

New Jersey Court of Errors & Appeals.

LOUISE E. FIELDERS,

Plaintiff and
Plaintiff in Error,

vs.

NORTH JERSEY STREET RAILWAY
COMPANY,

Defendant in Error.

} On Demurrer. 10

BRIEF FOR DEFENDANT IN ERROR.

This case was originally brought by Robert A. 20
Fielders and Louise E., his wife, against the defend-
ant company for injuries sustained on April 12, 1899.

Subsequently, and before trial at the Circuit, the
husband died, and the suit was thenceforth continued
in the name of the wife as sole plaintiff.

The case was tried at the Essex Circuit in January,
1900, and a verdict of \$ rendered for plaintiff.

Defendant took a writ of error to the Supreme
Court, and in that court the judgment was affirmed.
38, Vroom 76.

Thereupon, the defendant took a writ of error to 30
the Court of Errors and Appeals. In that Court the
verdict was set aside, Justice Pitney delivering the
opinion of the Court. 39 Vroom, 343.

The plaintiff, after the decision of the Court of
Errors, to avoid, if possible, the effect of the decision
of the Court, obtained leave to file an amended
declaration.

The amended declaration being filed, the defendant
demurred to the third, fourth, fifth, sixth and seventh
counts thereof. 40

The Court (Adams, judge), sustained the demurrer, and thereupon the plaintiff brought the pending writ of error.

The defendant, to sustain the demurrer, relies upon the opinion of Justice Pitney in the Court of Errors, and the opinion of Judge Adams sustaining the demurrer.

10 The opinion of Justice Pitney will be found in 39 Vroom, 343.

The opinion of Justice Adams (not printed) but filed in Essex County Clerk's Office, is as follows:

ESSEX CIRCUIT COURT.

Monday, July 27th, 1903.

20	ROBERT A. FIELDERS, <i>et al.</i> , vs. NORTH JERSEY STREET RAILWAY COMPANY.	}	In Tort. Memorandum.
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ON DEMURRER TO DECLARATION.

30 MR. FREDERICK E. HODGE, and MR. SAMUEL KALISCH for Plaintiffs; MR. GEORGE T. WERTS for defendant.

ADAMS, J.: This is a demurrer to the third, fourth, fifth, sixth and seventh counts of the amended declaration. The plaintiffs' cause of action, as presented at a trial under the original declaration has been recently dealt with by the Court of Errors and Appeals. The amendment to the declaration has been made in order to escape the force of this decision. The amendment consists in the addition to the declaration of the sixth and seventh counts.

40 In order to decide intelligently this issue of law, it

is necessary to examine the opinion read for the Court of Errors by Mr. Justice Pitney.

It appears that the plaintiffs, by their original declaration, advanced, among other things, two propositions: First, that by force of a certain ordinance of the City of Newark, the defendant was bound to keep a part of Mulberry street in that city paved and in good repair and, Secondly, that the plaintiffs, one of whom was injured by want of repair, could maintain an action against the defendant to recover damages thus inflicted. 10

The ordinance in question was approved September 7, 1894. It is entitled "An ordinance regulating street railways and providing for paving and repaving in the streets through which street railways are built or operated."

As to this ordinance the Court of Errors and Appeals reached two conclusions.

First. That if it were valid it would give no right of action against the company to an individual aggrieved through a breach of its provisions. It appeared to the Court that the language of the ordinance indicated no legislative intent to confer such a right of action. The following extract from the opinion shows the lines of thought on this subject: 20

"Assuming the validity of the ordinance, it seems to us not to admit of the construction that it was designed for the safety of travellers upon the street as a class. On the contrary, the design is to impose upon the street railway company a share of the public burdens of the municipal government. The prime object is the relief of the municipal treasury; the duties imposed are to be performed by the company as one of the municipal agencies and under the immediate supervision of the municipal board, and the ordinance provides that for any omission by the company to 40

comply with its terms the remedy shall be applied by the Board itself, in proceeding to do the work and recovering the costs thereof from the company. There is no penalty imposed upon the company; there is nothing to indicate that it is done for safety or protection of travellers upon the street; there is nothing in the language to indicate that it was the intent of the municipal authority in passing the ordinance that it should give rise to an action against the company by any citizen aggrieved through a breach of its provisions. There is no discretion given to the company as to the mode or style of paving or repairs; on the contrary, it is within the fair intendment of the ordinance that all work which is required to be done by the street railway company shall be done under the immediate direction of the Board of Street and Water Commissioners, or its inspectors and supervisors."

Secondly. That the ordinance is invalid, because it is an exercise of the power of taxation.

The Court further says that where some burden is lawfully imposed by a municipality upon a street railway company as a condition of the grant of its franchise, the acceptance of such a condition by the company constitutes a contract between the company and the municipality. In other words, an ordinance that is bad as a tax may be good as a bargain. Whether such an ordinance would give to a private individual a right of action against the company, would depend upon the construction of the terms of the ordinance.

The Court further held that there was no evidence to show any liability for the repair or maintenance of the street pavement on Mulberry street was imposed upon the defendant as a condition of its rights to exercise its franchise.

This being the situation, the plaintiffs made an

amendment to their declaration, and therein rested their right of action upon another foundation. The sixth and seventh counts say that the defendant exercises the franchise of the Elizabeth and Newark Horse Railroad Company, chartered by a special Act, approved March 25th, 1864, with a supplement, approved April 1, 1869, and that the Common Council of the City of Newark passed these ordinances that affect the exercise of this franchise. The first is entitled "An ordinance to regulate passenger railways," approved August 18, 1859. The second is entitled "An ordinance concerning the Elizabeth and Newark Horse Railroad Company," approved November 6, 1869, which subjects the said company to the ordinance first mentioned. The third is a supplement to the ordinance approved November 6, 1869, and is of no consequence. This was followed on February 17th, 1872, by an agreement of said company under seal to comply with the provisions of the ordinance of August 18th, 1859.

It is said that out of the premises a contract has arisen, whereby the company, as a condition of the grant of its franchise, by the City of Newark, has bound itself to do the things mentioned in section 12 of the ordinance approved August 18th, 1859, which reads as follows:

"Sec. 12. All streets or highways which are unpaved at the time of laying any railway tracks, shall be kept in repair and in good travelling condition by the company or individuals owning the railroad, until the same shall be ordered to be paved by Common Council; and in all streets which are paved at the time of making such grant, they shall be required to keep in good order the width of the tracks (and if there are double tracks, between the same), and for the space of five feet on the

10 outside of said tracks. When the same shall be so ordered, said streets or highways shall for the width of the tracks (and if there are double tracks, between the same) and five feet outside of said tracks be paved, and afterwards repaved, repaired and kept in good order at the expense of said company or individuals. All streets or highways which require grading preparatory to laying of said tracks, shall be graded by, or at the expense of said company or individuals, to the same extent as in the case of paving above mentioned and afterward kept in repair by them as above directed; all such work to be done under the direction of, and on notice by the street commissioner."

20 The ordinance of 1859 seems in its general terms to resemble very closely the ordinance of 1894. If the ordinance of 1894 is an exercise of the taxing power, the ordinance of 1859 is the same. It may be, however, that the ordinance of 1859, though bad as a tax, is good as a bargain; for its provisions seem to have been a condition of the exercise by the company of its franchise, which is not the case with the ordinance of 1894. But the question still remains whether the ordinance of 1859 gives an individual right of action to the plaintiffs.

30 The line of thought pursued by Mr. Justice Pitney in respect to the ordinance of 1894 seems equally applicable to the ordinance of 1859. I find in the ordinance of 1859 no evidence of legislative intention to do anything but to impose upon the street railway company a share of the public burden of municipal government, and no evidence of any legislative intention to confer a right of action against the company by any citizen aggrieved for a breach of its provisions.

40 This leads to the conclusion that the defendant company has been guilty of no breach of duty

under this municipal legislation of which the plaintiffs can avail themselves, and that the defendant is entitled to judgment on its demurrer to the third, fourth, fifth, sixth and seventh counts of the declaration.

We submit that the two cited opinions fully sustain the decision sustaining the demurrer.

Respectfully subscribed,

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WERTS & RUNYON,
Attorneys for Defendant in Error.

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New Jersey Court of Errors and Appeals. 10

LOUISE E. FIELDS,
Plaintiff-in-Error,

vs.

NORTH JERSEY STREET RAILWAY
COMPANY,
Defendants-in-Error.

In Tort.
On Demurrer to
Declaration.

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**Brief of Frederick E. Hodge and
Samuel Kalisch for Plaintiff-in-
Error.**

The Elizabeth and Newark Horse Railroad Company was incorporated by an act of the Legislature on March 25th, 1864, which act empowered said company to run a railroad through Elizabeth to Chestnut street, Newark (Case, p. 27, line 19). On April 1, 1869, by legislative act, it was allowed to extend its tracks to Morris depot, provided it shall first obtain the consent of the Common Council of the City of Newark. It would appear from the Ordinance of 1869 that it did not enter the limits of Newark until after the passage of that act (Case, 44, Sec. 1).

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On August 18, 1859, an ordinance was passed in the City of Newark, entitled "An Ordinance to Regulate Passenger Railways" (Case, p. 44), that said

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ordinance compelled all companies to keep in repair and in good traveling condition the tracks (Case, p. 43); that on February 2, 1872, an ordinance was passed giving said company permission to file in the office of the City Clerk of Newark the written obligation required to be filed in and by Sec. 5 of the ordinance, entitled "An Ordinance to Regulate Passenger Railways" approved August 18th, 1859 (Case, p. 53); that Sec. 5 of said ordinance provides that every passenger railroad shall file in the office of the Clerk a written obligation duly executed to comply with the provisions of said ordinance, and upon failure so to do shall forfeit all rights and privileges to them granted (Case, 47); that within the time mentioned the company did file such consent in said office.

That on the 12th day of April, 1899, the plaintiff, Louise E. Fielders, alighted from a car on Mulberry street at the south side of Oak street. Oak street begins at Mulberry street and runs about East. Plaintiff alighted facing West and, turning, stepped behind the car and stepped into a hole two feet deep between the rails (Case, p. 33, l. 30), and immediately alongside of the West rail, receiving severe injuries.

The Seventh Count sets out the same facts except the filing of the consent.

I.

Having amended our declaration we now stand on ground other than when we were in this Court before, in this same case. The facts being different, the former decision rendered in this case can now only be regarded as *obiter dictum*, and in no sense binding on this Court in this argument and to now reverse Judge ADAM'S opinion and thereby

dismiss the demurrer cannot be held as overruling the opinion of *Fielders vs. North Jersey Street Railway Company*.

53 Atl., 404.

II.

