Kuczko, say of defendant, Prudential Oil Corporation, that:

1. They repeat all the allegations contained in the First Count.

2. By reason of the injuries caused as aforesaid, plaintiffs will be deprived of the services and earnings of their son for a long period of time, and will in the future be deprived of the same, and said plaintiffs will be compelled to support and main-
20 tain their son after he becomes twenty-one (21) years of age because their said son's deformity will render him incapable of ever securing employment.

By reason of which premises plaintiffs claim judgment against the defendant in the sum of Twenty-five Thousand (\$25,000.00) Dollars.

FOURTH COUNT

30 Plaintiff, Joseph Kuczko, residing in the City of Newark, County of Essex and State of New Jersey, by his next friend, John M. Kuczko, residing in the City of Newark, County of Essex and State of New Jersey, says of Robert Brydon, defendant, who is a resident of the Township of Maplewood, County of Essex and State of New Jersey, that:

1. On or about the 16th day of March, 1929, Robert Brydon, defendant, did drive and operate an automobile truck along Hyatt Avenue in the City of Newark, in the County of Essex and State
40 of New Jersey, in an easterly direction.

Complaint

2. The said plaintiff, Joseph Kuczko, repeats all the allegations contained in paragraphs 1, 3, 4, 5, 6, 7, 8 and 9 of the First Count.

By reason of which premises plaintiff claims judgment against the defendant in the sum of Seventy-five Thousand (\$75,000.00) Dollars.

10

FIFTH COUNT

Plaintiff, John M. Kuczko, residing in the City of Newark, County of Essex and State of New Jersey, says of defendant, Robert Brydon, that:

1. On or about the 16th day of March, 1929, Robert Brydon, defendant, did drive and operate an automobile truck along Hyatt Avenue in the City of Newark, in the County of Essex and State of New Jersey, in an easterly direction.

20

2. The said plaintiff, John M. Kuczko, repeats all the allegations contained in paragraphs 1, 3, 4, 5, 6, 7, 8 and 9 of the First Count.

3. The said plaintiff, John M. Kuczko, repeats all the allegations contained in paragraphs 1, 3, and 4 of the Second Count.

By reason of which premises plaintiff claims judgment against the defendant in the sum of Twenty-five Thousand (\$25,000.00) Dollars.

30

SIXTH COUNT

Plaintiffs, John M. Kuczko and Mary Kuczko, as father and mother of the plaintiff, Joseph Kuczko, say of defendant, Robert Brydon, that:

1. On or about the 16th day of March, 1929, Robert Brydon, defendant, did drive and operate an automobile truck along Hyatt Avenue in the City of Newark, in the County of Essex and State of New Jersey, in an easterly direction.

40

Complaint

2. They repeat all the allegations contained in paragraphs, 1, 3, 4, 5, 6, 7, 8 and 9 of the First Count.

3. They repeat all the allegations contained in paragraph 2 of the Third Count.

10 By reason of which premises plaintiffs claim judgment against the defendant in the sum of Twenty-five Thousand (\$25,000.00) Dollars.

DONALD B. MUNSICK,
Attorney of Plaintiffs.

20

30

40

Answer

Filed May 13, 1931.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

JOSEPH KUCZKO, an infant, by JOHN M. KUCZKO, his next friend, JOHN M. KUCZKO, in- dividually, and JOHN M. KUCZKO and MARY KUCZKO, as father and mother of JOSEPH KUCZKO, jointly, <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;">vs.</p> PRUDENTIAL OIL CORPORATION, a corporation of Delaware, and ROBERT BRYDON, <p style="text-align: right;"><i>Defendants.</i></p>	}	<p style="text-align: right;">10</p> <p style="text-align: center;"><i>Action at Law.</i></p> <p style="text-align: center;"><i>Answer.</i></p> <p style="text-align: right;">20</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Defendant, Prudential Oil Corporation, having a place of business in Newark, County of Essex and State of New Jersey, and Robert Brydon, residing in Maplewood, N. J., for answer to the complaint herein, say

FIRST DEFENSE TO FIRST COUNT 30

1. The allegation of the first paragraph that on March 16th, 1929, Joseph Kuczko was riding a bicycle along Hyatt Avenue, in the City of Newark, is admitted. Otherwise the first paragraph is denied.

2. The allegations of the second paragraph of the first count are admitted.

3. The third paragraph of the first count is denied and the fact averred to be that the boy, 40

Answer

by his own carelessness or incompetency, caused the accident inaccurately described in the complaint.

4. In answer to the fourth paragraph of the first count these defendants deny that they failed in any particular to do anything which it was their duty to do.

10 5. The fifth paragraph of the first count is denied.

6. The sixth paragraph of the first count is denied but these defendants have no knowledge or information sufficient to form a belief as to the extent of the injury to Joseph Kuczko, from the accident inaccurately described in the complaint.

7-8-9. The 7th, 8th and 9th paragraphs of the first count are denied except that these defendants have no knowledge or information sufficient to form a belief as to the injuries to the plaintiff, Joseph Kuczko.

FIRST DEFENSE TO SECOND COUNT

1. These defendants have no knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of the second count.

2. The first defense to first count is repeated in answer to the second paragraph of the second count.

3-4. The 3rd and 4th paragraphs of the second count are denied but these defendants have no knowledge or information sufficient to form a belief as to any expenditures or liabilities caused, or in the future, to arise by reason of the accident inaccurately described in the complaint.

FIRST DEFENSE TO THIRD COUNT

40 1. The first defense to first count is repeated as

Answer

answer to the first paragraph of the third count.

2. The second paragraph of the third count is denied.

FIRST DEFENSE TO FOURTH COUNT

1. The first paragraph of the fourth count is admitted. 10

2. In answer to the second paragraph of the fourth count these defendants repeat the answer above made, by the first defense to first count in so far as the same relates to paragraphs 1, 3, 4, 5, 6, 7, 8 and 9 of the first count.

FIRST DEFENSE TO FIFTH COUNT

1. The first paragraph of the fifth count is admitted. 20

2. In answer to the second paragraph of the fifth count these defendants repeat the answer made by the first defense to the first count in so far as it relates to paragraphs 1, 3, 4, 5, 6, 7, 8 and 9 of first count.

3. In answer to the third paragraph of the fifth count defendants repeat the answer made by the first defense to second count to paragraphs 1, 3 and 4 of the second count.

FIRST DEFENSE TO SIXTH COUNT 30

1. The first paragraph of the sixth count is admitted.

2. In answer to the second paragraph of the sixth count these defendants repeat the answer made by the first defense to first count in so far as the same relates to the paragraphs repeated in the sixth count.

3. These defendants repeat the second paragraph of the first defense to the third count in answer to the third paragraph of the sixth count. 40

Answer

SECOND AND SEPARATE DEFENSES TO
ALL COUNTS

10 Whatever injury and damage the plaintiffs, and
any of them sustained by reason of the accident
inaccurately described in the complaint, proximate-
ly resulted from and was caused and contributed
20 to by the negligence, carelessness and incompetency
of the plaintiff, Joseph Kuczko, in that the said
Joseph Kuczko rode his bicycle on the roadway too
close to defendant's truck, did not make due and
sufficient observation of the condition of the road-
way and the presence and course and operation of
the defendant's truck and unskillfully operated his
bicycle at the rear of said truck so that he fell from
the same by his own unskillfulness, incompetency
and negligence rather than through any fault on
20 the part of the defendants, or either of them.

KELLOGG & CHANCE,
Attorneys of Defendants.

30

40

Reply

Filed May 20, 1931.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

JOSEPH KUCZKO, an infant, by JOHN M. KUCZKO, his next friend, JOHN M. KUCZKO, in- dividually, and JOHN M. KUCZKO and MARY KUCZKO, as father and mother of JOSEPH KUCZKO, jointly, <i>Plaintiffs,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
PRUDENTIAL OIL CORPORATION, a corporation of Delaware, and ROBERT BRYDON, <i>Defendants.</i>	}	<i>Reply.</i>	20

Plaintiffs deny every allegation in the Answer of the defendants, Prudential Oil Corporation, a corporation of Delaware, and Robert Brydon, and join issue with said defendants.

DONALD B. MUNSICK, 30
Attorney of Plaintiffs.

Substitution of Attorney

Filed August 21, 1931.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

10 JOSEPH KUCZKO, an infant, by
JOHN M. KUCZKO, his next
friend, JOHN M. KUCZKO, in-
dividually, and JOHN M.
KUCZKO and MARY KUCZKO,
as father and mother of JOSEPH
KUCZKO, jointly,

*Plaintiffs,**vs.*

20 PRUDENTIAL OIL CORPORATION, a
corporation of Delaware, and
ROBERT BRYDON,

*Defendants.**Action at Law.
Substitution
of Attorney.*

I hereby consent to the substitution of Joseph
L. Magrino, Esq., to be the Attorney of record for
the plaintiff herein, in my place and stead.

DONALD B. MUNSICK,

30

Attorney for Plaintiff.

Dated: August 10, 1931.

Postea

Filed December 22, 1931.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

JOSEPH KUCZKO, an infant, by JOHN M. KUCZKO, his next friend, JOHN M. KUCZKO, in- dividually, and JOHN M. KUCZKO and MARY KUCZKO, as father and mother of JOSEPH KUCZKO, jointly, <p style="text-align: right;"><i>Plaintiffs,</i></p>	} } <i>Action at Law.</i> } <i>Postea.</i>	10
<i>vs.</i>		
PRUDENTIAL OIL CORPORATION, a corporation of Delaware, and ROBERT BRYDON, <p style="text-align: right;"><i>Defendants.</i></p>		20

The above entitled cause was tried before the Hon. Worrall F. Mountain, the Circuit Court Judge to whom it was referred for trial, with a jury at the Essex Circuit on December 16th and December 17th, 1931. 30

The jury rendered a general verdict in favor of the plaintiff, Joseph Kuczko, and against the defendants, Prudential Oil Corporation, a corporation of Delaware, and Robert Brydon, for \$10,000.00, and a general verdict in favor of the plaintiff, John M. Kuczko, and against the said defendants, for \$63.00, and a general verdict in favor of the plaintiffs, John M. Kuczko and Mary Kuczko, 40

Postea

as father and mother of Joseph Kuczko, jointly,
and against the defendants, in the sum of \$2,500.00.

WORRALL F. MOUNTAIN, .

Circuit Court Judge.

Dated: December 18th, 1931.

10 A true copy.

FRED L. BLOODGOOD,
Clerk.

20

30

40

Judgment

NEW JERSEY SUPREME COURT

JOSEPH KUCZKO, an infant, by JOHN M. KUCZKO, his next friend, JOHN M. KUCZKO, in- dividually, and JOHN M. KUCZKO and MARY KUCZKO, as father and mother of JOSEPH KUCZKO, jointly, <p style="text-align: right;"><i>Plaintiffs,</i></p>	} } <i>Action at Law.</i> } <i>On Postea.</i>	10
<i>vs.</i>		
PRUDENTIAL OIL CORPORATION, a corporation of Delaware, and ROBERT BRYDON, <p style="text-align: right;"><i>Defendants.</i></p>		20

\$10,000.00 J. K.
 63.00 J. M. K.
 2,500.00 J. M. K.
 & M. K.

\$12,563.00
 78.88

\$12,641.88

30

It is ordered that judgment be and hereby is entered against the defendants and in favor of Joseph Kuczko, an infant, by John M. Kuczko, his next friend, plaintiff, for the sum of ten thousand dollars, and in favor of John M. Kuczko, individually, plaintiff, for the sum of sixty-three dollars, and in favor of plaintiffs, John M. Kuczko and Mary Kuczko, as father and mother of Joseph

40

Judgment

Kuczko, jointly, for the sum of two thousand five hundred dollars, besides costs to be taxed nisi.

On motion of

JOSEPH L. MAGRINO,
Attorney.

10 Entered December 22, 1931.

A true copy.

FRED L. BLOODGOOD,
Clerk.

20

30

40

Notice of Appeal

Filed January 4, 1932.

NEW JERSEY SUPREME COURT
ESSEX COUNTY

JOSEPH KUCZKO, an infant, by JOHN M. KUCZKO, his next friend, JOHN M. KUCZKO, in- dividually, and JOHN M. KUCZKO and MARY KUCZKO, as father and mother of JOSEPH KUCZKO, jointly,	10	} <i>Action at Law.</i> <i>Notice of</i> <i>Appeal.</i>
<i>Plaintiffs,</i>		
<i>vs.</i>		
PRUDENTIAL OIL CORPORATION, a corporation of Delaware, and ROBERT BRYDON,	20	
<i>Defendants.</i>		

To: Joseph L. Magrino, Esq., Attorney of
Plaintiffs:

Sirs:

Take notice that the defendants, Prudential Oil
Corporation, a corporation of Delaware, and
Robert Brydon, appeal to the Court of Errors and
Appeals of New Jersey from the whole of the judg-
ment entered in the above entitled cause, and that
they will hereinafter in compliance with law and
the rules of court in such case made and provided,
serve and file grounds of appeal. 30

Dated: December 30, 1931.

Respectfully yours,

KELLOGG & CHANCE, 40
Attorneys for Defendants.

Notice of Appeal

Service of a Copy of the within Notice of Appeal is hereby acknowledged this 31st day of December, 1931.

JOSEPH L. MAGRINO,
Attorney for Plaintiff.

10

20

30

40

Grounds of Appeal

3. The trial judge erred in charging the jury as follows:

10 “A bicycle is a vehicle within the meaning of that word as used in our traffic act. Hence, a bicycle on the highway has the rights of vehicles under the traffic act, and those who operate other vehicles on the highway owe to a bicycle the duties prescribed by the statute in the same manner as such other persons owe those duties to another automobilist on the highway.”

To which portion of the Court’s charge exception was duly noted by defendants-appellants’ counsel.

4. The trial judge erred in charging the jury as follows:

20 “We have held in this state that a breach of the traffic act is not of itself indication of negligence” * * * and “The court has said that while it is true that a breach of the traffic act is not of itself evidence of negligence,” * * *

To which portion of the Court’s charge exception was duly noted by defendants-appellants’ counsel.

Respectfully yours,

KELLOGG & CHANCE,

Attorneys for Defendants-Appellants.

30 Dated: January 30th, 1932.

To: Joseph L. Magrino, and Leonard J. Emmerglick, Attorneys for Plaintiffs-Respondents, or to whom it may concern.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 1st day of February, 1932.

JOSEPH L. MAGRINO,

40 *Attorney for Plaintiffs-Respondents.*

Joseph Kuczko, direct

NEW JERSEY SUPREME COURT
ESSEX CIRCUIT

December 16, 1931

JOSEPH KUCZKO, by next friend, JOHN M. KUCZKO, JOHN M. KUCZKO, individually, and JOHN M. KUCZKO and MARY KUCZKO, as father and mother of JOSEPH KUCZKO, jointly, <i>Plaintiffs,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
PRUDENTIAL OIL CORPORATION, a corporation of Delaware, and ROBERT BRYDON, <i>Defendants.</i>	}		20

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For plaintiffs appears Leonard J. Emmerglick.

For defendants appear Kellogg & Chance (by R. Robinson Chance).

30

A jury is called and sworn.

Mr. Emmerglick opens for plaintiffs.

Mr. Chance opens for defendants.

JOSEPH KUCZKO sworn in behalf of plaintiffs.

Direct examination by Mr. Emmerglick.

Q How old are you now? A Twelve.

Q When were you twelve? A January 8th.

Q Joe, you are the plaintiff in this case, one 40

Joseph Kuczko, direct

of the plaintiffs? A Yes.

Q Speak up real loud, so all of us can hear. Talk up real loud. Do you go to school? A Yes.

Q What school is it? A Lenox School.

Q And what grade are you in now? A 8-A.

Q And you are twelve years old? A Yes.

10 Q Now, these gentlemen can't hear you. Speak up to me back here. What grade were you in, did you say? A 8-A.

Q Now, do you remember this accident that you were in? A Yes.

Q What street were you on? A Hyatt Avenue.

Q And in what direction were you going, toward Newark or toward New York? A Toward Newark.

Q What part of the bicycle were you sitting on?

20 A The bar.

Q The long bar, that runs from the handle bars back to the seat? A Yes.

Q And upon which side of that bar were your feet hanging, the side toward the center of the road, or toward the sidewalk? A The center.

Q Toward the center. That would be then on the left side; is that right? A Yes, sir.

Q Now, on your right side is there a ditch, or a little depression or a hollow of some kind along
30 the road?

Mr. Chance. I object to it as leading.

The Court. Sustain the objection.

Q Well, is the road level all the way across?

Mr. Chance. I object to that.

The Court. I will admit it.

Witness. No.