The cases uniformly hold that where the railroad 10
accepts the obligation to repave or keep in repair
as a condition of the grant of its franchise, then an
absolute duty is imposed, and upon failure to per-
form its duty it is liable for damages to those of the
traveling public who suffer special injury thereby.

See

- Mahnke v. New Orleans City & L. R. Co.*,
29 S. Rep., p. 52.
- Cline v. Crescent City R. Co.*, 6 S. Rep., 20
851.
- McMahon v. Second Ave. R. R. Co.*, 11
Hun, p. 347.
- Wooley v. Grand St. R. R. Co.*, 83 N. Y.,
121.
- Baumgartner v. City of Mankato*, 62 N.
W. Rep., 127 (Minn.).
- Oakland Ry. Co. v. Fielding*, 48 Penn. St., 30
320.
- Conroy vs. 23rd St. Ry. Co.*, 52 How. Pr.,
49.
- 3 *Elliott on Railroads*, p. 1640, 1092, and
cases cited.

As to the legal effect of such ordinances, see

- Wilbur v. Trenton Pass. Ry. Co.*, 57 N. J.
L., 212.
- Railroad Co. v. Cape May*, 58 N. J. L., 40
565.
- City of Cape May v. Cape May Trans. Co.*,
44 Atl. Rep., 948.

III.

The defendant was liable at common law. Justice FORT, in the same case of *Fielders vs. North Jersey Street Railway Company*, 54 *Atlantic Reporter*, page 822, held that, "It is misleading, in my view, to refer to this case as one in which the failure of the defendant is a failure to repair the surface of the street. The hole in the highway was at a street crossing, and abutting upon the rail of the track, or its foundation, and the failure to repair at this point was a failure to repair its tracks within the well-recognized principles of law applicable to the duty to repair tracks, laid upon a railway company having a right to lay tracks in the public streets." The majority opinion in this case concedes that, "It is familiar law that a railway company having the right to lay tracks in a public street is bound by the general principles of the common law, and, without either a specific statute or ordinance, or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair." This principle thus stated is clearly sustained by 2 *Thom. on Neg.* (2 Ed.), 358, cited in that opinion. I am at a loss to perceive how the duty to repair the hole between the tracks was not one of the duties to repair the track which was incumbent upon the defendant company under its implied obligation to so construct and maintain the rails of its track as that they should be free from dangers to persons lawfully using the highway. I regard the tracks as contemplating all between the rails as laid in the public highway.

Justices HENDRICKSON, VREDENBURGH and BOGART concurred in this opinion.

The word "Tracks" should not be restricted to

designate merely the rails, but comprehends the tracks“ or way” over which the cars run, including, of course, the space in between the rails.

“The term track—is confined to the only space remaining, that is to say, the space bounded by the rails along which the cars run and between which the teams travel, and the greatest width of which is limited to five feet.”

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Robbins v. Omnibus R. Co., 32 Cal., 474.

In Delaware, etc., Canal Co. v. Whitehall,

90 N. Y., 21,

it was held that the track signifies the entire roadbed, and not merely the iron or railway, but includes turnouts and switches or other contrivances for passing engines or cars from one line of rails to another or for public traffic purposes.

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A track is “merely a part of the right of way—that part on which the rails and ties are laid.”

Drainage Com'rs Illinois Cent. R. Co.,

158 Ill., 361.

The term “Railroad” has a far more extended signification than the term track.

U. S. Trust Co. v. Atlantic, etc., R. Co.,

8 N. Mex., 689.

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In Mobile,, etc., G. R. Co., v. Alabama Midland Ry. Co. (Ala.), 6 So. Rep., 408.

it is held that “Road-bed” is here used as the synonym of the roads “tracks”—the track in use, or intended to be used, on which to operate its trains, and must include a sufficient space on either side to allow trains to pass each other in safety.

In Del. & Hudson Canal Co. v. Villiage,

90 N. Y., 21,

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Syllabus holds:

“The word ‘track’ in the provision of the act

10 regulating the construction of roads and streets across railroad tracks (1 Chapter 62, Laws of 1863), which authorizes the laying out of "any street and highway across the tracks of any railroad" without compensation signifies the entire roadbed, including turnouts and switches or other contrivances used for passing engines or cars from one line of rails to another, or for public traffic purposes."

Also *Rochester v. Rochester*, 45 N. Y. Sup., 687.

In *Gates vs. Chicago*, 48 N. W. Rep. (Iowa), 1041,

20 it was held that "the track of a railroad is not merely the rails and ties upon which cars are run, but it is the "road, course, way" (Webster), and includes all that enters into and composes the road, the course, the way."

Also *Dunne v. Burlington*, 27 N. W. Rep. (Minn.), 448, 451.

In re Folts, St., 46 N. Y. Sup., 43, 46.

Drainage Com. v. Ill. Cen. R. Co., 41 N. E. Rep., 1073, 1076.

30 *Fort Worth St. Ry. Co. v. Rosedale St. Ry. Co.*, 4 S. W. Rep., 534, 539.

The act of the Legislature incorporating the Elizabeth and Newark Horse Railroad Company, seems to regard the track as consisting of more than the mere rails in the street.

Case, page 38, Paragraph 7.

40 "That the track laid by said corporation shall be of the same width as the wagon track now established by law, and the same shall be laid, in all streets within the limits of said Cities of Newark and Elizabeth, level with the surface

of said streets, and in conformity with the grades thereof, which now are or hereafter may be established by the municipal authorities of said cities respectively; and in all cases the rails of such track shall be so laid as to present no unnecessary obstructions to, or in any way interfere with, the wagons or other vehicles turning in or crossing said streets or roads through or over which said road or its turnouts or switches may be laid." 10

The following are cases on police power in this State:

- North Hudson Co. Ry. Co. vs. Mayor, etc., of Hoboken, 41 N. J. L., 71;
- Consolidated Traction Co. vs. Elizabeth, 58 N. J. L., 619; 34 Atl., 146; 32 L. R. A., 170. 20
- Morris & Essex R. Co. vs. Orange, 63 N. J. L., 252; 43 Atl., 730; 47 Atl., 363.
- Consolidated Traction Co. vs. East Orange, 61 N. J. L., 202; affirmed, 63 N. J. L., 669.
- Trenton Horse R. Co. vs. Trenton, 53 N. J. L., 132.
- Also Booth Street R. Law, §§220, 224, 240, 242. 30
- Elliott Roads & S. (2nd Ed.), §§742, 743, 772.

IV.

The ordinance in question is a proper exercise of the city's authority, by its police power. Under the general provision of its charter, the City of Newark is empowered among other things: "To regulate, clean and keep in repair the streets, 40

highways, bridges, wharves, docks and slips in said City, etc.”

Laws of 1857, p. 132, Sect. 30, Plac. VII.

I quote from Justices FORT, HENDRICKSON and BOGART, dissenting opinion, 54 Atl. Rep., 822.

10 “Where a street railway company takes a franchise from a municipality to operate a street railway within the limits of such municipality, it takes it subject to the power of such municipality to regulate, under such franchise, its use of the streets, and its duty to pave and repair between the tracks is expressly or impliedly authorized by the municipal charter. I am also clear in my view that such a provision of a city charter, or of an ordinance passed under
20 it, is not for the benefit of the city, *per se*, but is for the protection of the traveling public. Especially must this be true with regard to a provision with relation to the paving and repairing of that portion of the highway lying between the rails constituting the tracks of the company.

The city does not pave for its own purposes, *per se*. Paving is for the use of the public—both those of the public who pass over it with horses and carriages, and those who pass on foot. A
30 corporate entity does not travel, and does not need paved streets.”

I also quote from Justice VREDENBURGH’S dissenting opinion, same case:

40 “A city charter, or an ordinance passed under it, is not for the benefit of the city, *per se*, but is for the protection of the traveling public. Especially must this be true with regard to a provision with relation to the paving and repaving of that portion of the highway lying between the rails constituting the tracks of the company. The

city does not pave for its own purposes, *per se*. Paving is for the use of the public."

Case of Van Wagoner v. The City of Paterson, 51 Atl. Rep., page 922.

"Holds that the city may require an abutting owner to pay the entire expense of laying a necessary pipe for house connections from the sewer to the curb line, and declares this to be an incidence of the police power of the State." 10
Now, we maintain, that this same principle should be applied to the trolley companies, for to compel them to make repairs of that portion of the street on which they have almost a monopoly, and repair that which by their almost exclusive use has been destroyed or made in need of repair, is but small compensation for the valuable franchises which they enjoy. 20

Elliott on Roads and Streets, 2nd Ed., page 833.

"It is clearly enough, no more than just that a street railway company which secures a right to use a public road or street, should maintain it in as good repair, at least, as it was at the time possession was taken by the company, except in cases where it is otherwise provided by the ordinance or resolution which grants the franchises. 30
It is indeed not easy to find any solid ground upon which it can be held that the street or road can be subjected to a use, which as matter of common knowledge every one knows greatly increases the wear and tear, and, consequently, the expense of maintaining the way, and yet individual property owners be compelled to bear the increased burden. The benefit which accrues 40
from the use is enjoyed by the company and not the property owners, and it seems, upon the

salutary equitable doctrine that, "he who derives the advantage ought to sustain the burden," the company should bear the burden of keeping the way in as good condition, at least, as it was when it entered upon the enjoyment of its franchise. The company is unquestionably bound to use ordinary care and diligence to keep the space it occupies in a reasonably safe condition for ordinary travel, insofar as its own use and acts are concerned, and there is reason for extending the doctrine, for the company secures a special privilege in a highway, and in consideration of the grant of such a privilege it ought to be held bound to keep the space it occupies in a reasonably convenient condition for travel. The principle upon which we base our conclusion is one that has been long established and often enforced, for it is the principle which is asserted in cases of the crossing or occupancy of highways by ordinary steam railroads. It is competent for the municipal officers to make it the duty of the street railway company licensed, to occupy the public streets, to maintain the streets in good repair by inserting a provision to that effect in the ordinance or resolution conferring the franchise. Where there is a provision in the ordinance or resolution imposing the duty of repairing upon the company, the duty is held to be a continuing one, and it is not discharged by a simple restoration of the streets to the condition they were in at the time possession was taken. This doctrine is clearly right. We are strongly inclined to the opinion that the duty exists as a continuous one, although there may be no express provision in the grant creating it, where no provision is made to the contrary that a company which acquires a right to use a highway for its special benefit will keep it in reasonable repair, the case falls within the rule that it is the act done for its own benefit,

and to advance its own interests that makes repairs necessary, and, therefore, it is equitable that it should bear the burden of maintaining the highway in repair."

V.

There is ample legislative authority for the ordinance under discussion: 10

By the charter of the City of Newark,
Laws of 1857, p. 132, Sec. 30, Plac. VII,

The City of Newark is empowered among other things:

"To regulate, clean, and keep in repair the streets, highways, bridges, wharves, docks and slips in said city, &c." 20

By an act entitled "An act to Revise and Amend the Charter of the City of Newark," approved February 15, 1860, p. 109.

"That it shall not be lawful for any person or persons or corporation to construct any passenger or other railroad, for cars or carriages to be drawn by horses or horse power, within the limits of the said City of Newark, without the permission and consent of the common council of the said City of Newark, first had and obtained, which permission and consent the said common council are hereby empowered to give to any person or persons or corporation who shall be authorized to construct such railroad by any laws of this state; provided always that no such permission or consent shall ever be given by the said common council until a majority of the owners of the lands in front of any such railroad and along which the same may be intended to run or be constructed, shall first consent in writing to the laying and construction thereof, and which said consent in writing of said 30 40

land owners shall also be first filed in the clerk's office of said city.

10 Sec. 2. That said railroads when constructed shall be subject to such general and police regulations of the said common council as now exist or hereafter may be ordained or established in regard to the same, or in regard to horse railroads in general in said city."

Approved February 15, 1860.

The ordinance now under discussion was passed in the year 1859. And, therefore, when the above act was passed, it was the "then existing ordinance, regulating horse railroad in said City of Newark."

20 Further, the act of the Legislature of 1869 (Case, p. 42), which authorizes the extension of said Elizabeth and Newark horse railroad through a great part of Newark, grants the privilege, subject to the following proviso: "Provided, that the right to construct the said road or roads through any street within the City of Newark shall not be vested in the said corporation until the consent of the Common Council of said city shall first be had and obtained."

30 Now, as to this consent, must we not say that the consent hereby referred to was such reasonable rules and regulations as the Common Council might impose and inasmuch as the Legislature, by the Act of 1864 (Case, p. 41), impose the obligation to keep the pavement between its rails and three feet on the outside thereof in repair, at the company's expense. And also to repave, and, inasmuch as these are the obligations laid down by the Legislature, as the obligations which this Elizabeth and Newark horse railroad company
40 should be under in running its line through Elizabeth to Newark, must we not believe that the Legislature intended and expected that these same ob-

ligations should be attached as a condition precedent to their running its cars through Newark? Also Paragraph 7 of the Act of 1864 (Case, p. 38), is as follows:

“And be enacted, That the track laid by said corporation shall be of the same width as the wagon track now established by law, and the same shall be laid, in all streets within the limits of said Cities of Newark and Elizabeth, level with the surface of said streets, and in conformity with the grades thereof, which now are or hereafter may be established by the municipal authorities of said cities respectively; and in all cases the rails of such tracks shall be so laid as to present no unnecessary obstructions to, or in any way interfere with the wagons or other vehicles turning in or crossing said streets or roads, through or over which said road or its turnouts or switches may be laid.”

Elliott on Railroads, Vol. 3, pp. 1621, 1081.

Under title of “Rights of Municipality to Impose Condition,” says: “When a municipal corporation has the power to grant or refuse a railroad company the right to use its streets as it sees fit, or when its consent is required before any company can so use them, it has, as we think, authority to prescribe the terms and conditions upon which the company shall have the right to construct and operate a railway in its streets. Thus it may require the company to repair, etc.”

And the same author, on pp. 1640, 1092, under the title “Duty of Company to Restore and Repair Streets,” says: “It is generally provided by statute that railroad companies which cross a highway, or lay their tracks therein, must restore it as far as may be to its former condition of use-

fulness and safety, and it is held that this duty rests upon them even in the absence of any express statutory requirement. This rule applies to street railways as well as to commercial railroads, unless otherwise provided, however, it seems that, although this admits of much doubt. The duty to repair is usually imposed by statute or by the municipality, as a condition annexed to the right to use its streets, and this is not performed by merely restoring the street in the condition in which it was at the time the track was laid, for it is a continuing duty to keep such portion of the street in repair, so as not to unlawfully obstruct or endanger travel. It is generally held that this duty may be enforced by mandamus and the neglect of the company to properly perform it will render the company liable in damages to one who, without fault on his part, is injured thereby while properly using the highway, etc." The author cites a large number of cases in a note, which sustain the text.

It is clear from the reading of the ordinance that a duty was imposed upon the defendant company to keep its tracks and the pavement between the rails of its track in good and complete repair.

It is also obvious that a failure on part of the defendant company to comply with such duty would eventuate in suffering the pavement between the rails of the tracks to sink into a condition of decay and thus imperil the safety of the public using the highway, and consequently it seems to be a fair and logical deduction that a failure on part of the defendant company to comply with such duty is a negligent act, for which negligent act the defendant company is answerable in damages to one who has suffered a special injury by reason of the neglect of such duty.

In a note, No. 4, to the case of Phil. & Read. R.

R. Co. vs. Bayer, 2 Am. and Eng. R. R. Cases, p. 183, it is said:

“As to how far the violation on the part of a railroad company of a municipal ordinance constitutes a ground of liability. As a rule, it may be said that, when such violation amounts in itself to an act of negligence, then the fact that such act is contrary to the ordinance may be submitted to the jury as portion of the proof of negligence on the defendant’s part.” 10

Jetter v. R. R., 2 Abb. Ct. of App., 458;
 Besiegel v. R. R., 14 Ab. Pr., N. S., 29;
 Massoth v. R. R., 64 N. Y., 524; B. &
 O. R. R. Co. v. State, 29 Md., 252; Rock
 Island, etc., R. R. v. Reidy, 66 Ill., 44;
 Briggs v. N. Y. Cent. & Hudson River
 R. R. Co., 72 N. Y., 26. 20

An important and instructive case on this subject is Hayes v. Mich. Cent. R. R. Co., 111 U. S. Sup. Ct., 228.

Judge Adams in his opinion sustaining the demurrer in this case on page 5, of the Addenda case, says:

VI.

“I find in the ordinance of 1859, no evidence of a legislative intention to do anything but to impose upon the street railway company a share of the public burden of municipal government, and no evidence of any legislative intention to confer a right of action against the company by any citizen, aggrieved for a breach of its provisions.” 30

Sec. 2 on case, page 45, reads as follows: 40

“It shall be the duty of every such company and all such individuals to employ careful, sober and

10 prudent agents, conductors and drivers, to take charge of their cars when upon their road, and for the violation of any ordinance of the city, on the part of any such officer or officers, employee or employees upon said road, and for all injuries caused by any neglect, misconduct or carelessness of its agents, servants or employees, or any of them, the company or individual, proprietor or proprietors, of the road shall be liable to all fines, forfeitures, penalties and damages arising therefrom, or by ordinance attached thereto, provided, however, that nothing in this shall be deemed or taken to excuse, discharge, or in any manner free any such officer or employee from the penalties or responsibility of any such violations or other acts by them committed."

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VII.

It is a mistake to confound this case with those class of cases in which only those having privity of contract might sue.

In passing we might say that this old rule of law might now be regarded as obsolete in New Jersey. A person for whose benefit a contract is made may maintain an action thereon.

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P. L. 1902, p. 709.

VIII.

40 An absolute duty was imposed upon the Elizabeth and Newark Horse Railroad Company, by the Act of 1859, and the filing of its, the railroad's, consent (Case, p. 54), was a mere incident and was done to prevent its losing the rights and privileges granted by such ordinance.

Surely, it is absurd to say that the plaintiff

would have had a right of action, if said consent had not been filed, but, inasmuch as it has filed its consent, she has no right of action.

The following are cases very much in point.

Sonn vs. Erie Railroad Co., 66 N. J. L.,
428; 49 Atl., 458.

In the case at bar there is a positive, unconditional duty imposed for the express benefit of the traveling public. The plaintiff was one of the traveling public, who has suffered a special injury by reason of the neglect of such duty. In this case there is the additional feature that the ordinance of 1859 (Case, p. 45), declares that the defendant shall be answerable for damages arising from any neglect, misconduct or carelessness, and for the violation of any ordinance of the city.

Mahnke v. New Orleans City & L. R. Co.,
29 S. Rep., page 52.

The plaintiff alighted from the car with her face looking away from the car and immediately turned towards the car. The car started and the plaintiff crossed directly behind it and stepped into a hole between the rails, breaking her leg. Page 54, "We do not think the measure by which the city's obligation to be advised of and to repair defects in the sidewalks and streets is to be tested, is the exact measure by which to test the obligations in this respect to street railway companies who have acquired valuable franchises upon the streets for their private emolument, and who, as part consideration for obtaining such franchises, have bound themselves by contract to keep the crossings between the rails in repair. They are held by stricter rules to their duty in this respect than are the municipal corporations themselves in the performance of their own obliga-

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tions to the general public. Cites *Cline v. Railroad Co.*, 41 La. Ann., 1038; 6 South, 851."

Plaintiff drove into hole in street by side of railroad track.

The contract between the city and railroad provided "that the street on which the road shall be built, shall be kept in repair at the expense of said company."

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Held that, "In case the defective condition of a public street is caused by the fault or neglect of a street car company, in the manner in which its tracks are laid, or in its failure to keep the streets traversed by its tracks in good repair and safe for use by the public, such corporation must answer for the consequences.

Cline v. Crescent City R. Co., 6 S. Rep., 851.

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While the plaintiff was driving in that portion of Second avenue occupied by the defendant's tracks, one wheel slipped into an excavation between the tracks, whereby he was thrown from his truck and injured. The excavation was made in order to connect with the sewer, by an adjoining property owner, who had notified defendant of his intention to make the same, whereupon the defendant bridged it over, so that horses could pass. The defendant had agreed with the city "to pave the streets, in and about the rails, in a permanent manner, and keep the same in repair." Held, that the contract made by the city inured to the benefit of the plaintiff, and that he was entitled to enforce it.

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McMahon v. Second Avenue R. R. Company, 11 Hun, page 347.

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A horse railroad company is as much bound to keep those parts of its road proximately con-

nected with its track, in good order and repair, as it is the track itself, and it is negligent if it omits to have such repairs made, not only to the track, but to contiguous portions of the road, as will keep it in good condition and make it safe for those who have a right to drive across it.

Conway v. 23rd Street R. R. Co., 52 How. Prac., 49.

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Also

Wiley v. Smith, *et al.*, 49 N. Y. Sup., p. 934.

In an action for damages for injuries sustained by the upsetting of plaintiff's sleigh by striking against a street railway switch, which switch, together with the abutting pavement, the defendant road was bound to keep in good condition, there is no error in a refusal to rule that, if the switch was properly put down, the defendant is not liable, for, though the switch were a proper one, and well laid down, yet, if from any cause, it was subsequently raised unduly above the pavement, or the pavement sunk below it, it was the defendant's duty to put it in good condition.