Q Where is it not level? A There is a lot of holes in the road.

40 Q Where are those holes? A All over the street.

Joseph Kuczko, direct

Q How big are they? A Big ones and small ones.

Q Well, how big are some of the big ones? A (Witness indicates.)

Q How big? A About like this here (indicating).

Q And how deep are those holes? A About half a foot. 10

Q Now, did you take a look at the right side of the road alongside where you were riding? A Yes.

Q And what was the condition of the right side of the road? A There was an iron beam on the side.

The Court. There was what?

Witness. There was an iron beam, or fence. 20

Q Were they lying right on top of the road? A Off the road.

Q Now, where they were lying, was that on the same level as the center of the road? A No, sir.

Q Well, it is higher or lower? A Lower.

Q How much lower about? A About half a foot.

Q Now, do you know where it begins to get lower on your right side? Do you remember where it began to get lower on the right side of the road there? A Right off the center, the road is kind of round. 30

Q Yes; well, how close to that lower part were you riding along on your bicycle? A I don't know what you mean.

Q Well, how close to those beams, those iron beams were you riding? A About three or four feet.

Q All right; now, how far away was this truck when you first saw it, Joe? A As soon as it 40

Joseph Kuczko, direct

turned around the corner of the street and straightened.

Q You mean there is a curve there up in the road? A Yes, sir.

Q And about how many feet is that from where you first saw it? A About half a block.

10 Q I see; now, did you watch him coming along there? A Yes, sir.

Q And how did he ride along? A Dodging holes.

Q Dodging the holes? A Yes, sir.

Q Now, Joe, do you remember where the center of that road is? A Where the center is?

Q I will withdraw that question. Joe, do you know how wide the road is? A About 22 feet.

20 Q How do you know that? A My cousin measured it.

Q When did he measure it? A When?

Q Yes. A About two or three Sundays ago.

Q What did you measure it with? A A tape measure.

Q Now, upon which side of the road was the truck riding, as you saw him coming along? A More on our side.

Q Well, how much of it was on your side? A More than half the truck.

30 Q What kind of a truck was it? A A gasoline truck.

Q One of these tanks, these round trucks? A Carrying a gasoline tank.

Q And did it have any wooden platforms built on the sides of it? A Yes, for the hose.

Q Now, was there a factory at about the place where you got hurt? A Yes, an iron factory.

40 Q You got hurt in front of that factory? A Yes, sir.

Joseph Kuczko, direct

Q Do you know the name of the place? A No.

Q Now, how did you come to be on the bicycle that day?

Mr. Chance. I object to it as immaterial.

The Court. Overruled.

Defendants' counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Witness. My cousin—

Q What is his name? A Alex Harpes.

Q He was with you? A Yes, sir.

Q Where did you start from? A From my house.

Q And where were you going? A To see my cousin.

Q Another cousin; is that it? A Yes, sir. 20

Q And did you see him? A No, sir.

Q Why? A We went down a long road.

Q Then were you going to see him at the time of the accident or were you going home? A Coming back.

Q Coming back home. Now, when you got up to this factory and when the truck got close to you, tell us just what happened. A Well, he was dodging the holes. We passed the front and then after awhile he hit a ditch and the truck went over, and then after awhile it hit the handle-bars, and the handle-bars started to shake, and then I went under. 30

Q Now, when you passed the front of the truck, how close were you to it? A I could touch it with my hand.

Q Did you try to? A No, but it was so near, I could.

Q Did he pull over to his right at any time that you saw the truck? A When I wanted to dodge 40

Joseph Kuczko, direct

a hole, I pulled over, when he was coming just like this (indicating). He was going straight.

Q Going straight—now you say the truck hit a ditch. A Yes, sir.

The Court. Hit a what? Did you say hit a ditch?

10 *Witness.* A hole.

Q Well, the truck hit a hole. Now, what wheel of the truck hit a hole? A The rear.

Q That was the rear wheel on your side? A Yes, sir.

Q Was that a single or a double wheel? A A double wheel.

Q And after it hit that hole, in what direction did that wheel go? A Toward us.

20 Q Toward you. And what happened to the body of the truck at about that time, if anything happened? A It hit our handle-bars.

Q Well, which way did the body go if it moved at all? A Toward us.

Q Now, when you fell off the bicycle, what was the next thing that happened to you? A The truck stopped, and I hollered.

Q Now, before the truck stopped, as you told us, what happened to you? A Then I fell, and then my cousin pulled me as much as he could.

30 Q And what part of you did the truck strike? A My hand.

Q What part struck your hand? A The rear.

Q The rear wheel? A Yes, sir.

Q After he hit your hand, how quick was it before he stopped? A As soon as I hollered, "Ouch, my fingers."

Q When he stopped where were your fingers? A Under the truck.

40 Q Now, then, what happened after that? A

Joseph Kuczko, direct

Then I picked myself up and went into the truck.

Q Now, what were the conditions of the finger then? A The skin was off.

Q Only the skin was off. Who got on the truck with you? A My cousin went around the other way.

Q Now, where did you go? A We turned around and went to St. James' Hospital. 10

Q What did they do there? A They gave me an operation.

Q And how long were you at the hospital, Joe? A Fifteen days.

Q And then how long did you have to see the doctor about your hand after that? A About two or three months after.

Q Now, did anything happen to your clothes? A Yes, sir. 20

Q What happened? A Well, they had to cut it all up, to get my hand off.

Q Did you have anything else happen to you in any other place on your body? A I got bruised up and scraped.

Q Did you hear him blow any horn? A No, sir.

Q Did you watch him all the time he was coming toward you? A Yes, sir.

Q Who was operating the bicycle? Who was steering it? Who was pedaling it? A My cousin. 30

Q Your cousin. Now, did you see the bicycle some time after the accident? A When I came out of the hospital.

Q Did you look at it? A Yes, sir.

Q Where was it? A In my cellar.

Q What did you see there that attracted your attention?

Mr. Chance. I object to what he saw at that time. 40

Joseph Kuczko, cross

The Court. Sustain the objection. It is too remote from the time of the accident, unless the bicycle is proved to have been in the same condition.

Mr. Emmerglick. I shall come to that by another witness.

10 *The Court.* If you can connect it up, I will admit it.

Q What was the condition of the bicycle? A The handle was out of line.

Q Anything else? A A couple of spokes broke.

Mr. Emmerglick. Is there any objection to have Joseph show his hand to the jury?

The Court. No.

20 *Mr. Emmerglick.* You may do it, Joe; will you step down, please.

(Witness exhibits his hand to the jury.)

Cross examination by Mr. Chance.

Q How far from the place of the accident was it that you were coming from? A What did you say, sir? I didn't get you.

Q Where is the place that you had been before the accident? A We were up a little further.

30 Q Ten blocks away? A No, about two blocks further up, then we turned around.

Q Is that where your cousin was, that you went to see before the accident? A My cousin.

Q Your cousin lives how far from the accident? A He worked in a paint shop.

Q And you were to see him at the paint shop? A Yes, sir.

40 Q And how far is the paint shop from the place of the accident? A The paint shop wasn't on that street.

Joseph Kuczko, cross

Q What time did you start out to see your cousin? A In the afternoon about twelve o'clock.

Q Had you had your dinner before you started? A Yes, sir.

Q As soon as you had your dinner, you started out? A Yes, sir.

Q And do you know where you went? A We went up a street. 10

Q Did you go to the paint shop? A No, sir.

Q Well, how many blocks had you been going on this street where the accident happened when the accident did take place? A There ain't no side streets on the block.

Q You just saw one street with no side streets? A Yes, sir.

Q Can you give any idea as to how far it was? Was it a thousand feet? A About seven blocks. 20

Q What would that ordinarily be about? A A street block.

Q What is the name of that street? Hyatt Avenue? A Yes, sir.

Q Now, how many of these holes were there that you told us about? A They were all around the street.

Q All over the street? A Yes, sir.

Q And how far apart? A Some were a foot or a half a foot, but mostly all over a foot. 30

Q Was it that way back of the place where you first got on Hyatt Avenue? A It was on the whole street.

Q The whole street from one end of Hyatt Avenue to the other at that time was all full of these holes? A Yes, sir.

Q Three feet across them, on both sides of the street? A Yes, sir.

Q And that went the whole length of Hyatt Avenue, did it? A Yes, sir. 40

Joseph Kuczko, cross

Q Now, when you passed the front of the truck, how far from the truck did your cousin ride his bicycle? A About 2½ feet.

Q About 2½ feet. And you say the street was 22 fet wide as you now know from measuring it?

A Yes, sir.

10 Q The truck was about 4 or 5 feet wide, was it? A No, about 8, I think.

Q You think about 8; and you think that half of that truck was on its lefthand side of the street, do you? A On our side.

Q Oh, yes; half on your side of the center, so that you would say it was about 4 feet of the truck to your side of the road? A Yes, sir.

20 Q And you say it is 22 feet, and a half of 22 is 11. You know that from the eighth grade, don't you? A Yes, sir.

Q Now, how many feet would you say as you learned that it was from the lefthand side of the truck to the lefthand side of the road? A About 4 feet, about.

Q Four feet; well now, let us see. You said the street was 22 feet wide? A Yes, sir.

Q And half of that would be 11 feet? A Yes, sir.

30 Q So there is 11 feet on your side of the center line and 11 feet on his righthand side of the center line; isn't it? A Yes, sir.

Q And you said that half of his truck was over on your side; didn't you? A Yes, sir.

Q And that is 4 feet from the 11, which is 7 feet; isn't it? A Yes, sir.

Q So that there must have been 7 feet between the lefthand side of his car and the lefthand side of the road as he was going, wasn't it? A Yes, sir.

40 Q And were there any cars parked along your righthand side? A No cars on the whole street.

Joseph Kuczko, cross

Q Now, you testified that no horn was blown.

A Yes, sir.

Q You didn't need any horn blown to see that truck, did you? A No, sir.

Q The horn blowing would not have helped you any, would it? A No, sir.

Q You say you noticed this truck was about 10
8 feet wide? A Yes, sir.

Q And that is what you think it was? A Yes,
sir.

Q And did you notice how high it was from
the ground? A No, sir.

Q Well, what part of the body was it that you
said hit something? A The rear.

Q The rear of the body; do you know where
it was? Do you know how far back from the back
of the truck the rear wheel was? How far ahead 20
from the back was the rear wheel on the lefthand
side? A How many feet?

Q Yes. A About 7 or 8.

Q About 7 or 8; was the accident back of the
rear wheel, or just at the rear wheel? A Just at
the rear wheel.

Q What was the first part of the truck that
was against you? A Against us?

Q Not against us, against you? A Where the
hose is held up. 30

Q Where did that hit you? A The handle-
bars it hit.

Q You don't know how high that is from the
ground, do you? A No, sir.

Q Do you know how high your handle-bars are
from the ground? A Not exactly, no.

Q You don't know. Well, how is the distance
of the handle-bars from the ground compared with
these holes that you say are 3 feet across? A I
don't understand the question. 40

Joseph Kuczko, cross

Q Well, you can testify how far 3 feet is, when you tell us how big the holes are, can't you? A Yes, sir.

Q Well, can you tell us whether the handle-bars were 3 feet from the ground? A Maybe they were more than that.

10 Q You think there were more than 3 feet. Do you think they were 4 feet? A About 3½ feet, maybe 4.

Q About 3 feet from the ground the handle-bars are on that bicycle. Well now, having in mind that 3½ feet, can you tell us whether the bottom floor of the truck was 3½ feet from the ground?

A About 3½ feet.

Q Wasn't it more than that? A I don't know.

20 Q You don't know. As you were near this accident, that is, after you passed the front of the truck without hitting it, didn't your cousin stick his hand up? A I don't remember.

Q As though he would reach the truck? A I didn't see him put his hand up, and I was in front of him.

Q Well, were you looking at him or looking at the truck? A At the truck.

Q You don't know whether he put his hand up or not, do you? A No.

30 Q Well, now, did you put your hand up? A No, sir.

Q Well, where were your hands? A On the handle-bars.

Q You kept them on the handle-bars? Were you doing it still? A No, sir.

Q Did the other fellow have a hold on the handle-bars? A Yes, sir.

Q Where did you have a hold? A I had them on the bottom, and he had them on the top.

40 Q Right on the end of the handles? Let us see,

Joseph Kuczko, cross

it comes around sort of some what curve shape, right on the end of the handles there are grips there. A Yes, sir.

Q You had a hold underneath the handles, and he had them on top? A The handle-bars come like this (indicating). I had them here (indicating) and he had them here (indicating). 10

Q I am afraid the jury can't see. Suppose you stand up. A The handle-bars come up like this (indicating).

Q And you had a hold down on the bars, and he had a hold on the end of the handles? A Yes, sir.

Q You kept the hands right up; they were up all the time you and the truck came together? A Yes, sir.

Q Well, it was the reason that the two of you were trying to steer that the street was so bumpy? A He only tried to steer. 20

Q He tried to steer, and you weren't trying to steer? A Yes, sir.

Q Did the bicycle go perfectly straight? A Yes, sir.

Q Didn't turn to the left? A When the accident happened, it was going straight.

Q Going straight. How long had it been going straight? A About 50 feet before the truck came to a stop. 30

Q 50 feet. Well, what did you do, go right through these holes across and 6 inches deep? A Well, we went where it was better, we didn't go outside of our own side of the street.

Q Well, if the holes were all over the street, as you told us before, and you went straight for 50 feet, how did you avoid the holes? A We were going where there was not any holes. Some parts you could run with a bicycle wheel. 40

Joseph Kuczko, cross

Q Well, was this place that you could run with the bicycle right straight ahead? A No, sir, we went in a couple of holes. We didn't go in many. The wheels are skinny, the wheels ain't so fat, and we could take the best of the road.

10 Q Well, but these holes run all straight one after the other, and leave a place down in it, between the holes, in a straight line where the skinny wheel could go? A No, sir.

Q Well, how could you get around the holes? A We were going around the holes here (indicating).

Q If there was a hole right in front of you, you could go around one side of the other hole? A Yes, sir.

20 Q And then you would go around one side of the next hole? A Yes, sir.

Q That is the way you had been doing all the way up the street? A No, sir.

Q No. Well, tell us where you would have to go before the accident happened. A We went near the edge and there ain't so many holes there.

Q No so many holes? A Just right on the edge.

30 Q How many holes were there right within a space of 10 feet long from where the accident happened?

Mr. Emmerglick. I object to that question, if your Honor please. I don't think it is a question which can give us any helpful knowledge on the subject, was it 10 feet near where the accident happened.

The Court. I don't think that could be helpful.

40 Q How could he go straight if there weren't—I will change that question. Now, take a line straight across the street from right where the ac-

Joseph Kuczko, cross

cident happened, was there more than one hole?

A Yes, sir.

Q How many? A There was holes all around the street.

Q All the way across the street? A They ain't connected, but they are parts like.

Q And that was so where your bicycle had gone, too; wasn't it? A I don't understand. 10

Q You don't understand. Well, there were holes all up and down the street? A Yes, sir.

Q All over the full length of it? A Yes, sir.

Q And they were six inches deep? A Yes, sir.

Q And it was around those holes that you and your cousin rode; didn't ride through any of them, did you? A We had to go through some of them.

Q You had to go through some of them. Well, how near to the place of the accident was the last hole that you remember going through? A Well, about 50 feet before we come to the truck. 20

Q Fifty feet; for fifty feet you didn't have to go through any holes. A We went right on the edges of the road, and the road comes right down.

Q You went right on the edge of the road. Well, a little while ago you told me that the front of the truck was about three feet away from you, wasn't it? Yes, sir. 30

Q And that if the truck was four feet on your side, and you were three feet away from it, that would be seven feet from the center. That is four feet more between you and the righthand side; isn't it? A Yes, sir.

Q Well, is that where you were going? A Where?

Q Four feet from your side, from your righthand side of the road. A I don't understand the question. 40

Joseph Kuczko, re-direct—re-cross

Q All right; will you say that your cousin was dodging holes as he was coming up this street? A A little bit.

Q Just the same as the truck was? A Well, we didn't have to do the same as the truck. I mean the truck was wide. We weren't so wide, and we could have dodged easier.

10 Q Were there any streets other than this one that you could have gone on to get where you were going? A No.

Re-direct examination by Mr. Emmerglick.

Q Now, Joe, during all the time that you saw this truck, can you remember if at any time more than half of it was over on your side of the road?

A Yes, sir.

20 Q When was that? A When we were dodging the holes.

Q And how close was he to you the last time that more than half of it was over on your side of the road? A When the accident happened, I could have touched him.

Q And at that time you were right along the edge?

Mr. Chance. I object to this as leading.

The Court. Sustain the objection.