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Wooley v. Grand Street R. R. Co., 83 N. Y., 121.

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The City of Mankato, having authority so to do, granted to a street railway company the right to lay its tracks and operate its railway in the streets of said city. The ordinance granting this right provides that the tracks of said railway shall not be raised above the surface of the street, and the rails shall be so laid and maintained that carriages and vehicles of every kind can easily and freely cross said track at any and all points thereof, with the least possible obstruction. The

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ordinance also provides that the railway company "shall repair any and all injury done to the streets, sidewalks, curbs, or gutters by the construction or repairing of the tracks along the streets, and to protect and save harmless the City of Mankato against any and all claims for damages arising from or caused by the construction or management of the tracks or roads herein provided for."

10 The railway company accepted this ordinance with all its provisions and conditions, and expressly made the ordinance a contract between the parties, and thereupon it constructed its track along the center line of Front street, of said city. On the 31st day of August, 1893, and for a period of several weeks prior to that date, the surface of the ground along the outer side of, and adjoining the rails of, said street railway in Front street,
20 in said city, had been worn away by public travel therein, so that in places the surface of the street outside of and next to such rails was over one and three-quarter inches below the upper surface of said rails. Held that, the railway company having received the benefits and advantages of the corporation franchise, from the city under the provisions, of the ordinance, it was its contract duty to so lay and maintain its rails that carriages could
30 easily and freely cross its track, and this includes the duty of filling up outside its rails (when the earth becomes worn or washed away) so as to make safe connection between the tracks and the balance of the street, and that this is a continuing duty under the terms of the ordinance.

Baumgartner v. City of Mankato, *et al.*,
(Sup. Court of Minn.), N. W. Rep., 62,
40 p. 127.

The act incorporating the Elizabeth and Newark

Horse Railway Co. contains a similar clause and expressly applies to Newark.

See Case, p. 38, P. 7.

In

Worster, Resp., v. 42nd street and Grand street F. R. Co., App., 50 N. Y., p. 203,

the plaintiff was driving a pair of horses belonging to him over the track; one horse stepped into a hole, was thrown down and injured, and in consequence died. 10

CHURCH, C. J., on p. 205, said:

"We are to assume that the defendants had a lawful right to lay their tracks in the street, where the injury occurred, but this right carries with it the obligation to lay the tracks in a proper manner and keep them in repair, and if an injury occurs, by reason of neglect in either respect, the defendants are liable in damages. 20

The duty of remedying the defects was affirmative and absolute. Notice to the defendant of the defect was not necessary (35 N. Y., 58). It was their duty to know it. It was patent, and an omission to know that such defect existed was *prima facie* negligence as much as an omission after notice. The facts tended to prove that the defect had existed for some days. The learned judge who presided non-suited the plaintiff because the defendants had no notice of the defects, and because they had not existed for such a length of time as to create the presumption of knowledge. The ruling was erroneous. The presumption of knowledge arises from the existence of the defects themselves. The plaintiff was only required to show that the injury resulted from the road being out of repair, and if circumstances existed 30 40

showing absence of negligence, it was for the defendant to prove them. The presumption of negligence was complete, when it appeared that defects existed and an injury was caused thereby. In some cases notice to municipal corporations, express or implied, of defects or obstructions in the street, is requisite to create liability for damages for an injury produced by reason of them, but the authority of these cases have no application here. (Hutson v. Mayor, etc., 9 N. Y., 163; Griffin v. Mayor, id., 456.)”

In

McLaughlin v. Philadelphia Trust Co., 34
Atl. Rep., p. 863,

the plaintiff, while driving over a street in the City of Philadelphia, by reason of a defect in the street alongside of said defendant's tracks, met with an injury, and it was held that the plaintiff was entitled to recover.

The theory which prevails in the cases referred to seems to be this: That the defendant, having laid down and constructed the road for its own profit, it is bound to use reasonable care to keep and *maintain* the same in safe repair and when it fails in its duty in that respect, it is answerable in damages to a person who has sustained special injury thereby.

Oakland Rwy. Co. v. Fielding, 48 Penn.
Stat., 320;

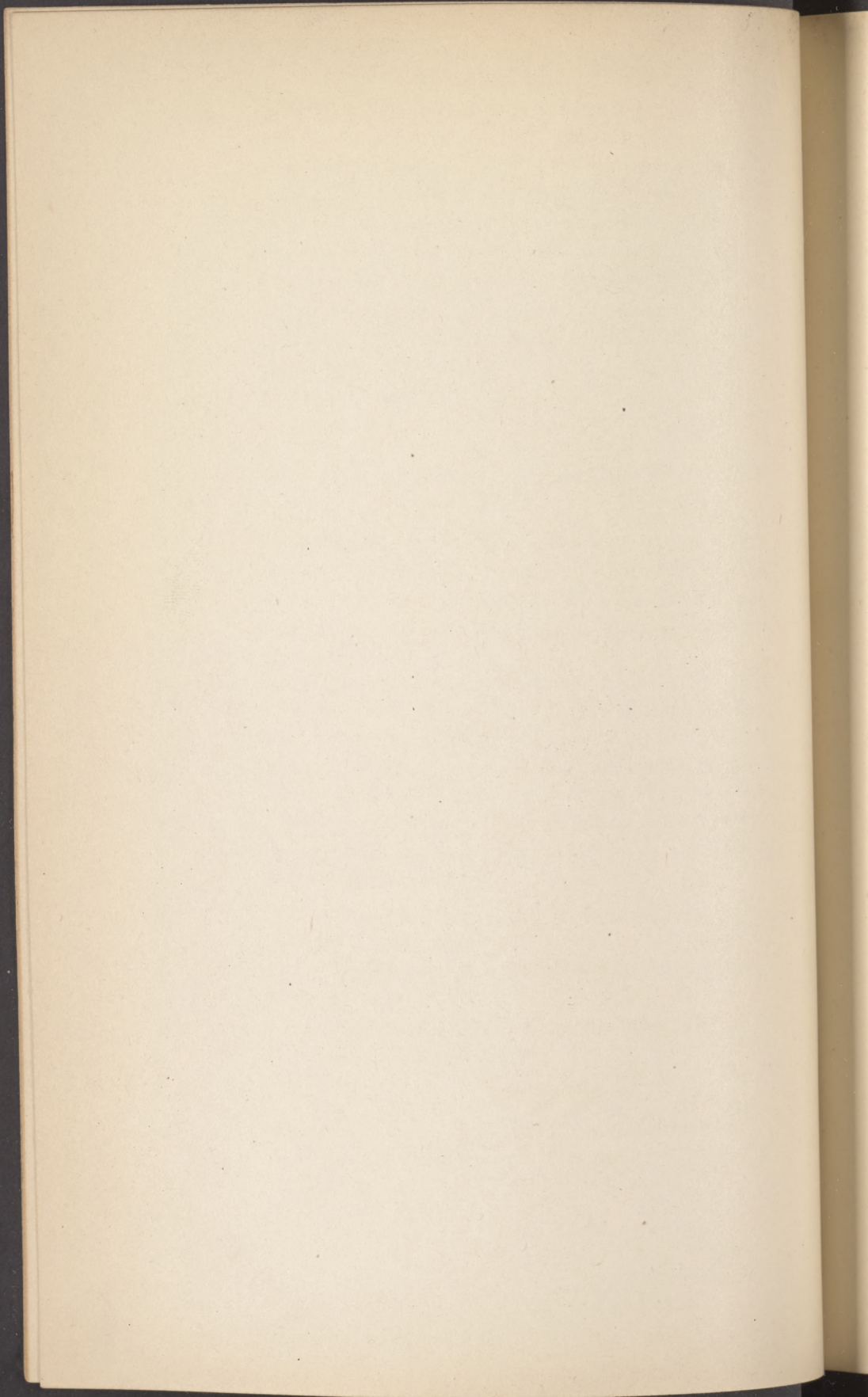
Conroy v. 23rd St. Rwy. Co., 52 How. Pr.,
49;

3 Elliott on Railroads, pp. 1640, 1092, and
cases there cited.

Respectfully submitted
[6563] Frederick E. Ho
Attorney of Plaintiff

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Essex Circuit Court.

MONDAY, JULY 27TH, 1903.

ROBERT A. FIELDERS, <i>et al.</i> ,	}	
vs.		In Tort.
NORTH JERSEY STREET RAILWAY COMPANY.		Memorandum.

On Demurrer to Declaration.

Mr. FREDERICK E. HODGE and Mr. SAMUEL KALISCH for plaintiffs; Mr. GEORGE T. WERTS for defendant.

ADAMS, J.: This is a demurrer to the third, fourth, fifth, sixth and seventh counts of the amended declaration. The plaintiffs' cause of action, as presented at a trial under the original declaration has been recently dealt with by the Court of Errors and Appeals. The amendment to the declaration has been made in order to escape the force of this decision. The amendment consists in the addition to the declaration of the sixth and seventh counts.

In order to decide intelligently this issue of law, it is necessary to examine the opinion read for the Court of Errors by Mr. Justice PITNEY.

It appears that the plaintiffs, by their original declaration, advanced, among other things, two

propositions: First, that by force of a certain ordinance of the City of Newark, the defendant was bound to keep a part of Mulberry street in that city paved and in good repair and, Secondly, that the plaintiffs, one of whom was injured by want of repair, could maintain an action against the defendant to recover damages thus inflicted.

The ordinance in question was approved September 7, 1894. It is entitled "An ordinance regulating street railways and providing for paving and repaving in the streets through which street railways are built or operated."

As to this ordinance the Court of Errors and Appeals reached two conclusions.

First. That if it were valid it would give no right of action against the company to an individual aggrieved through a breach of its provisions. It appeared to the court that the language of the ordinance indicated no legislative intent to confer such a right of action. The following extract from the opinion shows the lines of thought on this subject:

"Assuming the validity of the ordinance, it seems to us not to admit of the construction that it was designed for the safety of travellers upon the street as a class. On the contrary, the design is to impose upon the street railway company a share of the public burdens of the municipal government. The prime object is the relief of the municipal treasury; the duties imposed are to be performed by the company as one of the municipal agencies and under the immediate supervision of the municipal board, and the ordinance provides that for any omission by the company to comply with its terms the remedy shall be applied by the Board itself, in proceeding to do the work and recovering the costs thereof from the company. There is no penalty imposed upon the company; there is nothing to indicate that it is done for safety or protection

of travellers upon the street; there is nothing in the language to indicate that it was the intent of the municipal authority in passing the ordinance that it should give rise to an action against the company by any citizen aggrieved through a breach of its provisions. There is no discretion given to the company as to the mode or style of paving or repairs; on the contrary, it is within the fair intendment of the ordinance that all work which is required to be done by the street railway company shall be done under the immediate direction of the Board of Street and Water Commissioners, or its inspectors and supervisors."

Secondly. That the ordinance is invalid, because it is an exercise of the power of taxation.

The court further says that where some burden is lawfully imposed by a municipality upon a street railway company as a condition of the grant of its franchise, the acceptance of such a condition by the company constitutes a contract between the company and the municipality. In other words, an ordinance that is bad as a tax may be good as a bargain. Whether such an ordinance would give to a private individual a right of action against the company, would depend upon the construction of the terms of the ordinance.

The court further held that there was no evidence to show any liability for the repair or maintenance of the street pavement on Mulberry street was imposed upon the defendant as a condition of its rights to exercise its franchise.

This being the situation, the plaintiffs made an amendment to their declaration, and therein rested their right of action upon another foundation. The sixth and seventh counts say that the defendant exercises the franchise of the Elizabeth & Newark Horse Railroad Company, chartered by a special act, approved March 25th, 1864, with a supplement, approved April 1, 1869, and that the Common Council of the City of Newark passed

these ordinances that affect the exercise of this franchise. The first is entitled "An ordinance to regulate passenger railways," approved August 18, 1859. The second is entitled "An ordinance concerning the Elizabeth & Newark Horse Railroad Company," approved November 6, 1869, which subjects the said company to the ordinance first mentioned. The third is a supplement to the ordinance approved November 6, 1869, and is of no consequence. This was followed on February 17th, 1872, by an agreement of said company under seal to comply with the provisions of the ordinance of August 18th, 1859.

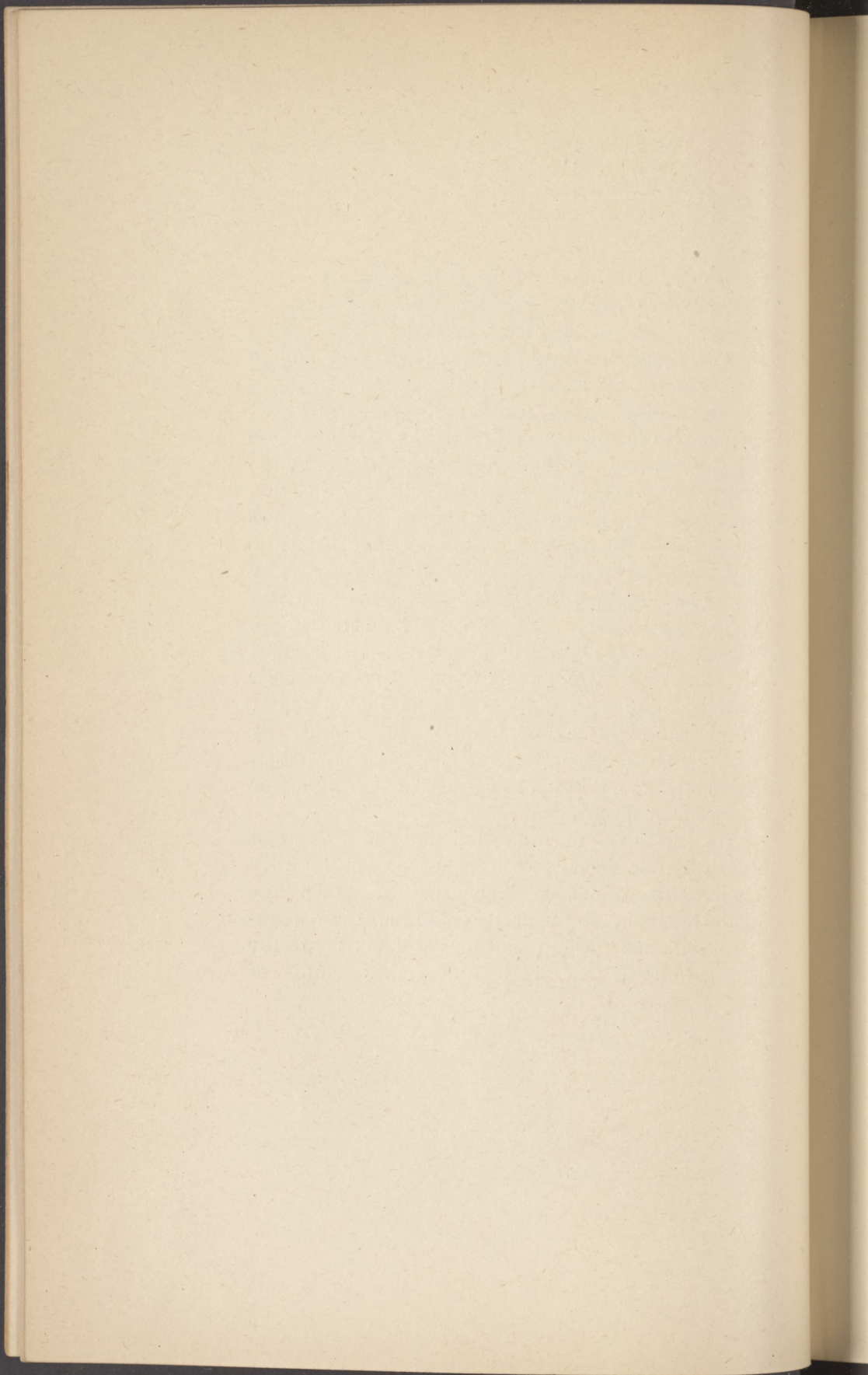
It is said that out of the premises of the contract has arisen, whereby the company as a condition of the grant of its franchise, by the City of Newark, has bound itself to do the things mentioned in Section 12 of the ordinance approved August 18th, 1859, which reads as follows:

"Sec. 12. All streets or highways which are unpaved at the time of laying any railway tracks, shall be kept in repair and in good travelling condition by the company or individuals owning the railroad, until the same shall be ordered to be paved by Common Council; and in all streets which are paved at the time of making such grant, they shall be required to keep in good order the width of the tracks, (and if there are double tracks, between the same), and for the space of five feet on the outside of said tracks. When the same shall be so ordered, said streets or highways shall be so ordered, said streets or highways shall for the width of the tracks (and if there are double tracks, between the same), and five feet outside of said tracks be paved, and afterwards repaved, repaired and kept in good order at the expense of said company or individuals. All street or highways which require grading preparatory to laying of said tracks, shall be graded by, or at the expense of said company or individuals, to the same

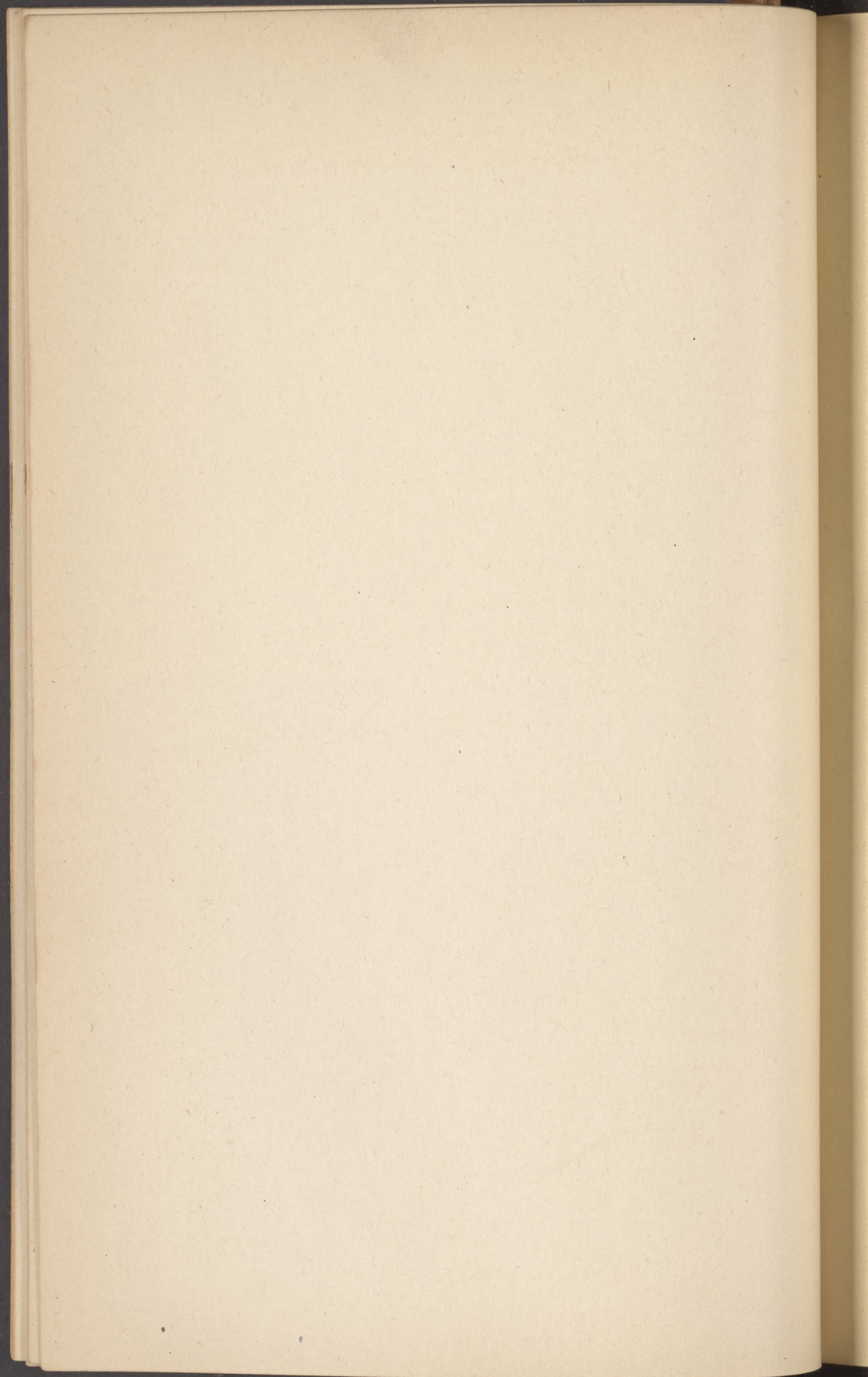
extent as in the case of paving above mentioned and afterward kept in repair by them as above directed; all such work to be done under the direction of, and on notice by the street commissioner."