30 Q And at that time where were you, Joe? A We were on the edge of the road.

Q How far from it? A About two or three feet.

Mr. Emmerglick. That is all.

Re-cross examination by Mr. Chance.

Q Did you turn there after you had passed the front of the truck? A I don't understand the question.

40

Joseph Kuczko, re-cross

Q Well, when you passed the front of the truck, you weren't any two feet from the side of the road?

A Well, we had to go over on account there was an iron fence on the side.

Q You had to go over toward the center? A Not exactly the center.

Q Toward the center. A Yes.

10

Q Was your cousin trying to turn the thing back when you had this accident happen? A No, he was keeping it straight.

Q Pretty hard for him to keep it straight on that bumpy street?

Mr. Emmerglick. I object to that question. He wasn't controlling the bicycle.

The Court. I shall admit it.

Witness. He was going as straight as he could. 20

Q That was not very straight, was it? A It was straight.

Q Right through the holes? A What?

Q Right through the holes? A Yes, sir.

Mr. Emmerglick. Just a minute, Joe; before you fell off the bicycle in which direction was the bicycle going?

Witness. Toward my home. It was going west. 30

By Mr. Emmerglick.

Q As you were going west, were you going directly up the road in a straight line, or were you going a little bit to one side?

Mr. Chance. I object to that.

The Court. I will admit it.

A When the accident happened, we were going straight. 40

Alex Harpes, direct

ALEX HARPES, sworn in behalf of plaintiffs.

Direct examination by Mr. Emmerglick.

Q Alex, do you remember the day of this accident? A Yes, it was on a Saturday.

10 Q And are you related to Joe who was just on the stand? A Yes, sir.

Q What relationship is there between you? A His mother and my mother are sisters.

Q In other words, you are his cousin? A Yes, sir.

Q How old are you? A Twenty.

Q At the time this accident happened you were seventeen? A Yes, sir.

20 Q Now, where did you start on that morning on the bicycle? A Started right from home.

Q You and Joseph went together? A I asked him if he wanted to go. He said he didn't want to go. He was afraid maybe he won't find him, my cousin, who is working in a paint factory.

Q You were going to find you cousin? A Yes, sir.

Q And did you find him? A No, sir.

30 Q Why? A We didn't know just where it was, so we took this one street, and that was the place.

Q And were you on your way there or on your way home? A On the way home.

Q Do you remember what kind of a street this was? A Well, it was a dirt road and plenty of holes in it.

Q How big were those holes across? A Oh, about two or three feet.

Q And how deep were they? A About half a foot.

40 Q How wide is that road? A Twenty-two feet.

Alex Harpes, direct

Q Did you go along with Joe, as he testified, and measure it some time ago? A Yes, sir.

Q Now, do you recall the condition which existed on the righthand side of the road, at the edge of the road from your righthand side? A I didn't get your question.

Q Do you recall the condition of the road along the edge on your righthand side? A Yes, it slanted off right near the end, and there is a bunch of iron beams there, and stones, and it wasn't fit to ride. 10

Q Now, is the level of the road at that place on the righthand edge the same as at the center of the road? A Well, I would pick the center of the road as the righthand.

Q No, I asked you if the righthand edge is higher or lower. A Lower. 20

Q How much lower? A I would say about a foot.

Q I see. Now, when did you first see this automobile? A About 150 feet away.

Q. And what kind of a truck was it? A big gasoline truck with the boards on the side of it, holding the hose and gasoline tanks.

Q About how wide do you think it was at its widest part? A About seven feet.

Q Now, did you notice the way the truck was being driven along the road? A Yes, sir, it was dodging holes. It was going to the left and to the right. 30

Q And on what side of the road was it? A On our side.

Q How much on your side was it? A About five or six feet.

Q Was it at any time more than that on your side?

Mr. Chance. I object to that as immaterial. 40

Alex Harpes, direct

Mr. Emmerglick. I won't press it.

Q Now, as you were riding along toward Newark, how close were you to the righthand edge of the road? A About two or three feet.

Q And who was propelling the bicycle? A I was.

10 Q And who was steering it? A I was.

Q Where did Joe have his hands? A On the bottom of the handle-bars.

Q Now, did you hear the truck driver blow his horn? A No, sir.

Q And from the time you saw him, which way were you going? A Straight ahead.

Q Now, how close was he to you when you passed the front of the truck? A About two or three feet.

20 Q And after you passed the front of the truck, what happened to the truck? A It seemed like he hit a bump. It swayed over to me, and I stuck my hand out to try to avoid getting hit, and just then it hit a bump and we fell.

Q Now, what happened to Joe? A Well, he went underneath the wheel. I went, and I just happened to fall on my knees and I pulled him right out.

30 Q Now, where did you go from there? A Well, we got a truck, put him in the truck, to the hospital, and—

Q From the hospital where did you go? A I didn't want to go home. I was scared.

Q When was the first time that you got the bicycle after the accident? A The same night I got it.

Q Where did you get it? A Right where the accident is.

40

Alex Harpes, direct

Q And did you examine the bicycle then? A Yes, sir.

Q What was its condition? A Two spokes were broken and the handle-bars weren't on it.

Q In what wheel were the spokes broken? A Front wheel.

Q What did you do with it? A I didn't know what to do. I didn't bother. About three weeks later it wasn't there. 10

Q Did you ever see it at home after that? A No, sir, I just saw the junk man.

Q Who saw it?

Mr. Chance. I object to that. I do not think that is material now.

Q Now, did the driver of the truck make any motion or signal to you at all? A No, sir.

Q And how fast was he going, do you know? A Oh, about fifteen miles an hour. 20

By the Court.

Q How far were you from your righthand side of the road when the front of the truck passed you? A. About two or three feet.

Q When I say the righthand side of the road; on your right? A About two or three feet on the road, and then there was a slant. We went off the road, and there was iron beams. It wasn't fit for riding. Some place on the road, on the side of the road, there was no place, just grease there. 30

By Mr. Emmerglick.

Q Now, how far to the right of the wheels of your bicycle did the slant begin? A About two feet.

Mr. Chance. I object to that.

The Court. When?

Q Just as you passed the front of the truck. A About two or three feet. 40

Alex Harpes, cross

Cross examination by Mr. Chance.

Q Now, where is the place that you measured the street? A Right near the works on Hyatt Avenue, about 275 feet from the corner.

Q Is the street the same width the whole length of it? A No, sir.

10 Q Is that the widest part or the narrowest part that you measured? A Well, it isn't the widest part. There are wider parts than that.

Q And there are narrower parts? A Yes.

Q Where is it any narrower than that? A Well, up a ways, a piece, and back.

Q Where was the accident with respect to the place that you measured? A The same place.

Q That place that you measured was where the accident was? A Yes, sir.

20 Q Were there any iron beams there? A Yes, sir.

Q They didn't interfere at all with your bicycle? A No, sir.

Q Didn't interfere with any traffic in the roadway? A No, sir.

Q No sidewalks are there? A No, sir.

Q Now, did your bicycle start to wobble when you got alongside of the truck? A No, sir.

30 Q Didn't you tell the officer who was there right after the accident that your wheels started to wobble when you got alongside of the truck and that you tried to steady yourself by reaching out to the truck

Mr. Emmerglick. I object to the question unless counsel is prepared to produce the officer.

The Court. What is the name of the officer?

40 *Mr. Chance.* Michael J. Helmstetter.

Alex Harpes, cross

Mr. Emmerglick. If the officer is here, I have no objection.

Q Then, you do admit that that was what you told the officer that day? A I can't remember that far back.

Q You can't remember that far back. If your memory was so stirred up, can you remember whether or not you were wobbling before the actual accident? No, I can ride a bicycle pretty good. 10

Q Can you ride, could you then ride through the holes two or three feet across and six inches deep? A Yes, sir.

Q Without wobbling? A Yes, sir, I could go in a straight line.

Q And is that what you were doing on this day? A I wasn't wobbling, just going straight ahead.

Q Straight ahead, right through the six-inch-deep holes, and up again, straight on, right over the rocky road? A Yes, sir. 20

Q Now, you said you were afraid to go home that night, did you? A Well, I went home after I was around the house. They told me to come in.

Q Was the fear about going home caused by the thought you had carelessly caused your cousin's injury?

Mr. Emmerglick. I object to that question, if your Honor please. 30

A No, sir.

Q What were you afraid of? A That the accident happened. I was sorry that it happened. I didn't know what to do. I didn't want to face my aunt.

Q Well, you remember everything that happened up to the time of the accident, do you? A Yes, sir.

Q Just how long a space is there where your 40

Alex Harpes, cross

memory doesn't lapse? You say that you don't remember whether you said something to the police officer or not. A Well, we took the fellow to the hospital. I didn't want the officer to delay me.

Q You did talk to the officer about what happened to you? A He just asked me what happened, and where it was.

10 Q Why didn't you tell him? A I told him it happened by an oil truck on Hyatt Avenue.

Q Is that all that you say you told this officer? A I can't remember any more.

Q You can't remember any more. Well, now, just see if you can't recall whether or not you did tell the officer that your wheels started to wobble when you got alongside of the truck. A I don't remember saying that.

20 Q You don't remember saying that? A No, sir.

Q You wouldn't remember whether you did say it or not? A No, sir.

Q You don't deny that you said it? A I couldn't say anything. I don't remember it.

Q Well, did your wheels start to wobble? A No, sir.

Q As you now remember it? A No, sir. I could ride a bicycle pretty good.

30 Q Did you try to steady yourself by reaching out to grab the truck? A I tried to avoid getting hit in the face and arm. I stuck my arm out to push it away.

Q Is that what you told the police officer? A I don't know what I told him.

By the Court.

Q When you say you tried to avoid being hit by the arm, what do you mean by "arm"? A As the truck was coming near us, after it passed us, then
40 hit a hole in the road and the body was swaying

Maximillian Sajdera, direct

over, and I stick my arm, to avoid getting hit. Just as I had it up there, the truck turned over, and we fell over with the bicycle.

Q Oh, you are referring to your own arm. I see. A Yes, sir.

By Mr. Chance.

Q Now, this hole that you say the truck struck, what is the size of that hole? A About two or three feet. Some holes were smaller and some bigger. 10

Q There wasn't anything especially peculiar about that hole that makes it any different? A They are all alike.

Q You were riding through the holes which were big enough to throw the back end of the truck around, and you went straight ahead without wobbling. Did you do that or didn't you? A What was that? 20

Q (Question read.) A I did.

MAXIMILLIAN SAJDERA, sworn in behalf of plaintiff.

Direct examination by Mr. Emmerglick.

Q Mr. Sajdera, do you recall when the plaintiff, Joseph, was hurt by this automobile truck? A Yes, sir. 30

Q Where were you employed at that time? A I was employed by the Raedel Leather Manufacturing Company. I was a shipping clerk.

Q And is that near the scene of the accident? A Yes, sir, that is. You could see the whole road from the window. The window opens onto the road.

Q You were standing on the first floor of the factory? A On the first floor. That is the Shipping Department. 40

Marimillian Sajdera, direct

Q Now, for how long a time before the accident happened did you see these boys on the bicycle?

A I had seen the boys coming all the way up the road.

10 Q And how were they riding? A They were riding along pretty good. The road was not very good then.

Q Were they riding, as you observed them, in a straight line? A Yes, sir.

Q And about how far were they, as they were riding along, from their extreme righthand side of the road? A Not any more than three feet.

20 Q Then, for how long a time did you see this truck before the accident happened? A I had seen the truck come out. You couldn't see right from the corner as it passed the factory. You could see after you got out about ten feet from the factory, you could see them come out and I noticed them just before the accident.

Q Now, upon what side of the road was he riding? A He was taking the best part of the road. He was riding more on his left than on his right, as I observed after the accident.

Q About how much of the truck was on his wrong side of the road?

30 *Mr. Chance.* I object to that. Maybe the left side is the right side, if the right side is impassable. I object to the "wrong side."

The Court. Sustain the objection. Tell us where the truck was in the road.

Q With reference to the imaginary center of the road, how far across that onto the side that the boys were traveling on was the truck? A You mean how many feet?

40 Q How many feet. A That I couldn't say. I am not a very good judge of feet. He was about

Marimillian Sajdera, direct

not any more than five feet from his left side.

Q I see; so that there was a space between the left side of the truck and the edge of the road on the side that the boys were riding on of about five feet; is that what you mean? A Yes, sir.

Q Now, did you see the boys pass the front of the truck? A I seen the boys pass the front of the truck. 10

Q And what happened after that? A While I was looking at them, the bicycle fell over, and the boy that was riding on the handle-bars made a grab for the side of the truck to save himself from falling under the wheel, and he did not see anything. I see the other boy pull him away, and I went out of the side of the door when I heard the truck was just moving off the boy's hand. The boy's hand was still under the wheel. 20

Q Now, was this boy who fell under the wheel on the handle-bar or on the cross bar? A He was on the cross bar, holding onto the handle-bars.

Q Now, did you see the manner in which the truck was proceeding along the road before the accident happened, just as the boys were passing it? I have seen the truck coming along, but I didn't notice anything wrong.

Q Well, was it going into the holes or not? A Yes, the road is rough there. You can't avoid any holes with a truck. It is hard to avoid holes with a truck. 30

Q You drive a truck now? A Yes, sir.

Q And was he going into these holes as he was passing the boys? A Yes, sir.

Q And do you recall that you noticed at all the motion that the body of the truck was making? A Any body on any truck will sway if there is any holes. 40

Maximillian Sajdera, direct

Q Well, did this body sway? A If he was going through holes, it must have been swaying.

Q Did it sway? A I didn't hardly notice that.

Q Did you notice that he was going into these holes? A Yes, sir.

10 Q Just one question more, please. When these boys were passing the body of the truck, how close was the truck to them? A The truck was about two and one-half feet from them.

Q And from the time that the front of the truck came up level with the front of the bicycle, did the truck driver swing over to the right?

Mr. Chance. I object to that as leading.

The Court. Sustain the objection.

20 Q Well, did the truck change the direction in which it was proceeding at any time before the accident? A No, I did not notice.

(Adjourned until tomorrow, Thursday, December 17, 1931, at ten o'clock a. m.)

SECOND DAY

Thursday, December 17, 1931

Continued pursuant to adjournment.

Present, counsel as before stated.

30

MAXIMILLIAN SAJDERA resumes the stand.

Direct examination (continued) by Mr. Emmerglick.

40 Q I want to direct your attention to the surface of the road at about the point where the accident took place. Tell me the condition of the surface on both sides, on both halves of the road. A The condition of the road toward the center it is always

Maximillian Sajdera, cross

worse. No vehicles never pull up to the extreme right.

Mr. Chance. I object to what they never do.

Q Tell us the physical condition at that time.

A The road on the extreme right is in pretty good condition.

Q On the extreme right of what? A Of the road. 10

Q Looking which way? A Going the way the truck was going.

Q Was there any relative difference between the other half of the road, that is, the side other than the extreme right, would you say? A On the extreme right the road is even and on the left side there is like the road slopes on the left.

By the Court.

Q Do you mean on the left side, the side the boys were on? A Yes, sir. 20

Cross examination by Mr. Chance.

Q Where is this street, Hyatt Avenue? A That is at the end of Wilson Avenue, where Wilson Avenue turns to Hyatt Avenue comes the street.

Q Do they sometimes call it Balls Road? A I don't know.

Q Where does this street go to, from Wilson Avenue to where? A I couldn't say. I never was at the end of that road. 30

Q It is only a little short road, isn't it? A I guess not. I guess it runs pretty far out.

Q How do you guess that? A I ride down around Port Newark and then I see a road come out, but I never went down it, so I don't know whether that is the road or not.

Q Do you know whether there is any other road beyond this one? A No, I do not. 40

Marimillian Sajdera, cross

Q This is out in the meadows, isn't it? A Yes, sir.

Q When did you work at this place you mentioned yesterday? A I left that leather factory already two years ago March.

Q What factory was that? A Raedel Leather
10 Manufacturing Company.

Q That is on Wilson Avenue? A Part on Wilson Avenue and part on Hyatt Avenue also.

Q How big a factory is that? A Pretty good size factory. I couldn't say how big.

Q Where did you work in that factory? A I was shipping clerk in that factory.

Q Where in that factory did you work? A First floor.

Q Where on the first floor? A On the side
20 next to the steel company, where they lifted steel beams.

Q Does the steel company face on Wilson Avenue? A No, it does not.

Q What does that face on? A Hyatt Avenue.

Q How close to the road is that? A You mean the steel company?

Q Yes. A Their yard runs up to the road.

Q Where does the front of the building run?
30 A The front of the building is about 150 foot back off the road.