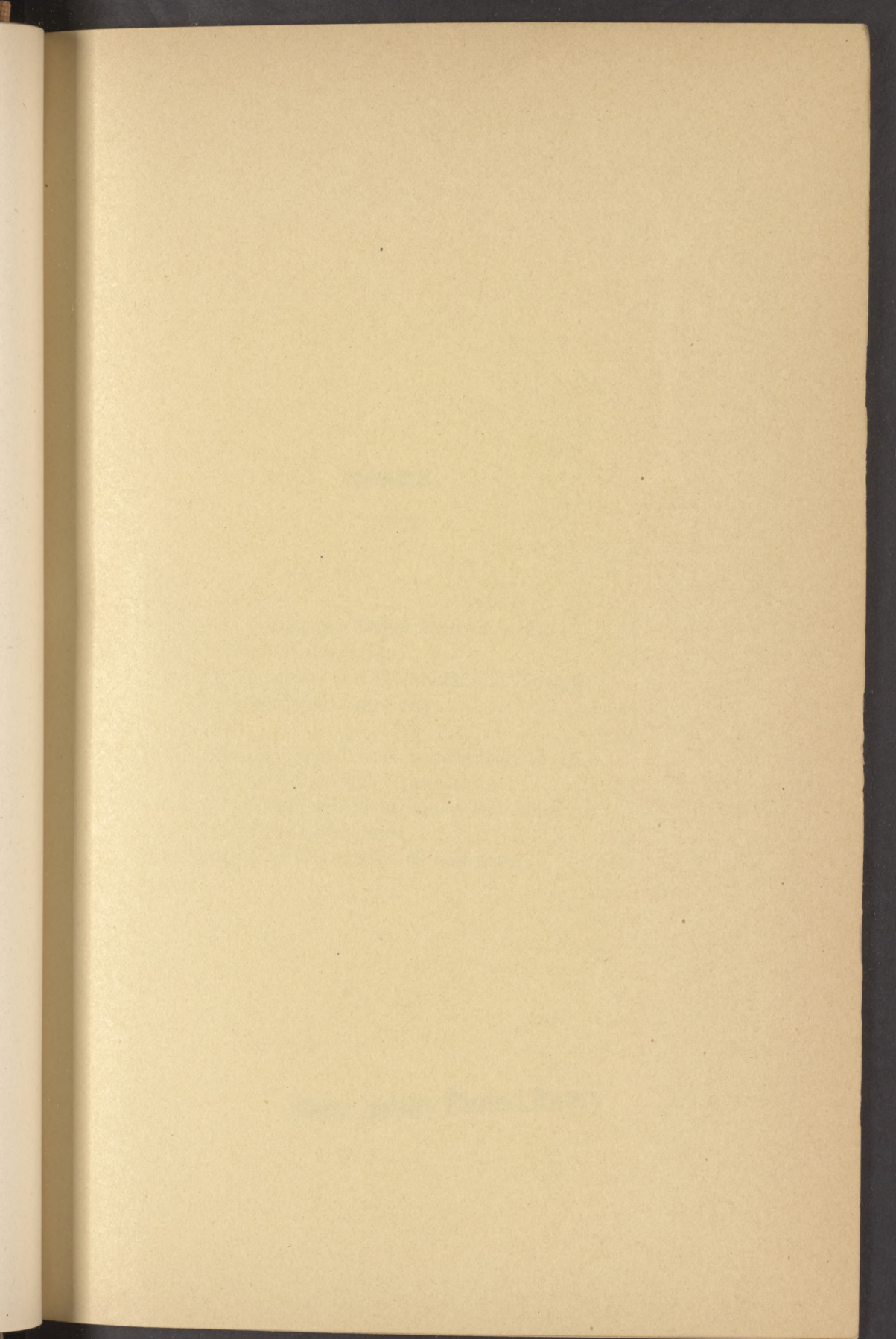
The ordinance of 1859 seems in its general terms to resemble very closely the ordinance of 1894. If the ordinance of 1894 is an exercise of the taxing power, the ordinance of 1859 is the same. It may be, however, that the ordinance of 1859, though bad as a tax, is good as a bargain; for its provisions seem to have been a condition of the exercise by the company of its franchise, which is not the case with the ordinance of 1894. But the question still remains whether the ordinance of 1859 gives an individual right of action to the plaintiffs. The line of thought pursued by Mr. Justice PITNEY in respect to the ordinance of 1894 seems equally applicable to the ordinance of 1859. I find in the ordinance of 1859 no evidence of legislative intention to do anything but to impose upon the street railway company a share of the public burden of municipal government, and no evidence of any legislative intention to confer a right of action against the company by any citizen aggrieved for a breach of its provisions.

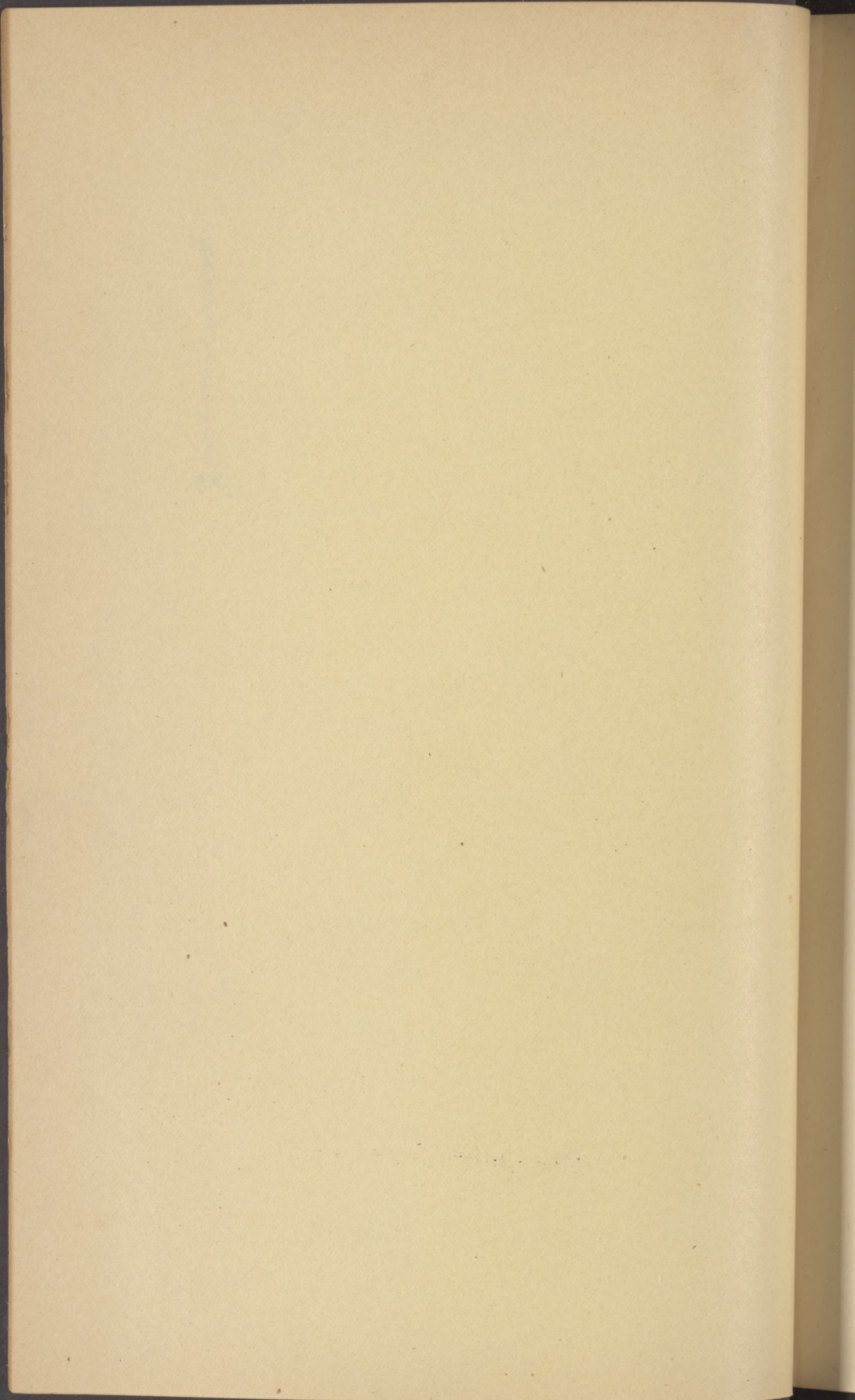
This leads to the conclusion that the defendant company has been guilty of no breach of duty under this municipal legislation of which the plaintiffs can avail themselves, and that the defendant is entitled to judgment on its demurrer to the third, fourth, fifth, sixth and seventh counts of the declaration.











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New Jersey State Library

1811

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Essex County, ss.:

The State of New Jersey, to the Sheriff of the
County of Essex aforesaid, GREETING:

[L. s.]

You are hereby commanded to summon North 20
Jersey Street Railway Company if in your County
it may be found, so that it be and appear before
our Circuit Court to be holden at Newark, in and
for the said County of Essex on the eighth day of
December, next, to answer unto Robert A. Field-
ers and Louise E. Fielders, his wife, in an action
in tort to their damage Twenty-five thousand dol-
lars as is said; and have you then and there this
writ.

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Witness, David A. Depue, Esquire, a
Judge of our said Circuit Court
at Newark aforesaid the twenty-
fourth day of November, in the
year one thousand eight hundred
and ninety-nine.

WILLIAM O. KUEBLER,
Clerk.

Frederick E. Hodge,
Attorney.

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Pleas before the Judge of the Circuit Court to be holden at Newark, in and for the County of Essex on the eighth day of December, A. D. 1899.

ARTHUR HORTON,
Clerk.

Essex County, ss.:

10 To wit, North Jersey Street Railway Company, the defendant in this suit, was summoned to answer unto Robert A. Fielders and Louise E. Fielders, his wife, the plaintiffs therein, in an action in tort, and thereupon the said plaintiff, by Frederick E. Hodge, their attorney, complain:

For that whereas the said defendant before and at the time of committing the grievance herein-after mentioned, was the owner and proprietor
20 and by its servants had the management and control of a certain car which was propelled by electricity, and on a certain railroad track of and under the control and management of the said defendant, which said track was located upon and extended along, to wit, South Orange avenue, in the town of Vailesburg, in the County of Essex, and State of New Jersey, to and along, to wit, South Orange avenue, in the City of Newark, County of Essex aforesaid, to and along, to wit,
30 Springfield avenue, in the City of Newark, County of Essex aforesaid, to and along, to wit, Market street, in the City of Newark, County of Essex aforesaid, to and long, to wit, Mulberry street, in the City of Newark, County of Essex aforesaid, for the carriage and conveyance of passengers along said streets and divers other streets in said City of Newark aforesaid, to such points thereon as
40 the said passenger desire to alight therefrom, for hire and award to the said defendant, to wit, in Newark aforesaid.

And the said defendant being such owner and proprietor of said car and having the management and control of the said car as aforesaid, the said plaintiff, Louise E. Fielders, wife as aforesaid, thereupon heretofore, to wit, on the twelfth day of April, eighteen hundred and ninety-nine, at Newark, in the County of Essex aforesaid, at the special instance and request of the said defendant, became and was a passenger upon the said car, to be safely and securely carried and conveyed on a certain journey, and to be safely landed at the end of said journey, to wit, at Oak street, on Mulberry street, in the City of Newark aforesaid, for a certain fee and award to the said defendant in that behalf paid, and the said defendant then and there received the said plaintiff, Louise E. Fielders, wife as aforesaid, as such passenger, and it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff, Louise E. Fielders, wife as aforesaid, should be safe and securely carried on her said journey and safely and securely let off from said car at the end of her said journey, to wit, at Oak street, in the City of Newark, County of Essex aforesaid; yet the said defendant, not regarding its duty in that behalf, did not use due and proper care that the said plaintiff, Louise E. Fielders, wife as aforesaid, should be safely and securely carried on her said journey and let off the said car at the termination thereof, but wholly failed and neglected so to do; and the said plaintiff, Louise E. Fielders, wife as aforesaid, avers that on the day and year aforesaid, to wit, at Newark aforesaid, she, the said plaintiff, Louise E. Fielders, wife as aforesaid, being a passenger upon said car the said defendant, by its servants, did then and there negligently and carelessly manage and operate said car so, as aforesaid, running in and along, to wit, South Orange avenue, to and along,

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to wit, Springfield avenue, to and along, to wit, Market street, to and along, to wit, Mulberry street, in the City of Newark, aforesaid, and under the control and management of its said agent, and in response to the said plaintiff, Louise E. Fielders, wife as aforesaid, to stop the said car at her destination, to wit, at Oak street on Mulberry street, in the City of Newark aforesaid, did

10 not stop the said car at a safe and proper place for passengers to alight therefrom, but did stop said car at or near said destination at an unsafe and dangerous place at which to alight, and did invite and request said plaintiff, Louise E. Fielders, wife as aforesaid, to alight therefrom; and the plaintiff avers that the place where the platform of the car, being the only means of egress therefrom, was located when said car had come to

20 a stop, there was a deep hole or excavation in the ground not visible to said plaintiff, Louise E. Fielders, wife as aforesaid, and the existence of which said defendant was well aware; and the plaintiff, Louise E. Fielders, wife as aforesaid, in response to the invitation and request of said defendant to alight from said car, did, when the same had come to a stop at or near her destination to which the said defendant had invited the said plaintiff, Louise E. Fielders, wife as aforesaid,

30 step from said car, supposing and believing that it was a safe and proper place so to do, and was thrown violently into said hole of great depth, to wit, the depth of two feet, by means whereof said plaintiff, Louise E. Fielders, wife as aforesaid, was knocked down and severely wrenched and otherwise greatly injured, also by means of the premises said plaintiff, Louise E. Fielders, wife as

40 aforesaid, sustained severe and permanent injuries, and also by means of the premises said plaintiff, Louise E. Fielders, wife as aforesaid, became sick, sore, lame and disordered, and the

back and spine of the said plaintiff, Louise E. Fielders, wife as aforesaid, became paralyzed, bruised and injured, and the right knee cap became bruised and fractured and so remained and continued for a long space of time, to wit, hitherto, and was otherwise greatly and permanently injured, internally, and will continue in the future to be sick, sore, lame, paralyzed and disordered, during all of which said time said plaintiff, Louise E. Fielders, wife as aforesaid, suffered and underwent great pain and in the future will suffer and undergo great pain, to wit, in the County of Essex aforesaid, to her damage Twenty thousand dollars. 10

And also by means of the premises the said Robert A. Fielders, plaintiff, husband of the said Louise E. Fielders, during all that time from thence hitherto lost and was deprived of the company, aid and assistance of the said Louise E. Fielders, his wife, which he might and otherwise would have had; and the said Louise E. Fielders has, by reason of her said injuries, become permanently disabled from rendering and affording to the said Robert A. Fielders, husband as aforesaid, in the future, that aid, comfort and assistance in and about his household and domestic affairs that she otherwise would and could have done, and thereby also the said Robert A. Fielders lost the services and assistance of the said Louise E. Fielders, his wife, for a long space of time, to wit, from the day and year aforesaid up to and until the present time; and in the future will lose the services and assistance of the said Louise E. Fielders, his wife, as aforesaid. 20 30

And thereby also the said Robert A. Fielders was obliged and did devote and consume a large amount of time in attendance upon his said wife, and in the future will be obliged to devote and consume a large amount of time in attendance upon his said wife, and also by means of the premises 40

the said Robert A. Fielders suffered great apprehension and anguish of mind because of the said injuries to his said wife; and also by means of the premises the said Robert A. Fielders was obliged and forced to lay out and expend and did necessarily lay out and expend the sum of, to wit, One thousand dollars in and about endeavoring to cure his said wife, Louise E. Fielders, of the injuries aforesaid, and will in the future be obliged and forced to lay out and expend a large sum of money in the endeavor to cure his said wife of her said wounds, bruises and injuries aforesaid, to wit, at Newark, in the County of Essex aforesaid. To the damage of the said plaintiff, Robert A. Fielders, in the sum of Five thousand dollars.

And Whereas, also heretofore, to wit, on the day and year aforesaid, at Newark, in the County of Essex aforesaid, the said defendant was the owner and proprietor and by its servants had the management and control of a certain other car which was propelled by electricity, and on a certain railroad track of and under the control and management of the said defendant, and which said track was located upon and extended along, to wit, South Orange avenue, in the town of Vailesburg, in the County of Essex, and State of New Jersey, to and along, to wit, South Orange avenue, in the City of Newark, County of Essex aforesaid, to and along, to wit, Springfield avenue, in the City of Newark, County of Essex aforesaid, to and along, to wit, Market street, in the City of Newark, County of Essex aforesaid, to and along, to wit, Mulberry street, in the City of Newark, County of Essex aforesaid, for the carriage and conveyance of passengers along said streets and divers other streets in said City of Newark, to such points thereon as the said passenger desired to alight therefrom, for hire and reward to the said defendant, to wit, at Newark

aforesaid, and the said defendant being such owner and proprietor of such other car and having the management and control of the said last mentioned car as aforesaid, the said plaintiff, Louise E. Fielders, wife as aforesaid, thereupon heretofore, to wit, on the day and year aforesaid, at Newark in the County of Essex aforesaid, at the special instance and request of the defendant, became and was a passenger upon the said last mentioned car to be safely and securely carried and conveyed on a certain other journey and to be safely landed at the end of said journey, to wit, at Oak street on Mulberry street, in the City of Newark aforesaid, for a certain other fee and reward to the defendant in that behalf paid, and the defendant then received the said plaintiff, Louise E. Fielders, wife as aforesaid, as such passenger, and it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff, Louise E. Fielders, wife as aforesaid, should be safely and securely carried on her said journey, and to be safely set off said car at a place which would give the said plaintiff, Louise E. Fielders, wife as aforesaid, a reasonably safe way across Mulberry street, between the tracks of the defendant to her destination, to wit, Oak street on Mulberry street, in the City of Newark, County of Essex aforesaid. Yet the said defendant, not regarding its duty in that behalf, did not use due and proper care that the said plaintiff, Louise E. Fielders, wife as aforesaid, should be safely and securely carried on her said journey and let off the said last mentioned car at the termination thereof, at a place which would give the said plaintiff, Louise E. Fielders, wife as aforesaid, a reasonably safe way across Mulberry street, between the tracks of the defendant, but wholly failed and neglected so to do, and the said plaintiff, Louise E. Fielders, wife as aforesaid,

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avers that on the day and year aforesaid, to wit, at Newark aforesaid, she, the said plaintiff, Louise E. Fielders, wife as aforesaid, being a passenger upon said last mentioned car, and said defendant by its servants did then and there negligently and carelessly manage and operate the said last mentioned car so, as aforesaid, running in and along, to wit, South Orange avenue, to and along, to wit, Springfield avenue, to and along, to wit, Market street, to and along, to wit, Mulberry street, in the City of Newark aforesaid, and under the control and management of its said agents and in response to the request of the said plaintiff, Louise E. Fielders, wife as aforesaid, to stop the said last mentioned car at her destination, to wit, Oak street on Mulberry street, in the City of Newark, County of Essex aforesaid, did not stop the said last mentioned car at a place which would give the said plaintiff, Louise E. Fielders, wife as aforesaid, a reasonably safe way across Mulberry street, between the tracks of the said defendant, but did stop said last mentioned car at or near said destination at a place which gave the said plaintiff, Louise E. Fielders, wife as aforesaid, an unsafe and dangerous way across Mulberry street, between the tracks of the said defendant, and that said defendant well knew that in said way across Mulberry street, between the tracks of the defendant, there was a deep hole or excavation in the ground not visible to said plaintiff, Louise E. Fielders, wife as aforesaid, and the said plaintiff, Louise E. Fielders, wife as aforesaid in response to the invitation or request of the said defendant to use said way across Mulberry street, between the tracks of the defendant, did go along said way, supposing and believing that it was a safe and proper way across Mulberry street, between the tracks of the defendant, and stepped or was thrown violently into said hole of great

depth, to wit, two feet, and that without any fault or neglect on her part, by means whereof, the said plaintiff, Louise E. Fielders, wife as aforesaid, was knocked down, severely wrenched and otherwise greatly injured and wounded, and also by means of the premises the said plaintiff, Louise E. Fielders, wife as aforesaid, became and was sick, sore, lame and disordered and the back and spine of said plaintiff, Louise E. Fielders, wife as aforesaid, became paralyzed, bruised and injured, and the right knee cap became bruised and fractured, and so remained and continued for a long space of time, to wit, hitherto, and was otherwise greatly and permanently injured internally, and will continue in the future to be sick, sore, lame, paralyzed and disordered, during all which said time the said plaintiff, wife as aforesaid, suffered and underwent great pain, and in the future will suffer and undergo great pain. to wit. at Newark, in the County of Essex aforesaid, to her damage, Twenty thousand dollars.

And also by means of the premises, the said Robert A. Fielders, plaintiff, husband of the said Louise E. Fielders, during all that time from thence hitherto lost and was deprived of the company, aid and assistance of the said Louise E. Fielders, his wife, which he might and otherwise would have had, and the said Louise E. Fielders has by reason of her said injuries become permanently disabled from rendering and affording to the said Robert A. Fielders, husband as aforesaid, in the future that aid, comfort and assistance in and about his household and domestic affairs that she otherwise could and would have done. And thereby also the said Robert A. Fielders lost the services and assistance of the said Louise E. Field-

ers, his wife, for a long space of time, to wit, from the day and year aforesaid up to and until the present time; and in the future will lose the services and assistance of the said plaintiff, Louise E. Fielders, his wife as aforesaid.