Q Was it in the front of the front building you looked when you saw what you did see? A The Raedel Leather Company faces their lot, the side of the building.

Q Did you look in front of the front building when you saw what you did see? A Yes, I was looked up Hyatt Avenue.

Q How wide is the steel company's property?
40 A I don't know.

Maximillian Sajdera, cross

Q How great a width do you place on the steel company's property? A The steel company's property runs out to the back of the meadows.

Q I don't mean that way. How much is facing the street? A You mean the front part?

Q Yes. A About 250 feet.

Q Was this accident in front of the steel company? A Yes, sir. 10

Q How much of the steel company's property was there between you and the accident? A About 75 feet.

Q How far would you say you were from the scene of the accident? A About 75 feet.

Q Did you go out to the scene of the accident? A Yes, sir.

Q Did you tell the officer you were a witness? A There was no officer there. 20

Q You didn't see any officer there? A No, I did not.

Q How did the boy get away from them? A Both boys were in the truck. The driver took them to the hospital.

Q Were you looking through an open window or through a glass window? A An open window.

Q Could you see from where you were the condition of the road at the place exactly where the accident happened? A Yes, sir. 30

Q Did you see the truck going down the street? A I seen him as he passed the leather company, before he got to the steel company.

Q The truck passed where you were working, did it? A Yes, sir.

Q And went on down to where the accident happened? A Right.

Q Do you drive a truck? A Yes, sir, I do.

Q Tell us how the truck was going as it went down there. A The truck was going along, just 40

Maximillian Sajdera, cross

going right along, not too fast. I couldn't say how fast, not too slow. If it had a load on or not I don't know.

Q There was nothing about his driving, the manner of his driving that attracted your attention particularly? A. The only thing that attracted
10 my attention was he was too far over on his left-hand side.

Q How far over do you say he was on his left-hand side? A He was about five feet from the edge of the road on his left.

Q The nearest part of his truck you say was five feet from his lefthand side of the road? A Yes, sir.

Q Did you see the boy pass the front of the truck. A Yes, sir, I saw the boy pass the front of
20 the truck.

Q How far did they get past the front of the truck when the accident happened? A They got past the cab, about the center of the truck, between the rear wheels and the cab; about the center.

Q Was the truck then turning to its right? A No, it wasn't, it was going straight ahead.

Q Was there anything between the boys and their righthand side of the street? A Between
30 the boys and the righthand side of the street there is the slope of the road.

Q Was there anything on this slope in the road? A Right off the slope.

Q On the slope? A Nothing on the slope, no, but right below the slope there was.

Q Off the road, you mean, or below the slope? A Yes, sir.

Q Had you seen these boys traveling any distance? A Yes, I have. I seen them coming down
40 for a block or a block and a half.

Maximillian Sajdera, cross

Q What were you doing, standing there watching them? A I was standing by the desk; I didn't have anything in particular to do. We weren't very busy at the time.

Q As you saw these boys coming all this distance, could you from where you stood see the holes in the street? A I could always see the holes. 10

Q How big are the holes? A Small and big ones, all sizes.

Q All over the surface of this street there were holes and it was rough? A Yes, sir.

Q Were there some loose stones at some place on the road? A I didn't see any loose stones, nothing but a cinder road; that is what it was.

As these boys were coming down, did you notice any change in the direction they took? Did they go in an absolutely straight course? A Fifty feet before they got to the truck they pulled over to their right as far as possible as they could. 20

Q As far as they could? A Yes, sir.

Q Didn't you say a little while ago that there was about five feet between the truck and its left-hand side of the road? A Yes, sir.

Q Didn't you tell us the truck continued straight ahead? A It did.

Q And still the truck continuing straight ahead five feet from its lefthand side of the street, you say came in contact with the boys who were as far to the right of the street as they could get? A That part I didn't see, whether the truck came in contact with the bicycle or not. 30

Q All you saw then was that the boys and the bicycle fell over, but as to what made it fall you do not know, do you? A I don't know.

Q When they fell did they fall with their bicycle toppled toward the truck or away from the truck? 40

Frank Rocco, direct

A Toward the truck.

Q Do you remember whether the body of this truck was higher than the handle-bars of the bicycle? A I don't remember it.

10 Q I suppose you were not observing the condition of the roadway right at the wheels of the bicycle at the time it toppled over, were you? A No.

Q You do not know whether there was a hole of a certain size or not there? A No, I do not.

Q All you know about the actual happening of that accident, right at the time it happened, is that you saw one of the boys' knees go up and the bicycle fall over and then the truck against the boy? A Yes, sir.

Mr. Emmerglick. I object.

20 *The Court.* Admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

FRANK ROCCO, sworn in behalf of plaintiffs.

Direct examination by Mr. Emmerglick.

Q You are a licensed practicing physician of this state? A Yes, sir.

30 Q Do you recall having performed an operation on Joseph Kuczko, the little boy here? A Yes, sir.

Q Where did you perform that operation? A St. James' Hospital.

Q Do you recall the condition of his hand before the operation was performed? A Yes, sir.

Q What was the condition? A The hand was all mashed up and full of grease and dirt.

40 Q In your opinion was that operation necessary? A Absolutely.

Mary Kuczko, direct—cross

Q Did you administer an anesthetic to the patient? A Yes, sir.

Q What anesthetic? A Ether.

Q Have you seen him since? A Just now in court.

Q Do you know whether he received treatments after the operation? A He returned to the clinic. 10

Q For how long a period of time? A Three or four weeks.

Cross examination waived.

MARY KUCZKO, one of the plaintiffs, sworn in behalf of plaintiffs.

Direct examination by Mr. Emmerglick.

Q You are the mother of Joseph? A Yes, sir. 20

Q Did you go to the hospital and pay the hospital bill? A Yes, sir.

Q How much did you pay them? A \$63.

Q Is this the receipted bill you got (indicating)? A Yes, sir.

Q Is your husband living? A Yes, sir.

Q Do you live with him and your family? A Yes, sir.

Q How many children have you? A Four.

Q Are the other three older or younger? A 30
younger. He is my oldest boy.

Q What does your husband do for a living? A He is a brakeman.

Q Where? A On the Central Railroad.

Cross examination by Mr. Chance.

Q This bill has on it here "Admitted—

The Court. It is not admitted in evidence.

Mr. Chance. She testified to the amount of 40

Motion for Non-Suit

it and I want to check with her certain dates it is supposed to be for.

The Court. If you want to put it in evidence I will let you do that.

Q Was your son at the hospital beginning March 16th? A Yes, sir.

10 Q Was March 30th the date he was discharged from the hospital? A Yes, the day before Easter. On Easter Saturday.

By the Court.

Q How old is this boy at the present time? A Ten years old.

Q At the time of the accident or now? A At the time of the accident.

Q What month was he born in? A January 8th.

20 Q He was ten at the time of the accident in 1929? A Yes, sir.

Q At the time of the accident he was a little over ten? A Yes.

Mr. Emmerglick. I want to read into the record answers to interrogatories propounded of the defendant Robert Brydon.

1. Did you see the plaintiff riding on the bicycle before he was injured by the truck which you were operating? A Yes.

30 3. How far away from the front of the truck was the bicycle when you first saw it? A 100 feet or more.

PLAINTIFFS REST

Mr. Chance. I respectfully move for a non-suit upon the ground that it appears in this case that the plaintiff Joseph Kuczko—this non-suit applies to the three plaintiffs—the ground of the motion is that Joseph Kuczko

40

Motion for Non-Suit

at the time of the accident was riding on a bicycle and that act is controlled by chapter 281 of the Laws of 1928, which says that "No person shall carry any other person on his bicycle." In making this motion I am fully aware of the general rule that prevails in some cases that the effect of a statute is that it is one circumstance to be taken into consideration on the question of whether or not there was negligence, but the distinction I make between that rule and the kind of statute to which that rule applies is that that rule applies where a plaintiff is on the road rightfully, and not in a case like this where the statute forbids their being on the road.

10

The Court. Where in the statute is he forbidden to be on the road?

20

Mr. Chance. On the road on a bicycle.

(Argument.)

Mr. Chance. On that ground I respectfully ask for a non-suit.

The Court. The statute does not forbid the rider of a bicycle carrying a boy on the handlebar or frame work from being on the road. He had as much right to be on the road as a truck had; in fact, if the legislature began to enact that kind of a law, it seems to me they would start and put all automobilists off the road as well as bicycles, if you read the statute.

30

Mr. Chance. Assuming from the evidence that the truck was on the left side of the road as the testimony shows—

The Court. We won't argue about that. It is too silly. You can have an exception.

Mr. Chance. I ask an exception also to the Court's remark that it is too silly, as prejudicial to the defendant.

40

Exception noted as ground of appeal.

Robert Brydon, direct

ROBERT BRYDON, one of the defendants' sworn
in behalf of defendants.

Direct examination by Mr. Chance.

Q Where do you live? A 685 Sanford Avenue, Newark.

10 Q On the 16th of March, 1929, were you employed by the Prudential Oil Company? A Yes, sir.

Q What was your position with that company? A Chauffeur.

Q What kind of a car was it you drove? A White truck.

Q How long had you been driving automobiles? A About six years.

20 Q Have you ever had an accident? A A minor accident.

Q What do you mean by a minor accident? A Such as a scratched mudguard, or something like that.

Q Did you ever injure a person? A No, sir.

Q Had you ever been sued for any of these minor accidents?

Mr. Emmerglick. I object.

The Court. Sustain the objection. That hasn't anything to do with this case.

30 *Mr. Chance.* The fifth paragraph says, "Servant and agent was an incompetent driver," and it is in connection with that I am inquiring.

Withdraw the question.

The Court. The fact that a person has driven a year or two years doesn't mean he is negligent. It is what he did at the time.

40 Q Now, on this 16th of March, where did you start from in the morning? A From Doremus Avenue.

Robert Brydon, direct

Q That is the place where the Prudential Oil Company was located? A Yes, sir.

Q When you started out what kind of a truck did you have, a White? A A White.

Q What else is there in regard to the construction of the truck besides it being a White? What sort of a body? A A tank truck. 10

Q A tank truck they carry oil in? A Yes, sir.

Q How big was it? A Two and one-half ton truck.

Q How were the speeds of this truck? Were there more than three speeds? A Four speed truck.

Q What were these four speeds? A I should say five speeds; four speeds forward and one reverse.

Q How far is Doremus Avenue from the place where the accident happened? A I didn't get that. 20

Q How far is Doremus Avenue from the place where the accident happened? A I should say a distance of ten city blocks.

Q You had gone from Doremus Avenue over some intervening street until you came to the street we speak of, Hyatt Avenue? A Yes, sir.

Q When you got to Hyatt Avenue where did you enter it? A On Doremus Avenue, coming from Newark I come off Wilson Avenue to Hyatt Avenue. 30

Q Describe to the jury what sort of a street it is they call Hyatt Avenue, or was at that time? A A dirt street, very rough.

Q How far had you gotten off Wilson Avenue before the accident happened? A I should say about 150 feet.

By the Court.

Q What do you mean by "very rough," I mean 40

Robert Brydon, direct

as it was on the day of the accident? A Holes in the road.

Q Was it a macademized street, or supposed to be that kind of a street that had gone into disrepair? A No, sir; it was a dirt street that never was macademized.

10 Q Just dirt? A Yes, sir.

Q Full of holes, pitted? A Yes, sir.

By Mr. Chance.

Q Which side of the street were you traveling on as you proceeded along that avenue? A On the extreme right of the street.

Q Beginning from that point go ahead and tell the Court and jury in your own words just how the accident happened. A I was traveling east on the right side of the road and I noticed the boys
20 were about 100 feet in front of me. When they passed the front of my truck they were about four and one-half feet from the side of my truck and they had passed the front wheels and the cab, and I didn't know anything else until I heard the boy scream. I stepped on my brake, and when I got down from the cab the boy's hand was under the wheel. I picked the boy up and put him in the truck and took him to St. James' Hospital.

Q In what gear was your truck at the time of
30 the accident? A In second gear.

By the Court.

Q How fast were you going? A About eight miles an hour.

By Mr. Chance.

Q How much room would you say there was between the left side of your truck and the left side of the road facing the way you were going? A I should say about six feet.

Q When you got out were you able to see the
40 bicycle? A When I got off the truck, yes.

Robert Brydon, direct

Q Where was it? A Laying right alongside the truck.

Q How far was it laying from its righthand side of the road? A From the extreme right?

Q Just how much room between the bicycle and the extreme right side of the road going in the opposite direction from the way you had been going? A I should say about five feet.

10

Q Was there anything between the place where the bicycle lay and the far right of this five feet you have just told us about, any obstruction in the road? A No, sir.

Q Were you present when Mr. Harpes was interviewed by Officer Helmstetter? A Yes, sir.

Q Did you hear Mr. Harpes tell Officer Helmstetter that the bicycle started to wobble when they got alongside of the truck and they started to steady themselves on the truck? A Yes, sir.

20

Q How far were you from your righthand side of the road at the time the bicycle must have come in contact with you to your rear?

Mr. Emmerglick. I object.

Mr. Chance. Withdraw it.

Q How far were you from your extreme right of the road when you first heard the scream, just when the boys passed in front of your truck? A I was right at the edge of the righthand side of the road.

30

By the Court.

Q How wide is that road, have you any idea? A About 25 feet. It is wider in some parts than it is in other.

Q How wide is your truck about? A Five foot wide.

Q You were how far from the righthand side of the road? A Right at the edge of the righthand side.

40

Robert Brydon, direct

By Mr. Chance.

Q Between the time you saw the boys pass in front of your truck and the time you heard the outcry, did the rear of your truck swerve? A No, sir.

10 Q This width of the road you speak of, from what point to what point is it you have in mind when you gave us the width? You told in answer to the Judge's question. A From the extreme right side, of my right side, to the very extreme right side.

Q How much of this part of the roadway was passable? Any difference in it? A On the extreme right on both sides the road was passable, rather smooth, and toward the center is where the rough holes are.

20 Q Someone said something about the incline in the road. What do you say about the elevation? A By the steel works there is sort of a slope.

Q On which side is the slope, toward the steel company or away from it? A It slopes toward the steel company.

Q Where is the entrance to the steel company with respect to the place of the accident? A The whole of it is open; there is no special entrance.

30 Q Did you see any steel beams laying along the side of the road in front of the steel works at that time? A No, sir.

Q Do you recall where the Raedel Leather Company is? A Yes, sir.

Q How far would you say that is from the place of the accident? A Why, it was right almost directly opposite.

Q About 75 foot is the proper distance? A Yes, sir.

40 Q How were your brakes?

Robert Brydon, cross

Mr. Emmerglick. I object.

The Court. Admit it.

Q What was the condition of your brakes? A Very good. They had only been adjusted two weeks before.

Q In how long a distance did your truck come to a stop at the time you heard the outcry? A It stopped immediately. 10

Cross examination by Mr. Emmerglick.

Q How do you know the brakes were adjusted about two weeks before the accident? A I took them down to the White Motor Car Company myself.

Q You testified that you heard Mr. Harpes say something to Officer Helmstetter. You testify to that from your memory? A Yes, sure. 20

Q Purely from your memory? A Yes, sir.

Q Now, you had been over that road before, hadn't you? A I went over it every day.

Q You knew the condition of the road, did you not? A Yes, sir.

Q You knew where the bumpy parts were and where the smoother parts were, did you not? A Yes, sir.

Q At the time of the accident you knew of that slope in front of the iron factory? A Yes, sir. 30

Q How close were these boys to you?

Mr. Chance. At what time?

Q When the front of your truck approached or as it came level with the front of the bicycle. A I should say four to four and one-half feet.

Q At that time how many feet were they to your right? A From the edge of the road?

Q Yes, from your righthand edge. A I should say about a foot or two foot. I was almost at the 40

Robert Brydon, cross

edge of the road.

Q Could it have been more than two feet? A I don't think it could.

Q You could have pulled over another two feet approximately? A Yes, I could.

Q Did you? A No, I didn't.

10 Q From the time you came level with the front of the bicycle did you change the direction of the truck at any time up to the time you stopped after having heard the scream? A No, I didn't.

Q Was your truck loaded or empty that morning? A Empty.

Q You say it is about five feet wide? A Yes.

Q How wide is it from the edge of the platform on either side of the tank, from one platform to the other platform across? A It measures
20 about five feet.

Q Did you have double rear wheels on the truck? A Yes, sir.

Q Did you strike any bumps as you approached these boys on the bicycle? A No, sir.

Q You did not hit any bumps at all? A Just before I did, before I was close to them, as I came onto the road.

Mr. Chance. I object.

The Court. Objection overruled.

30 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q For how great a distance had you been riding on this street when you first saw the boys? A I saw them just as I came up on Hyatt Avenue there.

Q You rode 100 feet on the road until you got up to them? A About 100 or 125 feet.

40 Q In the course of that 125 feet you had taken in some bumps, hadn't you? A Yes, sir.

Robert Brydon, cross

Q When you take a bump such as existed on that street with that truck, that truck began to sway, did it not? A It swayed, but don't sway like an ordinary truck does.

Q It does sway? A Yes.

By the Court.

Q Did you have a mirror on your truck? A 10
Yes, sir.

Q Did that reflect so that you could see the boys at the time as you were driving just a second after they passed you. Did you get sight of them in the mirror? A The boys were coming toward me.

Q After they passed your driver's seat, did you pick them up in the mirror, or wasn't it adjusted that way? A I don't remember that.

Q Can you tell us this: After you heard this scream, when you stepped on your brakes, in how 20
short a distance could you stop? A I should say about a foot. The truck stopped immediately.

Q When the boys passed you one boy was sitting on the saddle of the bicycle? A Yes, sir.

Q And the other was on the cross bar? A Yes, sir.

Q Holding onto the handle? A Yes, sir.

Q Was the bicycle wobbling or riding along in a straight direction? A It was wavering, but not a whole lot, not that I think it was dangerous. 30

By Mr. Emmerglick.

Q Mr. Brydon, that mirror of yours was connected on the left side, was it not? A Yes, sir.

Q That was the side on which the boys passed? A Yes, sir.

Q When you saw the bicycle wobble—

The Court. I think he said he saw it waver.

Q When you saw it waver, did that create in your mind any impression that made you continue to remember the boys after they had passed out of 40

Michael J. Helmstetter, direct

your vision? A The boys were clear enough of the truck and I didn't pay any more attention. I thought they were out of danger.

Q Notwithstanding the waver, you thought they were out of danger? A Yes, sir.

10 MICHAEL J. HELMSTETTER, sworn in behalf of defendants.

Direct examination by Mr. Chance.

Q You are a police officer of the City of Newark? A Yes, sir.

Q And were you such on the 16th of March, 1929? A Yes, sir.

20 Q Was it called to your attention that there had been an accident between a bicycle and an automobile? A Yes, sir, we got a telephone call, but it didn't say what the accident was.

By Mr. Emmerglick.

Q Are you referring to some record? A No, just a memorandum.

By Mr. Chance.

30 Q Do you know how you got word there had been an accident? A The precinct got word by telephone from St. James Hospital there was an accident.

Q You were detailed to find out about it? A Yes, sir.

Q Where did you see Alex Harpes, who was on the witness stand yesterday while you were here? A St. James Hospital.

Q Did you talk with him regarding the things that had happened? A Yes, sir.

40 Q Did he say to you that at the time the accident happened his bicycle had started to wobble when they got alongside of the truck and they tried

Michael J. Helmstetter, cross

to steady themselves on the truck but failed to do so? A No, sir.

Q What did he say to you? A He stated that when they got about the center of the truck he felt the bicycle slipping down the road.

Q Is that all he said? A Yes, sir.

Q From the time he felt it slipping did he tell you as to what happened from the time he did feel it slipping to the time it got to the ground? A Yes, sir. 10

Q What did he tell you about that? A As he felt it slipping he put up his left hand guiding himself against the truck to keep himself away from the truck, and with that the other boy slipped under the truck.

Cross examination by Mr. Emmerglick. 20

Q Are you testifying so far as these conversations are concerned, from your recollection, unaided by any reference to writings of any kind? A Recollection and also notes.

Q What notes? A What was said at the hospital.

Q Who made the notes? A I, myself.

Q Where are those notes? A Down at the precinct, I believe.

Q Did you use those notes for the purpose of refreshing your recollection? A Well, no. 30

Were you able to remember this conversation without referring to these notes? A Yes, sir.

Q You did refer to them, nevertheless. A Well, no. I can say no.

Q What do you mean? You told us a little while ago that you did use the notes. I want to know whether unaided by those notes and before you looked at them were were able to recall this conversation. 40

Michael J. Helmstetter, cross

Q You did look at the notes. A Yes, sir.

Q Why? A Well, we have about thirty or fifty accidents more or less from time to time, and we go over our records to see what was disposed of and what is apt to come up, and all that.

10 Q When did you look at these notes last? A I should say four or five months ago.

Q Didn't you look at them before you came to court here, when you became aware that you were to be called to testify? A No, sir.

Q What is that paper you have there?

The Court. He hasn't referred to that.

Q How many accidents did you investigate? A On reserve some days twenty accidents. On an unusual day there may be sixty.

20 Q You have investigated a lot of cases since this accident? A When you are on reserve the lieutenant calls for a man in uniform and whoever is there goes out.

Q Didn't you investigate a lot of accidents since this one happened? A Well, yes.

Q Do you remember the statements made by all the persons whom you interview? A We don't interview nobody.

30 Q You interviewed Alex Harpes, didn't you? A This was at the hospital. It is up to us to ask is the driver guilty.

Q Did you interview this boy Alex? A No, sir.

Q Where did you get this information? A At the hospital. That's up to me to see if I have to place the driver under arrest.

40 Q Whom did you speak to that day at the hospital? A Why, to Harpes and the driver, and I called my lieutenant and he says, "Use your own judgment. If it isn't the driver's fault, don't place

Michael J. Helmstetter, cross

him under arrest, but make notes of it.”

Q Would you recognize Harpes if you saw him?

A I don't think so. I seen him yesterday, but I don't think I can really recognize him today.

Q Did you recognize him yesterday as the boy you spoke to? A Practically, yes.

Q Do you recall the driver saying to you that he had at that time ten years' driving experience? 10

Mr. Chance. I object. That is not cross examination.

A. Eight years.

By the Court.

Q You mean that Harpes said this?

Mr. Chance. No, the driver.

Mr. Emmerglick. No, the driver.

The Court. Sustain the objection. 20

By Mr. Emmerglick.

Q Do you recall whether anything was said about the directions in which the truck and bicycle were going? A Yes, sir.

Mr. Chance. I object.

Witness. You have to make a slip out on that.

Q These notes you looked at, who prepared them? A Myself.

Q Are you testifying here under subpoena? 30

The Court. That doesn't make any difference. A Yes, sir.

Mr. Emmerglick. I want to find out whether it was a subpoena *duces tecum* or not.

The Court. All right.

Mr. Chance. I offer the subpoena in evidence.

Q Where is this other paper?

The Court. What paper is that? A The boy's name and the driver's name and the license 40

Charge to the Jury

number and the name of the company.

Q Where is nothing on here you haven't told us about?

The Court. I wouldn't put that in evidence.

Re-cross examination by Mr. Emmerglick.

10 Q Nothing on there about this conversation, is there? A No.

20 *Mr. Chance.* It is stipulated that the injury which Joseph Kuczko, the infant plaintiff, exhibited to the jury just now consists of an amputation of the fourth finger on the right hand and the removal of the knuckle joint and the amputation of the remaining three fingers other than the thumb of the right hand at the head of the metacarpal bone with the resulting scar running from the middle finger in a semi-circle over to the base of the thumb.

Defendants rest.

Plaintiffs rest.

Mr. Chance sums up for defendants.

Mr. Emmerglick sums up for plaintiffs.

Kuczko et als. v. Prudential Oil Corp. et al.

30 The Court charges the jury as follows:

MOUNTAIN, J.

40 There are three sets of plaintiffs in this case, and there are two defendants; one of the defendants is a corporation and the other is an individual. The action is brought on the theory that the individual defendant was negligent and that he at the time was employed by the other defendant and was acting within the scope of his authority and under the control of the other defendant, and was a servant

Charge to the Jury

of the other defendant, and as such servant was negligent, and his negligence may be imputed to the master. I would assume that if you find that Brydon, this individual defendant, was guilty of negligence, you would hold both defendants. You cannot apportion the damages against the two defendants if you find against them; that is, you cannot bring in a verdict for a certain amount against Brydon and another amount against the Prudential Oil Company; it must be one amount against both. 10

These plaintiffs have brought this action against the two defendants relying for the successful termination of their respective actions upon whether or not you find in favor of Joseph Kuczko, this small boy who was injured, because if he cannot prevail then the actions of the other plaintiffs fall. The theory of the action is, as I say, that the defendant was negligent. Specifically, it is alleged that on March 16, 1929, Robert Brydon was driving a truck of the Prudential Oil Corporation and that this truck came into contact with a bicycle upon which Joseph Kuczko was riding, not in the saddle of the bicycle but on the cross bar, that bar which is at the top of the frame and supports the frame between the front and rear wheels and is connected with the post that in turn controls the handles of the machine. This bicycle was being driven by Kuczko's cousin. He was the individual who was in the saddle, and he at that time was seventeen years old. The plaintiff Joseph Kuczko at the time of the accident was ten years old. 20 30

Negligence is never presumed; negligence must always be proved. It probably never occurs to a jury, it fact I do not know that it ever occurs to lawyers, that a judge sitting on the bench as weeks go by, and as months and years pass, has a good deal of satisfaction if juries try cases properly. If 40

Charge to the Jury

he feels that justice is done it is easier to go to sleep at night. Perhaps that personal element is unknown as you sit there and see us quote the law with our dignified manners, and you perhaps think that we are not human. I would not like to disclose how human we are.

10 Now, a case like this is not so easy to decide, because naturally all the sympathy that you have is aroused. The fact that a young boy has to go through life with a maimed hand is not a pleasant thing to contemplate, and so if I, in trying to tell you both sides of this story, seem perhaps to tell one side too well, I should not do that, and I shall not do it intentionally. You must understand that you are not here to transfer money from one man's pocket into another man's pocket, but to do justice.

20 Of course, small boys do foolish things. Probably all can look back, time and again in our lives, when a slip would have been rather dangerous.

When you retire to the jury room, remember that the plaintiff claims that the defendant was negligent, and it was the negligent act of the defendant which caused the infant plaintiff to be injured. If you find that the defendant Brydon was not negligent, the plaintiff cannot recover, nor can any of them. If you find, under certain circumstances
30 which I will endeavor to outline, that the defendant Brydon was negligent, but that the boy himself was negligent, then the plaintiffs cannot recover.

Of course, negligence and contributory negligence are questions for you to determine. They are factual questions. The Court cannot decide any of those questions. If I misquote any of this testimony, in your opinion, you must ignore what I say and take your own memory of what the witnesses have testified to. As I said to a jury yesterday, if I were on a jury and a case was closed
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Charge to the Jury

and I was asked for my vote, or a vote was taken, and perhaps negligence was shown, it seems to me that I would say to the foreman, "Well, what was the act of negligence? If you are going to hold the defendant, what was the act of negligence? Because in the absence of that you cannot find negligence."

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Now, this is the accusation that the plaintiff makes against the truck driver. He said that the road upon which they were riding was a road about 22 feet wide, and that the road, as I understand it, was of dirt and was badly pitted; I mean by that that there were holes at intervals. We were told by the plaintiff that some of them were three feet in diameter and a half a foot deep, six inches deep. We were told that as the boys proceeded (and they were approaching the truck) on their righthand side there was a slight declivity where iron beams were lying. The youth who was injured was riding, as I told you, according to his story. He said he noticed this truck coming toward the bicycle, and that it came along, as he expressed it, "dodging holes," and he said it was being driven more on their side of the road than on its own. This truck was an oil truck, and was described as having platforms on the sides for the apparent retention of oil receptacles and hose. There was testimony indicating, you may find, that the boys were driving two to three feet—speaking now of the plaintiffs' case—from their righthand side of the road when the front of the truck passed them, and then as I understand the story of the plaintiff he said at that time he could have reached out and touched the truck. The rear wheel of the truck nearest to them struck a hole, or hit a hole, and the rear of the truck was thrown over. Whether the truck came into contact with the bicycle or not is

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Charge to the Jury

for you to decide, but as a result of that maneuver the boy plaintiff was thrown to the ground in such position that his hand went under the wheel in question, which was a double wheel. There was testimony I think given on behalf of the plaintiff that when the truck stopped the wheel was either
10 on his hand or just off of it. As a result of that the hand was mashed and was full of grease and dirt and an amputation was made. The hand has been exhibited to you.

The plaintiff called a witness who testified that he was a shipping clerk in a leather factory, and had a view of this accident through an open window. I think he testified that he saw no contact between the truck and the bicycle, but he told us that the boys were riding about three feet from the
20 righthand side of the road, and that as the truck approached them it was taking up the best part of the road and riding about five feet from its lefthand side of the road. He thought that when the truck passed the boys there was an interval of about two and a half feet between them. He said when the truck was about fifty feet from the boys they pulled over to their right as far as possible, and as a result of whatever did happen he told us that the bicycle fell toward the truck.

30 Now, let us turn to the defendant's case. Perhaps you will find that the witnesses called for the defendant Robert Brydon told a story which you will examine on behalf of the defendant with the most interest. Mr. Brydon told us that he was driving the truck on this road, Hyatt Avenue, which he estimated was about 25 feet wide. He said that his truck was five feet wide and that he was driving on the righthand side of that road in an easterly direction. He said he saw these boys as they ap-
40 proached him and after that they passed his truck

Charge to the Jury

and were at a distance from the truck of four and a half feet. He testified he heard a scream and put on his brakes and stopped within one foot. He testified that at the time his speed was eight miles an hour and he was in second gear, and that the truck had four other gears, as I understood him, making four forward and one reverse. He told us he could have pulled over another two feet, but as I understood his testimony he did no think that was necessary.

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After the accident an officer of the Police Department made an examination in this case and he paid a visit to Alexander Harpes; he is, as you remember, a cousin of the boy plaintiff who was injured, and he is the one who was operating the bicycle. The officer who made the examination told us that Harpes had stated to him that after they had passed the truck and when they got about in the center of it he felt his bicycle slipping down and he put out his left hand, presumably in the direction of the truck or against it, when the other boy who was riding on this cross bar slipped underneath the truck.

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Of course, in view of the fact that negligence is never presumed and must be proved, the happening of an accident does not give rise to a presumption of negligence; it is a factual question. You have a right, gentlemen of the jury, leaving all sympathy aside, to consider the testimony of these various witnesses just as you would consider a man who comes into your office and sits down and crosses his legs and starts to tell you a story. As he sits there you appraise him, if you have never seen him before, to determine how much of his story you are going to believe and how much you are not going to believe, or what you put down to his enthusiasm or put down to his self-interest and you probably

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Charge to the Jury

in an unconscious manner eventually decide whether you are going to believe him or not and sometimes whether you like him or not. These witnesses have been called, and you have a right to consider their interest in the case and your impression obtained from them, and the probability of the stories they tell. You may find that Mr. Brydon was negligent. You may find that he was not negligent. You may retire to the jury room and determine among other things that he did not impress you as the kind of man who would do a negligent act under all the circumstances that existed.

Well, all those questions are for you to decide. You have both sides of the case presenting conflicting stories.

What is the law? I hardly need tell you the law, because common sense dictates it, and you probably have heard it so often quoted that you know it by this time. Of course, the boys on this bicycle, which is classed as a vehicle under our Traffic Act, and the operator of this truck had as much right on the highway one as the other. They both had a right to use this road, but with that right, as I have told many juries, there was the correlative duty of observing the rights of others also lawfully on the highway. That is, of course, nothing but plain consideration. The truck driver, Mr. Brydon, had to exercise such care as a reasonably careful and prudent man would have exercised under similar conditions. He had under his control at the time this White truck, and he was driving this truck on the kind of road that you had heard described.

How about the boy who was riding as a passenger or as a guest or as an invitee on the cross bar of this bicycle? Of course, you know that in ordinary cases contributory negligence absolutely bars the right of one to recover, and when I say "one" I

Charge to the Jury

mean an adult. The law frowns upon the recovery of a sum of money by a man who has himself contributed to his own injuries, but what are we going to do with a boy? Well, in the first place, this boy was ten years old, and to explain how the law regards the negligence of children, may I say this to you: You know that you would never accuse a child of the age of a month or two of being negligent; you would say that was ridiculous. You would say it was equally ridiculous to hold that a man of fifty could not be guilty of contributory negligence, so there you have the two extremes. Where is the middle ground? As that child comes along in years and becomes older, it gradually comes to that equatorial line where it crosses from irresponsibility to responsibility. Of course where that is, is a jury question. It may be a little helpful to tell you that the courts of this state have held, remembering this boy was ten years old, that a child of seven years is presumed not to be guilty of negligence and not to be capable of it, although that is rebuttable. The contrary may be shown; it is a jury question. This boy was ten, and when you are scrutinizing or examining his actions to determine whether you will decide that he was old enough to be guilty of contributory negligence, of course you would not use as a standard the same judgment and intelligence that you would find in an adult. There again you have youth, so I charge you that what you should use as a standard of similarity is to compare him with, and expect from him the same degree of care and responsibility that you would expect from a boy of similar age, intelligence and education.

Now, bearing that in mind, this boy we were told was riding on the cross bar of a bicycle. With that in mind I charge you that unless there was something, if you found that he was old enough to have

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Charge to the Jury

10 been guilty of negligence, which he should have done in the exercise of due care to have avoided injury under all the circumstances in the case, he cannot be charged with the negligence of the operator of the bicycle. You may ask what should he have done? Well, in the consideration of the case an answer to that might be that he should never have ridden there, because the traffic law of this state expressly forbids it. The traffic law of this state says, and I will leave out the parts that are immaterial, "The rider of any bicycle shall not carry upon his bicycle any other person." What else could this boy have done? Well, he may have jumped off his bicycle if he saw any imminent danger, and contributed to his injury. There are other things that may occur to you, too.

20 The burden of proving that this boy was guilty of contributory negligence is upon the defendant. As I stated, the burden of proving negligence of Mr. Brydon is upon the plaintiff.

30 If you find that this boy was old enough to be sui juris, that is, responsible, and you find that he was negligent, then that defeats the action of the plaintiffs and your judgment should be for the defendants. If you find for the plaintiff, then, as I say, you have three groups, if I may so picture them—not exactly groups, because the boy himself practically stands alone in one group. What are the elements of his recovery if he is entitled to recover anything? Well, he may recover for the bodily injury he has sustained and the effect of that injury upon his health as to degree and probable duration; that is, as to whether it is temporary or permanent, and I presume if you find for him you will find that the loss of these fingers is permanent. Lastly, he may recover for the pain and suffering which he has had or has as a result of the
40 accident.

Charge to the Jury

In the next group we find the father alone. He has only one element of recovery. He may recover for any reasonable amount he has spent to cure or alleviate his son's injuries, and the only testimony as to that, as I recall it, was that the hospital bill was \$63.

In the third group we have the father and mother together. They have sued under a particular statute which permits them to recover for the loss of earnings of a child, under certain circumstances. Technically, they may recover for what we call the diminution in the wage earning ability of the child, under this theory. When a man and woman have children, they are under a duty to rear those children and nourish them, to provide them with an education, to clothe them, feed them, and to generally take care of them. That is their duty. On the other hand, and this is very important, as you know in some of the poorer families they have a right to the child's earnings until the child is either emancipated or becomes of age, and it is the law that these two persons are entitled to that in this case if you find for them; that is, this father and mother are entitled to this boy's earnings and would be entitled to them under our law until he is either emancipated or becomes twenty-one years old; and as I said, technically the measure of damages to them in this case is the diminution in the wage earning ability of this little fellow.

Those are the elements of damages which these plaintiffs are entitled to, if you find for them.

If there is any doubt in your minds, or if my charge has been perhaps not entirely clear, if you will either speak to me now or send me a communication I will be glad to answer it or you may return to court and be further instructed.

If you find on the other hand that Mr. Brydon,

Charge to the Jury

on the day in question, was not negligent, if you find, as I said, under certain circumstances the boy was, and that the former should be exonerated, then your judgment should be for the two defendants. I should say to you, in fairness to the defendants, that the motion for a non-suit, while it was denied on a point of law, Mr. Chance and I disagreeing, was properly made. Counsel has a right to make such a motion when counsel believes the case as presented is insufficient to warrant it going to a jury.

On behalf of the plaintiff I will charge certain requests:

“1. If you find that the driver of the truck had room to the right of his truck on the roadway, where he could have operated it with safety to himself and the truck, and if you find that he did not pull over to the right, but on the contrary drove his truck so that in passing the bicycle the side of the truck would be so close to the bicycle that as a reasonably prudent person under all the circumstances the driver might or did see that injury might result to the boys, then I charge you that you may find that failure of the driver to pull his truck over to the right and give more room to the bicycle would be an act of negligence.”

“2. If you find that under all of the circumstances which existed at the time and place of the accident that the driver as a reasonably prudent man should have operated his truck further to his right, then I charge you that his failure to do so constitutes negligence.”

3. If you find that under the circumstances that existed at the time and place of the accident that a reasonably prudent man operating the truck in question would have stopped it in order to avoid any possible injury to the boys on the bicycle, then

Charge to the Jury

I charge you that the failure of the driver to do so, if you find that he failed to do so at the proper time, constitutes negligence."

"5. A bicycle is a vehicle within the meaning of that word as it is used in our Traffic Act. Hence, a bicycle on the highway has the rights of vehicles under the Traffic Act, and those who operate other vehicles on the highway owe to a bicycle the duties prescribed by the statute in the same manner as such other persons owe those duties to another automobilist on the highway." 10

"6. It was not negligence per se for the plaintiff to ride in the position that he did on the bicycle as he did, that is to say, that it is not negligence as a matter of law."

I want to explain that because that may sound paradoxical in view of what I have said. We have held in this state that a breach of the Traffic Act is not of itself an indication of negligence; common sense has dictated that the Court still insisting that negligence must be proved, and that a case may exist where a plain infraction of the Traffic Act is shown and yet instead of negligence great care can be spelled from what the persons did who were involved. I will illustrate it, if I may, and I will use the wording of the old Traffic Act, although it hasn't been changed very much in the new one. Assuming that all you twelve men drive automobiles and that you knew and know that the Traffic Act requires that you shall drive an automobile on the righthand side of the improved portion of the highway, as the layman expresses it; that is the law. The act provides it, and you expect persons to do that. Suppose that you do not do it under certain circumstances, does that fact, standing by itself, indicate that you are negligent? I say "No." Assume, for instance, you are driving in the coun- 20 30 40

Charge to the Jury

try on a clear day and you can see all around and there are no other cars on the highway, and as you approach a point in the road a child suddenly darts out into your path from behind a tree. To proceed on the righthand side of the highway means that you will kill the child; to turn to the left means that you will break the Traffic Act. Now, you see how ridiculous it is for me to say that if the act is not carried out it indicates negligence, because it does not. In that case the jury might say if one had broken the Traffic Act, "We will not hold him negligent." This act was passed by the legislature, and it probably was passed with the expectation that it would make vehicular and pedestrian traffic not only more easy on our highroads and streets but more safe.

The Court has said that those who use the highroads are presumed to know the law, and they may assume that others who use the highroads know the law. The act also provides, as I read, "The rider of any bicycle shall not carry on his bicycle any other persons." That act was apparently passed because that was looked upon as something that was dangerous, but under certain circumstances you may find that might happen and not be dangerous at all. The Court has said that while it is true that a breach of the Traffic Act is not of itself evidence of negligence, nor does it give rise to a presumption of negligence, nevertheless it is a factor to be considered in the case. The jury relies on what the law is and then takes into consideration all the circumstances of the case. I make this explanation of the last section which I have charged for the plaintiff.

(The jury retires.)

Exceptions to Charge

Mr. Emmerglick. I respectfully pray an exception to that portion of the Court's charge wherein the Court stated that the apparent purpose in passing the statute prohibiting the rider of a bicycle to carry any other person on it was because it was considered that it might be dangerous.

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Exception noted as ground of appeal.

Mr. Chance. I respectfully pray an exception to that part of the Court's charge where the Court charged its theory of the rights of the parties to be on the highway which was indicated in substance that the plaintiff had the right to be upon the highway while riding on a bicycle operating by his cousin. The basis of my exception is that the statute in this particular relating to bicycles is different from some of the regulatory provisions of the statute and precludes the plaintiff Joseph Kuczko from having any right to be on the highroads on a bicycle operated by another, and, accordingly, is therefore barred from a right of recovery under the facts as proved by the case.

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Exception noted as ground of appeal.

Mr. Chance. I respectfully pray an exception on the further ground to the fact that the Court in speaking of the effect of the statute said that the violation of the statute is not any evidence or indication of negligence, it being my idea it is an indication of negligence but it is not a matter per se even in those cases where the plaintiff has a right to be upon the highroad.

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Exception noted as ground of appeal.

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Plaintiffs' Requests to Charge

PLAINTIFFS' REQUESTS TO CHARGE

1. If you find that the driver of the truck had room to the right of his truck on the roadway, where he could have operated it with safety to himself and the truck, and if you find that he did not pull over to the right, but on the contrary drove his truck so that in passing the bicycle the side of the truck would be so close to the bicycle that as a reasonably prudent person the driver might see that injury might result to the boys, then I charge you that failure of the driver to pull his truck over to the right and give more room to the bicycle would be negligence. Charged, as amended.

2. If you find that under all of the circumstances which existed at the time and place of the accident that the driver as a reasonably prudent man should have operated his truck further to his right, then I charge you that his failure to do so constitutes negligence. Charged.

3. If you find that under the circumstances that existed at the time and place of the accident that a reasonably prudent man operating the truck in question would have stopped it in order to avoid any possible injury to the boys on the bicycle, then I charge you that the failure of the driver to do so, if you find that he failed to do so at the proper time, constitutes negligence. Charged.

4. It is not pleaded by the defendants that the boys on the bicycle were engaged in a common enterprise. Therefore any negligence on the part of the boy who was pedaling the bicycle is not chargeable to the passenger so long as the passenger did not exercise control over the operating of the bicycle. Therefore, if you find that the defendants were negligent, but that the operator of the bicycle was in sole control of it and was also negligent,

Plaintiffs' Requests to Charge

nevertheless the plaintiffs are entitled to the verdict, so long as the negligence of the defendants contributed in a proximate degree in producing the injuries sustained by the plaintiffs. Denied.

5. A bicycle is a vehicle within the meaning of that word as it is used in our traffic act. Hence, a bicycle on the highway has the rights of vehicles under the traffic act, and those who operate other vehicles on the highway owe to a bicycle the duties prescribed by the statute in the same manner as such other persons owe those duties to another automobilist on the highway. Charged. 10

6. It was not negligence per se for the plaintiff to ride on the bicycle as he did, that is to say, that it is not negligence as a matter of law. Charged, as amended.

7. Where an automobile driver sees a child in a place of danger, or has reason to apprehend that it might run into a place of danger, and has sufficient time to stop his car if under proper control, it is his duty to exercise such care as would be reasonable necessary to avoid a collision. *Silberstein v. Showell* (Supreme Court of Pa.), 109 At. 703. Denied. 20

8. It was the duty of the driver of the truck after he saw the boys on the bicycle to exercise a high degree of watchfulness in the operation of the truck in respect to the boys on the bicycle. It was the duty of the driver of the truck, under the circumstances which existed in this case, to exercise a greater degree of care toward the boys than such driver would be obliged to exercise as to an adult riding along the highway. *Bergen County Traction Co. v. Heitman's Administrator*, 61 N. J. L. 682; *Goldfarb v. Phillipsburg Transit Co.*, 103 N. J. L. 690. Denied. 30 40

Plaintiffs' Requests to Charge

10. If you find that by the negligence of the defendants, the operator of the bicycle was placed in a position of danger and that he acted as a reasonably prudent person of his age and experience would have acted under the same circumstances, then even though no accident would have occurred if he had acted in some other manner, the defendants are nevertheless chargeable with negligence, for which they must answer in damages. Denied.

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New Jersey Court of Errors and Appeals

JOSEPH KUCZKO an infant, by
JOHN M. KUCZKO, his next
friend, JOHN M. KUCZKO, indi-
vidually, and JOHN M. KUCZKO
and MARY KUCZKO, as father
and mother of JOSEPH KUCZKO,
jointly,

Plaintiffs-Respondents,

vs.

PRUDENTIAL OIL CORPORATION,
a corporation of Delaware, and
ROBERT BRYDON,

Defendants-Appellants.

Action at Law.

On Appeal

from

Supreme

Court.

BRIEF FOR DEFENDANTS-APPELLANTS

This is an appeal from a judgment aggregating \$12,641.88 (page 17) in a Supreme Court case tried at the Essex Circuit before Judge Mountain and a jury. The error assigned is in connection with the charge to the jury and the denial of a non-suit.

STATEMENT OF FACTS

On March 16th, 1929, Hyatt Avenue in Newark was a rough street full of holes. The automobile truck owned by the Prudential Oil Corporation and driven by Robert Brydon, was proceeding along that street. In the opposite direction the plaintiff Joseph Kuczko was riding on the bar of a bicycle propelled by his cousin. A collision occurred between the truck and the bicycle with its two riders.

As a result Joseph Kuczko sustained the injuries which are involved in this action. The defendant Brydon testified that he was on the right hand side of the road (page 62, line 14), that he saw the boys 100 feet away (page 62, line 20); that when they passed the front of his truck they were about 4½ feet from the side of it (page 62, line 22); that they passed the front wheels and cab and that the next thing he knew he heard the boys scream, following which he immediately stopped his truck (page 62, line 25). He said he was on his extreme right hand side of the road (page 63, line 5); that there was about 5 feet between the left hand side of his truck and the left hand side of the road through which space the boys could have passed.

The plaintiff Joseph Kuczko admitted that the bicycle and its two riders got by the front of the truck (page 27, line 29) without injury and gave particulars as to how plaintiffs claimed the rear of the truck and the bicyclists collided.

From the defendants' point of view the outstanding fact over-shadowing all others in importance, is that Joseph Kuczko at the time of the accident was participating with another in the violation of the law which forbids the rider of a bicycle to carry upon his bicycle any other person (Chapter 281, laws of 1928). With this fact, the appellants' argument is very largely concerned.

Motion for non-suit was made and denied. The case being submitted to the jury, they returned a verdict in favor of the plaintiffs. Defendants appeal.

GROUND OF APPEAL

The grounds of appeal alleged are as follows:

1. The trial judge erred in denying motion for non-suit made by counsel for defendants, to which denial exception was duly noted.

2. The trial judge erred in charging the jury as follows:

“Of course the boys on this bicycle, which is classed as a vehicle under our traffic act. and the operator of this truck had as much right on the highway one as the other.” * * *

To which portion of the Court’s charge exception was duly noted by defendants-appellants’ counsel.

3. The trial judge erred in charging the jury as follows:

“A bicycle is a vehicle within the meaning of that word as used in our traffic act. Hence, a bicycle on the highway has the rights of vehicles under the traffic act, and those who operate other vehicles on the highway owe to a bicycle the duties prescribed by the statute in the same manner as such other persons owe those duties to another automobilist on the highway.”

To which portion of the Court’s charge exception was duly noted by defendants-appellants’ counsel.

4. The trial judge erred in charging the jury as follows:

“We have held in this state that a breach of the traffic act is not of itself indication of negligence” * * * and “The court has said that while it is true that a breach of the traffic act is not of itself evidence of negligence,” * * *

To which portion of the Court’s charge exception was duly noted by defendants-appellants’ counsel.

DEFENDANTS' POINTS

1. THE TRIAL JUDGE ERRED IN HIS CHARGE TO THE JURY.

2. THE TRIAL JUDGE ERRED IN DENYING MOTION FOR NON-SUIT.

ARGUMENT

POINT I

THE TRIAL JUDGE ERRED IN HIS CHARGE TO THE JURY

Under this head the argument is directed at two phases of the court's charge, first, that part where in substance the court told the jury that the plaintiff and defendants had equal rights on the highway at the time of the accident and, secondly, that part of the charge where the jury was told in substance that violation of the provision of the Traffic Act against two people riding upon a bicycle is not evidence of negligence.

The parts of the charge which in substance said that the plaintiff and his cousin who were riding on the same bicycle on a public highway had equal rights on that highway with the operator of the truck owned by one defendant and driven by the other are quoted in the second and third grounds of appeal. The language of the court excepted to, is as follows:

“Of course the boys on this bicycle, which is classed as a vehicle under our Traffic Act, and the operator of this truck has as much right on the highway one as the other” * * * (page 78, line 22, et seq.), and also “A bicycle is a veh-

icle within the meaning of that word as used in our Traffic Act. Hence, a bicycle on the highway has the rights of vehicles under the Traffic Act and those who operate other vehicles on the highway owe to a bicycle the duties prescribed by the statute in the same manner as such other persons owe those duties to another automobilist on the highway. (page 83, line 7, et seq.).

In connection with this language of the trial court, we would first point out that the definition of a vehicle, as given by the Traffic Act, P. L. 1928, Chapter 281, is as follows:

Vehicle—

“Every device in, upon or by which any person or property is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks.”

The words “*excepting devices moved by human power*” thus excludes from the definition of a vehicle within the meaning of the Traffic Act, a bicycle which obviously is a device moved by human power. Furthermore, the Traffic Act (P. L. 1928, Chapter 281—Comp. Stat. Supp. 1930, page 1539), provides with respect to the rider of any bicycle:

“nor shall he carry upon his bicycle any other person.”

This last named statute clearly made it illegal for Joseph Kuczko's cousin to take him riding upon his bicycle on Hyatt Street, Newark, N. J. at the time the accident occurred. And Joseph Kuczko, by riding upon the bicycle, was participating in and aiding and abetting another in the violation of the statute which forbids two persons to ride upon a bicycle upon the highway.

In the face of the statutory provisions above mentioned the trial judge erred when he charged the jury as above quoted. Clearly it cannot be said that the plaintiff and his cousin, participating in violating the provision against two riders on a bicycle, can be said to have had an equal right upon the highway with a duly licensed driver operating a duly registered truck. Instead of the plaintiff, while riding on this bicycle, having equal rights with the defendants, the statute denied him any right to be upon the highway on a bicycle with another person.

The charge of the court in the particulars specified was obviously prejudicial to the defendants.

Turning to the portion of the charge relating to the evidential effect of a breach of the Traffic Act it is noted that the language excepted to is set forth in the fourth ground of appeal. The trial judge said to the jury:

“We have held in this State that a breach of the Traffic Act is not of itself indication of negligence” (page 83, line 20) * * * and “The court has said that while it is true that a breach of the Traffic Act is not of itself evidence of negligence.” * * * (page 84, line 29).

That part of the charge unduly narrowed the significance of the violation of the statute which aims to prevent the traffic menace of a bicycle containing two riders even if the provision in question be considered as an ordinary regulatory traffic provision, as will appear from the following quotation from the decision by this court in *Kolankiewiz v. Burke*, 91 N. J. L. at 571:

“That the failure to obey the city ordinance was evidence from which a jury might infer negligence is settled by the principle in our

decision of *Evers v. Davis*, 86 N. J. L. 196. A city ordinance is as evidential in this respect as a statute. It is, as we have held, evidential but not conclusive." *State v. Schutte*, 88 *Id.* 396."

The charge of the court unduly restricted the jury when it said the violation of the statute was not evidence of negligence. It was evidential. This was error prejudicial to the defendants.

POINT II

THE TRIAL JUDGE ERRED IN DENYING MOTION FOR NON-SUIT.

On this point the appellants' position is that the plaintiff, Joseph Kuczko brought about his own injury by participating with his cousin in the violation of the statute forbidding two people to ride a bicycle upon the highway. The pertinent legal rule is stated in the third syllabus of *Betts v. Massachusetts Bond & Ins. Co.*, 90 N. J. L. 632, as follows:

"Upon grounds of public policy, one who actively or passively participates in violating a statute, cannot recover damages for a loss occasioned by such violation, following and applying the doctrine enunciated in *Hetzel v. Wasson Piston Ring Co.*, 89 N. J. L. 205."

As it appeared that Joseph Kuczko's injury was occasioned by his participation in the violation of the provision against two riders on one bicycle, there was no right to recover for damages so sustained and the motion for non-suit should have been granted.

We have found no case in this State involving collision between an automobile and a bicycle containing two riders, which arose since the statute was

enacted making it illegal for two persons to ride on a single bicycle. Previously the law allowed a bicyclist to carry a passenger, but cases involving the statute when it was legal to carry a passenger should not control after the statute made it illegal to do so.

It cannot be said in this case that the violation by Joseph Kuczko was a mere condition rather than a part of the proximate cause, as has been said in some cases allowing recovery, although the plaintiff was at the time of accident violating the Sunday law. In those cases it is said that the injury might just as well have occurred on some other day than Sunday and that accordingly the Sunday violation was too remote to be considered a part of the proximate cause. But the illegal riding on the bicycle is different. It was that illegal riding and operation which actually and necessarily was involved in the collision. In the case of the Sunday statute the things which brought about the damage might have taken place had the instrumentality been legally operated on some other day, but there never could have been this collision with the plaintiff Joseph Kuczko had that plaintiff not joined with his cousin in violating the prohibition against two persons riding on a bicycle. The case of the plaintiff illegally riding the bicycle is more like the act of the person who left a transit standing in the street referred to in *Menger v. Lauer*, 55 N. J. L. 205. Leaving the transit in the street was held part of the proximate cause. Likewise the riding on the bicycle in violation of the statute continued up to the accident and was part of the proximate cause.

If it be suggested that the violation of the statute in this case was merely one circumstance to be taken into consideration in determining whether or not the plaintiff was negligent, we would point out

that the particular provision of the traffic act here involved is not a mere regulatory provision regulating the conduct of a party rightfully on the road. The provision here does not merely regulate the manner of operation of a vehicle, as do the provisions about right of way, stop street and the like. Obedience of the statutory provision here involved would have kept the plaintiff off the street altogether, or at least would not have allowed him to be there on another person's bicycle.

It is true that our courts have held with respect to various regulatory provisions of the statute, that such provisions are merely circumstances to be taken into consideration on the question of whether there was negligence. The distinction we make is that in applying those regulatory provisions the court had to deal with persons who at the outset had equal rights upon the highway. In case of collision it became a question which of the persons having a legal right departed from the legal exercise thereof and the facts were so involved that it became a jury question. Where persons have equal rights on the highway, an occasion might arise where obedience of the statute might under all the circumstances constitute negligence. But it is inconceivable that obedience of the bicycle provision, in other words, keeping off the bicycle, or off the highway when two passengers were on the bicycle, can ever make a person negligent with respect to another vehicle on the highway. If the plaintiff had kept off the bicycle, there never could have been a collision. All this shows a difference between this particular prohibitory statutory provision and the mere regulatory provisions, and shows that the rule applicable to persons having an equal right on the highway should not apply to the plaintiff who was participating in the violation of a statute designed to keep from the highways the

traffic menace of a single bicycle with two riders.

As the plaintiff's participation in the violation of law was apparent, and such violation continued to, and constituted part of, the proximate cause of the collision, the motion for non-suit should have been granted.

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

KELLOGG & CHANCE,
Attorneys for and of counsel
with Defendants-Appellants.

**NEW JERSEY COURT OF ERRORS AND
APPEALS**

JOSEPH KUCZKO, an infant by
John M. Kuczko, his next
friend, JOHN M. KUCZKO, in-
dividually, and JOHN M.
KUCZKO and MARY KUCZKO,
as father and mother of
Joseph Kuczko, jointly,
Plaintiffs-Respondents,

v.

PRUDENTIAL OIL CORPORATION, a
corporation of Delaware, and
ROBERT BRYDON,
Defendants-Appellants.

On Appeal
from Supreme
Court (Essex
Circuit).

BRIEF OF PLAINTIFFS-RESPONDENTS.

(Italics ours unless otherwise indicated.)

Statement of Facts.

The infant plaintiff below sued to recover for personal injuries sustained on March 16, 1929. His complaint alleged that he was riding as a passenger on a bicycle which was being propelled along Hyatt Avenue, Newark, New Jersey, in a westerly direction; that the defendant corporation, through its agent and servant the individual defendant, was operating its automobile

truck in the opposite direction on Hyatt Avenue, and that the truck was suddenly and without warning caused to run into the bicycle and throw down from it the plaintiff. It was further alleged that the defendant corporation, through its agent and servant, was negligent for a number of specified reasons, which negligence proximately caused the injuries sustained by the infant. These consisted of the loss of all of the fingers of his right hand with the exception of the thumb, and the consequences thereof set forth in detail. In a separate count the complaint presented the same cause of action against the individual defendant.

By additional counts the father of the boy sued to recover sums paid for medical and hospital attention. By still further counts the infant's father and mother sued jointly to recover for their loss of the services and earnings of their son.

The answers admitted the ownership and operation of the truck and set forth that the injuries sustained were the result of the carelessness or incompetency of the infant plaintiff, and that the accident was inaccurately described in the complaint. As a separate defense it was pleaded that the infant was guilty of contributory negligence and incompetency "in that the said Joseph Kuczko rode his bicycle on the roadway too close to the defendant's truck; did not make due and sufficient observation of the condition of the roadway and the presence and course and operation of the defendant's truck, and unskillfully operated his bicycle at the rear of said truck so that he fell from the same
* * * ."

A brief summary of the testimony indicates that the following case was made out by the plaintiffs' proofs: Joseph Kuczko (the infant plaintiff), being at the time ten years of age, was riding on the cross-bar which extends from the handles to the seat of the bicycle. The bicycle was being propelled by his cousin Alex Harpas, who was 17 years old. The oil tank truck owned by the corporate defendant was being driven in the opposite direction and the driver was so steering it as to avoid the many holes which pitted the thoroughfare.

Harpas kept his bicycle as far to his right-hand edge of the road as he could. He found there better conditions with respect to the surface of the road. At about the scene of the accident, on the side of the road upon which the boys were traveling, a depression existed at the edge of the highway. The bicycle was being propelled as near to this depression as was possible. Iron beams were lying in the depression, near the scene of the accident. Joseph was holding the handle bars of the bicycle at the point where they are attached to the frame. He was neither peddling nor steering the bicycle, nor participating in any manner in its operation or control.

The narrowness of the bicycle enabled the boys to proceed with comparatively little inconvenience from the holes. Just before the accident took place, the bicycle was proceeding on a comparatively smooth stretch of the thoroughfare.

The truck, a wide one with a double rear wheel, and a platform built on each side, was proceeding easterly in a general way, changing

its course in order to avoid holes, and bumping and swaying as it progressed. It was, as it approached the boys, well over its own proper side of the road. The driver saw them when they were 100 feet away from his truck (S. C., p. 58). The driver continued to dodge the holes and alter his course, and as the front of the truck passed the bicycle with a very few feet of clearance and well over the center of the road, the rear wheel of the truck which was nearest to the bicycle struck a large depression, causing the rear of the truck to swing over towards the bicycle and to strike the handlebars, throwing the bicycle down and causing Joseph to fall in front of the wheel. Alex pulled at Joseph but the wheel passed over the latter's right hand, so injuring it as to require the amputation of four fingers, as indicated by the stipulation describing the injury (S. C., p. 72).

The statement of these facts by the infant plaintiff was substantially corroborated by the testimony of Alex and by the testimony of Max Sajdera, an eyewitness of part of the occurrence. Medical testimony to the effect that amputation was essential was produced.

When the Court charged the several propositions here assigned as error, the testimony indicated in addition that the driver of the truck was *admittedly* on that side of the road designated for vehicles traveling in the opposite direction. The road was about 22 feet wide. The driver stated that between *his* left side of the truck, and *his* left side of the road, there were about six feet (S. C., p. 62) when the acci-

dent happened. This indicates that he was at least five feet to his left of the center of the road. It is important to note that Mr. Sajdera had testified (S. C., pp. 50-51) that the surface of the road to the extreme right of the driver's right-hand side of the truck was, if anything, *in better condition* than that to his left. The driver also said that as the front of his truck passed the boys, "I didn't pay any more attention. I thought they were *out of danger*" (S. C., p. 68).

In answering the contentions of the appellants that the Court below committed error by its refusal to non-suit, and in its charge to the jury, the respondents will make the following points:

POINT ONE.

The Court below properly denied the motions to non-suit.

POINT TWO.

The Court below committed no error in its charge to the jury.

POINT ONE.**The Court below properly denied the motions to non-suit.**

The basis upon which the appellants attempt to build their argument that non-suits should have been granted, is that Joseph Kuczko participated in violating the statute relating to carrying a person on a bicycle and therefore cannot recover damages for his injuries because they were sustained while engaged in a violation of the law. In the first place it should be noted that the statute does not prohibit the passenger from riding on the bicycle. It prohibits the operator from carrying a passenger. The statute reads (P. L. 1928, p. 726):

“The rider of any bicycle shall not allow the same to proceed in any street by inertia momentum, with his feet removed from the pedals, nor shall such rider remove both hands from the handlebars while riding the bicycle nor practice any trick or fancy riding in any street; nor shall he carry upon his bicycle any other person.”

Since the statute does not run against the passenger, it cannot be said that he violated it in riding on the bicycle. The passenger could not be prosecuted under the act just because he rode as such on the bicycle. His conduct in doing so is not a violation of the statute. This legislation is only designed to operate upon the driver of a bicycle who carries another person on it.

But even if it be assumed that Joseph's act

was a violation of this provision, he is not thereby deprived of his right to recover damages resulting from the negligence of another using the highway. In support of a contrary statement the appellants cite *Hetzel v. Wasson Piston Ring Co.*, 89 N. J. L. 205. That case arose under the Workmen's Compensation Act. The Court found that the injury of an infant was the direct result of the violation of a statute which prohibited a child under the age of 14 years to work in any factory, etc. The *boy's father* was denied the right to recover for a loss which came to him as a direct result of his own violation of this statute, which expressly provided that any parent who violated its provision should be liable to a penalty of \$50 for every offense. Also cited by the appellants, is *Betts v. Massachusetts Bonding & Insurance Co.*, 90 N. J. L. 632. There the plaintiff, against whom a judgment for dental malpractice had been recovered, sued an insurance company upon a policy relating to such a claim. The judgment recovered against the assured was based upon the action of an assistant who was not a licensed dentist. The Court rested its decision on the *Hetzel* case.

These decisions are essentially different from and consistent with the rule which applies to this case. That rule is well stated in *Muller v. West Jersey & Seashore R. R. Co.*, 99 N. J. L. 186, a decision of this Court. It was said:

“The rule established in this state is that where one unlawfully traveling on a highway is injured by the negligence of another, he may recover for his injuries unless his violation of the law contributes to the accident, or is its proximate cause.”

Continuing the assumption that the infant respondent was unlawfully traveling upon the highway, the inquiry here must be whether his violation of the law contributed to the accident or was its proximate cause.

In the *Muller* case the plaintiff was injured while driving an unregistered automobile without having a driver's license. The Motor Vehicle Act (P. L. 1921, p. 643) provided that no motor vehicle should be driven on the highways of this state unless properly registered, and that drivers should be licensed. The statute contained far stronger indications of a legislative intent that a violator should be regarded as a trespasser on the highway, than does the legislative language here under consideration. The Court nevertheless brushed aside the contention that the plaintiff was a trespasser on the highway and said of the plaintiff's violation:

“But that does not justify the defendant in running him down by a negligent act, for the unlawful presence of the plaintiff on the highway was not the proximate cause of the accident.”

The Court also quoted with approval the language of Chief Justice Knowlton, speaking for the Supreme Judicial Court of Massachusetts in *Bourne v. Whitman*, 95 N. E. Rep. 404. Part of the quoted excerpt reads:

“*We think that the operation of a car without a license, while it is a punishable act, does not render the operator a trespasser on the highway, * * *.*”

It is but logical to conclude that if the violation of a statute which provides that a motor

vehicle *shall not* be driven on the highway without first complying with certain provisions of the law, does not render the violator a trespasser, certainly a provision couched in less stringent language—language directed only to the operator of the bicycle and not the passenger—must be similarly construed. It cannot be successfully maintained that the presence of the infant on the bicycle was, **as a matter of law**, a contributing or proximate cause of the injury he sustained. A further reason why is pointed out in *Ross v. Pennsylvania Railroad Company*, 106 N. J. L. 536, a decision of this Court based upon the *Muller* case. There it was said:

“Non-observance of the statute, by Ross, is not evidence of his inability to drive a car. He may have possessed more skill than many persons who hold a license; and the date of the registration of the car was immaterial, as it is possible that he owned several cars before the one in question.”

If the Court will not regard the want of a license as evidence of incompetence and unskillfulness in a driver, it will no more regard the presence of a boy on a bicycle as conclusive evidence that it was an efficient cause of his injuries subsequently sustained in a collision as to which there is plenary evidence of negligence by the other party. No evidence was produced in this cause that the operator of the bicycle was impeded in any manner by the presence of the infant upon it. No evidence was presented which in any other fashion indicated just how the carrying of this passenger contributed to or caused the accident.

In the appellants' brief it is said (p. 9):

“If the plaintiff had kept off the bicycle, there never could have been a collision.”

There was no testimony which will support this statement. On the contrary, the record plainly indicates that the truck had passed the bicycle to the extent of a good portion of its length when it struck a depression and swung over towards the bicycle and collided with it, and for no reason chargeable to Joseph. The very least that can be said is that a question of fact was presented with respect to the question whether the violation of the statute contributed to the accident or was its proximate cause. There is ample support for the statement that as a matter of law this query should be answered in the negative. It is not necessary to go to that length upon this appeal. It was at least a factual question which the Court was warranted in submitting to the jury as it did. In charging the jury upon the issue of contributory negligence, the Court referred to the statute and said (p.79):

“Now, bearing that in mind, this boy we were told was riding on the cross bar of a bicycle. With that in mind I charge you that unless there was something, if you found that he was old enough to have been guilty of negligence, which he should have done in the exercise of due care to have avoided injury under all the circumstances in the case, he cannot be charged with the negligence of the operator of the bicycle. You may ask what should he have done? *Well, in the consideration of the case an answer to that might be that he should never have rid-*

den there, because the traffic law of this state expressly forbids it. The traffic law of this state says, and I will leave out the parts that are immaterial, 'The rider of any bicycle shall not carry upon his bicycle any other person.' What else could this boy have done? Well, he may have jumped off his bicycle if he saw any imminent danger, and contributed to his injury. There are other things that may occur to you, too.'

It is contended by the appellants that the provision prohibiting a person from carrying a passenger on a bicycle is different from other portions of the act. It is said that while other sections have been construed to be regulatory merely, this provision is different because by the violation of the statute the bicycle does not have equal rights with other conveyances on the highway. The basis of this contention has already been indicated to be without substance. The taking of a passenger upon the bicycle does not render these persons trespassers. It does not forfeit their rights to human consideration from others using the highway, and to the care which the law requires such others to exercise toward their fellowmen. The statute does not operate to cancel the right of one to be on the highway because he violates it. It does not give to others a license to disregard such a violator. It might as well be said that so soon as a motorist speeds he loses all right to be upon the highway, or that so soon as he fails to sound his horn when he should do so, he becomes a trespasser.

There is nothing to indicate that the legislature meant some of the provisions of this

statute to be regulatory and others to partake of a different nature. Certainly it did not mean that an individual who took a passenger upon his bicycle should thenceforth have no status upon the highway, and might be disregarded by others using it, but that one who without a license operated an automobile at an excessive rate of speed, without proper signals, and on the wrong side of the street should have superior rights to the consideration of others.

A rather complete answer to the contentions of the appellants is found in *Sharkey v. Herman Brothers, Inc.*, 3 N. J. Misc. 126, affirmed by this Court, 102 N. J. L. 224. The plaintiff, a boy of 12, was riding on the cross bar of a bicycle operated by a companion named Fisher. The defendant's truck came up behind them and in attempting to turn collided with the bicycle and injured the plaintiff. At the time of the accident the traffic act provided that the rider of a bicycle should not carry on it any child under the age of 10 years.

The jury rendered a verdict for the plaintiff and upon appeal it was urged, among other things, that there should have been a nonsuit for contributory negligence. The Supreme Court said:

“Secondly, that there should have been a nonsuit for contributory negligence. The plaintiff was a boy of twelve and normally, any negligence of his would be a jury question.”

Respecting the refusal of the Trial Court to charge certain requests the Court said:

“Fourteenth, the Court properly re-

fused to charge that it was contributory negligence as a Court question to ride sideways on a bicycle * * *."

Bearing in mind that the sole inquiry is whether or not the violation of the statute bears a causal relationship to Joseph's injuries, the *Sharkey* decision holds that it does not. In deciding that it was not contributory negligence as a matter of law to ride on the bicycle as the plaintiff there did, the Court held that the *fact* of such riding was not conclusive evidence of contributory negligence. Nothing is added by the circumstance that to so ride is also a violation of the present traffic act. That additional circumstances would not change the issue from one of fact to one of law. The statute is regulatory and its violation is merely a factor for consideration by the jury. It cannot be maintained that the statute lays down a standard of care. This Court has construed it to do otherwise. In *Jackson v. Geiger*, 100 N. J. L. 330, it was said:

"The legal effect of the traffic regulations taken in connection with the common law on the subject of negligence is well stated by Mr. Justice Minturn, speaking for the Supreme Court, in *Paulsen v. Klinge*, 92 N. J. L. 99 (at p. 101), where he says: 'The legislative act was not intended to provide an exclusively hard and fast rule, applicable to all hazards and in all situations, regardless of actual conditions, and thus liberate from responsibility one who, by fortuitously adhering to the regulation, may be otherwise reckless and indifferent to the situation of others, lawfully exercising equal rights upon the highway, but who may

be subject to untoward and unlooked for situations beyond their control.' * * *
 'The common law rules applicable to negligence have not been abolished by the enactment. Its existence but adds an additional factor to be considered in given situations by which negligence may be measured and determined between conflicting claimants exercising a common right.'

"And, again, in *Winch v. Johnson*, 92 N. J. L. 219, Mr. Justice Minturn, speaking for this Court, in discussing the purpose of the Traffic act (at p. 220), says: 'The manifest purpose of the legislation being the avoidance of danger and collision upon the highway, its application in any instance must co-ordinate with the rule of reason, which at common law vests an exercise of discretion for care and foresight in the wayfarer, consistent with the exercise of a like discretion in others in the lawful use of the highway' * * *."

While the Court in each case construed a predecessor of the present traffic act, the general design and purpose of the latter is not essentially different so as to require any other construction.

Nor can it be logically advanced that the particular provision under consideration is different from the rest of the act and does lay down a standard of care. The appellants have made this contention and have endeavored to support it by arguing that the violation of this provision takes place immediately that the bicycle with its passenger ventures upon the highway, while the violation of a provision relating to speeding, signals, or the like, is different be-

cause the violator was initially lawfully upon the highway. This claim is entirely inconsistent with the nature and construction of the act, and with the rule laid down in the *Muller* case where the injured plaintiff was driving an unregistered automobile without a driver's license. He certainly was unlawfully upon the highway from the very moment that he commenced to operate the car, and was permitted to recover for the results of the defendant's negligence.

In nature and in logic it must follow that any violation of the traffic act chargeable to Joseph adds nothing potent enough to change the issue of fact with respect to his act in riding on the bicycle, to one of law. Hence the motions to nonsuit were properly denied. *This conclusion is inevitable when we consider the effect of Joseph's infancy upon any contributory negligence and his chargeability with knowledge of the law.*

POINT TWO.

The Court below committed no error in its charge to the jury.

The portions of the charge alleged to be erroneous relate to two subjects: (a) the status of a bicycle under the traffic act; (b) the evidential effect of a breach of the traffic act upon the proof of negligence.

The Court committed no error in charging that a bicycle was a vehicle within the meaning of the traffic act, and that those who operate

others vehicles on the highway owe to a bicycle the duties prescribed by that act *in the same manner* that they owe those duties to an automobilist on the highway. A bicycle is of course moved by human power, and hence is not embraced within the generic definition which appears in the introductory portion of the statute and which has been quoted on page 5 of the appellants' brief. But with respect to all definitions, the very first provision of the statute recites (P. L. 1928, p. 721):

“1. Definitions, as used in this act, shall for the purposes of this act have the meanings respectively ascribed to them in this article *except in those instances where the context clearly indicates a different meaning:*”

It is thus plain that the definition of the word “vehicle” is not a declaration that a bicycle is for all purposes classified as something different. The context in many instances indicates clearly “a different meaning.” For example, it is provided that drivers of vehicles, street cars, or horses, must at all times comply with any directions by voice or hand of any member of the police department, etc., when enforcing any of the provisions of the act. Certainly the legislature did not mean that a bicyclist could disrupt the orderly movement of traffic by disregarding such directions. Again, it is provided that upon all highways of sufficient width the driver of a vehicle shall drive the same upon the right half of the highway. Here also it is evident that the legislature did not intend that a bicyclist could operate his machine in the face of a moving traffic and thus seriously im-

pede it. It is also provided that upon the approach of any police or fire department vehicle, giving audible signal, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb of the highway. Obviously a bicyclist is embraced within this provision. These are but a few of many parts of the act relating to the safe and mutually cooperative operation of conveyances, which indicate a purpose that they embrace bicycles.

In addition to these circumstances it is to be noted that an entire section of the statute (Article 3) is devoted to bicycles and is captioned with that word. It consists of five paragraphs which provide in substance that a bicycle shall carry a lighted lamp at night; that it be equipped with an audible signal; that the operator shall not allow it to proceed in any street by inertia momentum with his feet removed from the pedals or with both hands removed from the handle bars, or practice any trick or fancy riding in any street, or carry on his bicycle any other person; and it is further provided that no person shall ride a bicycle on a sidewalk or hold fast to or hitch on to trolley cars or other vehicles. The use of the words "other vehicles" is quite significant for the purposes of this case. These provisions demonstrate that the bicycle is regarded as being in fact a vehicle. Especially important in this respect is the requirement that no bicycle be operated upon the sidewalk.

In the traffic act of 1915, where a bicycle was embraced within the general definition of the word "vehicle," substantially the same provisions were included in the article entitled "Bicycles."

In enacting the statute of 1928, the legislature did not intend to declare that although a bicycle might only be operated upon the highways, and although the various obligations hereinabove referred to should rest upon a bicyclist, that he might nevertheless be considered by operators of other vehicles as not coming within the category of a vehicle and hence was not entitled to the performance of the various obligations imposed upon such operators of other vehicles. The legislature did not close its eyes to the essential fact that a bicycle is in its nature a vehicle, and that its presence on the highway requires at least as much consideration and care from other vehicles as is owing to an automobile. Any other conclusion would only be warranted if the legislature had legislated the bicycle off the highways. This it did not do.

In *Zanzonico v. Yellow Cab Company*, 4 N. J. Misc. 458, a decision of the Supreme Court, it was said:

“Our examination of the case leads us to conclude that there was a question of fact in regard to contributory negligence which was for the determination of the Judge sitting as a jury. His bicycle is recognized by law as a vehicle, and, consequently, had the rights of a vehicle under the Traffic Act.”

In *Baker v. Fogg & Hires Co.*, 95 N. J. L. 230, this Court after referring to the Traffic Act of 1915, said of a boy who was riding on a bicycle:

“*The boy, therefore, had the right of way, and it was not negligence on his part to assume that the truck driver would keep to the right of and beyond the center of the*

*intersection of the two streets as provided by Section 6 of said Traffic Act (p. 286), which provides that, 'A vehicle turning into another road to the left shall, before turning, pass, when possible, to the right of and beyond the center of the intersection of of the two roads.' * * * .''*

The Court obviously recognized the bicycle to be a vehicle.

Although these decisions are based upon the 1915 act, in neither case did the Court put its opinion upon the ground that the statute expressly declared a bicycle to be a vehicle. And since the 1928 act *treats* the bicycle as a vehicle, these decisions support the charge of the Trial Judge, for the breadth of their reasoning on this subject indicates that the same result would be reached under that enactment.

If in fact the Court below was technically in error in charging on this subject, this error was harmless. The case was tried upon the theory that the appellants owed to the infant the duty of reasonable care. The case was submitted to the jury upon that theory. The charge of the Court plainly indicates this to be so. The excerpts from the charge already quoted herein and the language of the Court immediately preceding and following them, demonstrate that such was the law of the case. The charge only imposed upon the appellants their obligation which they in fact carried. If the Court had charged the jury that the bicycle was not a vehicle, it would nevertheless have been proper to charge that the appellants owed the duties which are in fact defined in the charge. The Court did not intimate that these duties were owed only because the bicycle

was a vehicle. It made it clear that they flowed from the appellants' obligation to use reasonable care towards persons on the highway, whom they were not free to disregard.

The Trial Judge said (S. C., p. 78):

“They both had a right to use this road, but with that right, as I have told many juries, there was the correlative duty of observing the rights of others also lawfully on the highway. That is, of course, nothing but plain consideration. The truck driver, Mr. Brydon, had to exercise such care as a reasonably careful and prudent man would have exercised under similar conditions.”

When this part of the charge is considered together with the portions wherein the Court discussed the effect of the traffic act, it is manifest that the impression produced was not harmful to the appellants.

The statute does not lay down rigid rules and compel a strict observance of them by the appellants. The Court adequately indicated this in accordance with the doctrine laid down in *Winch v. Johnson, supra*.

To say that the duties prescribed by such an act were owed to the boys *in the same manner* as they were owed to an automobilist, accompanied by a minute instruction as to the nature of the act, the effect of its violation, and the limitation of the appellants' obligation to the exercise of reasonable care, did not impose on them any duty they did not in fact owe. The policy of this Court and the provisions of the Practice Act (P. L., 1912, p. 382, Sec. 27) discountenance

contentions which rest upon mere technical error which do not substantially affect the rights of a party. In *Kargman v. Carlo*, 85 N. J. L. 632, this Court said:

“So long as the law is stated correctly and intelligently, the ultimate test of the soundness of instructions is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole.”

Independent of the statute above referred to, which provides that no judgment shall be reversed on the ground of misdirection unless after an examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party, this Court has adopted the policy of looking to the whole charge to ascertain whether or not there was error. In *McLaughlin v. Damboldt*, 100 N. J. L. 127, it was said:

“It falls within that other well recognized rule, that the whole charge must be looked at. *Sullivan v. North Hudson Railroad Co.*, 51 *id.* 542; *Veader v. Veader*, 89 *id.* 728; *Brown v. Spence*, 79 *id.* 452; *Kargman v. Carlo*, 85 *id.* 633; *Schoeffler v. Phillipsburg Horse Car Railroad Co.*, 90 *id.* 235; and when so regarded, if it was right, there is no error. The instruction is to be construed as a whole, and the legal rule which was declared, thus extracted.”

The charge there under consideration dealt with the questions of negligence, contributory negligence, and proximate cause. The action re-

lated to a collision between a motorcycle and an automobile. The portion of the charge at which criticism was aimed read:

“If you find from the evidence that the proximate cause of the plaintiff’s injury was his own negligence, and that the defendant was not negligent, then, of course, you must find a verdict for the defendant. * * *”

The contention was that when severed from the context, this part instructed the jury that they could not find the plaintiff guilty of contributory negligence unless the defendant was free from negligence. The Supreme Court held this to constitute reversible error, but upon appeal to this Court it was said:

“But if the paragraph of the charge criticised, considered apart from its context, is susceptible to such meaning, it is then difficult for us to see how it harmed the defendant. The utmost that can be said is, that such paragraph is not a complete statement of the law. It certainly is not a contradictory statement from the other portions of the charge.”

It was urged that even though the correct rule was fully stated when the charge in its entirety was looked to, this did not cure the alleged vice. The Court held to the contrary and declared that there was no room to apply the rule that a jury is not required to determine what part of a contradictory charge is correct.

The charge in the instant case was possessed of far less energy to injure the appellants. The Trial Judge with much more clarity indicated

the true nature of the rights and obligations of the parties.

The isolated portions of the charge relating to the evidential effect of a breach of the traffic act, attacked by the appellants, do not fairly indicate the instruction given to the jury on this subject. These portions constitute part of an explanation of the following statement of the Trial Judge (S. C., p. 83):

“It was not negligence *per se* for the plaintiff to ride in the position that he did on the bicycle as he did, that is to say, that it is not negligence as a matter of law.”

The Court then, *with much caution*, elaborated upon the meaning of this statement. The Trial Judge introduced his explanation by saying:

“I want to explain that because that may sound paradoxical in view of what I have said.”

He proceeded to state that a breach of the traffic act is not in itself an indication of negligence. The whole explanation makes it clear that in using the word “indication” the connotation attributed to it was “demonstration” or “proof.” The Court presented an illustrative example with respect to driving an automobile on the wrong side of the road and said (S. C., p. 83):

“Suppose that you do not do it under certain circumstances, does that fact, *standing by itself*, indicate that you are negligent? I say ‘No.’ ”

The Trial Judge then pointed out that under certain circumstances driving on the wrong side of the road would constitute the exercise of proper care. In stating thereafter that a breach of the traffic act is not of itself evidence of negligence, he immediately reiterated as part of the same statement, that it is a factor to be considered in the case. Thus he said (S. C., p. 84):

“The Court has said that while it is true that a breach of the Traffic Act is not of itself evidence of negligence, nor does it give rise to a presumption of negligence, nevertheless it is a factor to be considered in the case. The jury relies on what the law is and then takes into consideration all the circumstances of the case. I make this explanation of the last section of which I have charged for the plaintiff.”

The whole of the charge on this subject conforms with the rule thereon laid down by this Court. In *Jackson v. Geiger, supra*, it was said of the infant riding on the bicycle:

“ * * * his conduct was only a factor to be taken in connection with the circumstances of the case as to whether or not he was negligent. * * * .”

And in *Baker v. Fogg & Hires Co., supra*, after speaking about the claim that the infant bicyclist was violating the traffic act, it was said:

“The mere failure to observe a traffic regulation is not *per se* negligence, that is, failure to observe it is not necessarily a contributing cause to the accident. Whether in a given case it is or is not is a matter to be determined by a jury.”

These decisions are illustrative of many others. Only by straining and playing upon words can it be said that the jury could have derived an impression different from that sanctioned by the cases. The reasonable and necessary construction of the charge results in the conclusion that the jury was informed that a violation of the traffic act was a factor to be considered in determining the issues presented.

It is respectfully submitted that the judgments below should be affirmed.

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