10 And thereby also the said Robert A. Fielders was obliged to and did devote and consume a large amount of time and attendance upon his said wife, and in the future will be obliged to devote and consume a large amount of time in attendance upon his said wife, and also by means of the premises the said Robert A. Fielders suffered great apprehension, anguish and anxiety of mind because of the said injuries to his said wife.

20 And also by means of the premises the said Robert A. Fielders was obliged and forced to lay out and expend and did necessarily lay out and expend the sum of, to wit, One thousand dollars in and about endeavoring to cure his said wife of her said wounds, bruises and injuries aforesaid, and will in the future be obliged and forced to lay out and expend a large sum of money in the endeavor to cure his said wife of her said wounds, bruises and injuries aforesaid, to wit, at Newark, in the County of Essex aforesaid.

30 To the damage of the said plaintiff, Robert A. Fielders, in the sum of Five thousand dollars.

40 And Whereas, also heretofore, to wit, on the twelfth day of April, eighteen hundred and ninety-nine, at Newark, in the County of Essex aforesaid, the said defendant was the owner and proprietor, and by its servants operated a certain railroad along which cars were propelled by electricity on certain railroad tracks of and under the control and management of the said defendant, and which said track was located on and extended along, to wit, Mulberry street, a public street or highway in the City of Newark, County of Essex aforesaid, as well as upon several other public

streets or highways in the City of Newark, County of Essex aforesaid, and was engaged in the business of common carriers of passengers thereon.

And the plaintiff, Louise E. Fielders, wife as aforesaid, avers that the said public street or highway known as Mulberry street as aforesaid, at the time of committing the grievance herein-after mentioned, and from thence hitherto, was then and there, had been for a long time, and still is a common public street or highway for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, at their free will and pleasure, by reason whereof the said defendant ought to have conducted itself in and about the running, operating and conducting of the said railroad in a careful, prudent and safe manner in, on, upon and through the said public street or highway, well knowing the premises; yet the said defendant, disregarding its duty in that behalf, did then and there, at the time aforesaid, wrongfully, negligently, carelessly, improperly and unjustly tear up, excavate and dig holes in, on and upon said highway, and did wrongfully, negligently, carelessly, improperly and unjustly allow the said public street or highway between the tracks of the defendant to fall in and leave big holes therein, and so remain for a long space of time, by reason whereof the said street or highway was then and there extremely dangerous and hazardous for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, and subjected said persons so travelling to unnecessary dangers and risks, and to such dangers and risks as could and ought to have been provided against by said defendant, and did then and there negligently, carelessly, wrongfully, improperly and unjustly keep and continue the same therein for a long space of time without fixing, placing or causing

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to be fixed or placed any warning at or near the said holes or excavations to denote or warn or show persons travelling, going, returning, passing or repassing on foot or in, by and with coaches, carriages, wagons or other vehicles, that the same was then and there so extremely dangerous and hazardous.

10 And the plaintiff, Louise E. Fielders, wife as aforesaid, further avers that by means of the premises and in consequence of which said negligence, carelessness, imprudence and wrong conduct of the said defendant in that respect as aforesaid then and there done by said defendant, she, Louise E. Fielders, wife as aforesaid, while then and there travelling, going, returning, passing and repassing in and along said public street or highway on foot, as she had a right to do, and without
 20 any negligence, carelessness or fault on her part, she, the said plaintiff, Louise E. Fielders, wife as aforesaid, did then and there fall into and upon said holes and excavations, by reason whereof she, the said plaintiff, Louise E. Fielders, wife as aforesaid, was knocked down severely wrenched and otherwise greatly injured and wounded, and also by means of the premises the said plaintiff, Louise E. Fielders, wife as aforesaid, sustained severe and permanent injuries; and also by means of the
 30 premises the said plaintiff, Louise E. Fielders, wife as aforesaid, became and was sick, sore, lame and disordered and the back and spine of said plaintiff, Louise E. Fielders, wife, as aforesaid, became paralyzed, bruised and injured, and the right kneecap became bruised and fractured, and so remained and continued for a long space of time, to wit, hitherto, and was otherwise greatly and permanently injured internally, and will continue
 40 in the future to be sick, sore, lame, paralyzed and disordered, during all which said time the said plaintiff, wife as aforesaid, suffered and under-

went great pain, and in the future will suffer and undergo great pain, to wit, at Newark, in the County of Essex aforesaid, to her damage, Twenty thousand dollars.

And also by means of the premises, the said Robert A. Fielders, plaintiff, husband of the said Louise E. Fielders, during all that time from thence hitherto lost and was deprived of the company, aid and assistance of the said Louise E. Fielders, his wife, which he might and otherwise would have had, and the said Louise E. Fielders, has by reason of her said injuries become permanently disabled from rendering and affording to the said Robert A. Fielders, husband as aforesaid, in the future that aid, comfort and assistance in and about his household and domestic affairs that she otherwise could and would have done. And thereby also the said Robert A. Fielders lost the services and assistance of the said Louise E. Fielders, his wife, for a long space of time, to wit, from the day and year aforesaid up to and until the present time; and in the future will lose the services and assistance of the said plaintiff, Louise E. Fielders, his wife as aforesaid.

And thereby also the said Robert A. Fielders was obliged to and did devote and consume a large amount of time in attendance upon his said wife, and in the future will be obliged to devote and consume a large amount of time in attendance upon his said wife, and also by means of the premises the said Robert A. Fielders suffered great apprehension, anguish and anxiety of mind because of the said injuries to his said wife.

And also by means of the premises the said Robert A. Fielders was obliged and forced to lay out and expend and did necessarily lay out and expend the sum of, to wit, One thousand dollars in and about endeavoring to cure his said wife of her said wounds, bruises and injuries aforesaid,

and will in the future be obliged and forced to lay out and expend a large sum of money in the endeavor to cure his said wife of her said wounds, bruises and injuries aforesaid, to wit, at Newark, in the County of Essex aforesaid.

To the damage of the said plaintiff, Robert A. Fielders, in the sum of Five thousand dollars.

10 And whereas, also heretofore, to wit, on the twelfth day of April, Eighteen hundred and ninety-nine, at Newark, in the County of Essex aforesaid, the said defendant was the owner and proprietor, and by its servants operated a certain railroad along which cars were propelled by electricity on certain railroad tracks of and under the control and management of the said defendant, and which said tracks was located on and extended along, to wit, Mulberry street, a public street or highway in the City of Newark, County of Essex aforesaid, as well as upon several other public streets or highways in the City of Newark, County of Essex, aforesaid, and was engaged in the business of common carriers of passengers thereon.

20 And the plaintiff, Louise E. Fielders, wife as aforesaid, avers that the said public street or highway known as Mulberry street as aforesaid, at the time of committing the grievance hereinafter mentioned, and from thence hitherto, was then and there, had been for a long time, was and still is a common public street or highway for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, at their free will and pleasure.

30 And the said defendant, being the owner and operator of the said railroad and the tracks running along said Mulberry street, a public street or highway as aforesaid, it became and was the duty of the said defendant under an ordinance of the City of Newark, entitled, "An Ordinance Regu-

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lating Street Railways and Providing for the Paving and Repairing of the Streets through which said Railways are built or operated," which ordinance was adopted September 6, 1894, and approved September 7, 1894, a copy whereof is hereto annexed, and to which reference is hereby made, and made a part hereof, to keep in good and complete repair the said public street or highway between the tracks of the defendant on said public street or highway; yet the said defendant disregarding its duty in that behalf, did then and there at the time aforesaid, wrongfully, negligently, carelessly and improperly allow the said public street or highway between the tracks of the said defendant to become out of repair and to contain large holes, to wit, two feet in depth, in the said public street or highway between the said tracks and so to remain for a long space of time, by reason whereof the said street or highway was then and there extremely dangerous and hazardous for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, and subjected said persons so travelling to unnecessary dangers and risks, and to such dangers and risks as could and ought to have been provided against by said defendant, and did then and there negligently, carelessly, wrongfully, improperly and unjustly keep and continue the same for a long space of time without fixing, placing or causing to be fixed or placed any warning at or near the said holes or excavations to denote or warn or show persons travelling, going, returning, passing or repassing on foot or in, by and with coaches, carriages, wagons and other vehicles that the same was then and there so extremely dangerous and hazardous.

And the plaintiff, Louise E. Fielders, wife as aforesaid, further avers that by means of the premises and in consequence of which said negli-

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10 gence, carelessness, imprudence and wrong conduct
 of the said defendant in that respect as aforesaid
 then and there done by said defendant, she,
 Louise E. Fielders, wife as aforesaid, while then
 and there traveling, going, returning, passing and
 re-passing in and along said public street or high-
 way on foot, as she had a right to do, and without
 any negligence, carelessness or fault on her part,
 she, the said plaintiff, Louise E. Fielders, wife as
 20 aforesaid, did then and there fall into and upon
 said holes and excavations, by reason whereof,
 she, the said plaintiff, Louise E. Fielders, wife as
 aforesaid, was knocked down, severely wrenched
 and otherwise greatly injured and wounded, and
 also by means of the premises the said plaintiff,
 Louise E. Fielders, wife as aforesaid, sustained
 severe and permanent injuries; and also by means
 of the premises the said plaintiff, Louise E.
 30 Fielders, wife as aforesaid, became and was sick,
 sore, lame and disordered and the back and spine
 of said plaintiff, Louise E. Fielders, wife as afore-
 said, became paralyzed, bruised and injured, and the
 right knee cap became bruised and fractured, and so
 remained and continued for a long space of time,
 to wit, hitherto and was otherwise greatly and
 permanently injured internally, and will continue
 in the future to be sick, sore, lame, paralyzed and
 40 disordered, during all which said time the said
 plaintiff, wife as aforesaid, suffered and under-
 went great pain, and in the future will suffer and
 undergo great pain, to wit, at Newark, in the
 County of Essex aforesaid, to her damage, Twenty
 thousand dollars.

And also by means of the premises the said
 Robert A. Fielder, plaintiff, husband of the said
 Louise E. Fielders, during all that time from
 40 thence hitherto lost and was deprived of the com-
 pany, aid and assistance of the said Louise E.
 Fielders, his wife, which he might and otherwise

would have had, and the said Louise E. Fielders has by reason of her said injuries become permanently disabled from rendering and affording to the said Robert A. Fielders, husband as aforesaid, in the future that aid, comfort and assistance in and about his household and domestic affairs that she otherwise could and would have done. And thereby also the said Robert A. Fielders lost the service and assistance of the said Louise A. Fielders, his wife, for a long space of time, to wit, from the day and year aforesaid up to and until the present time; and in the future will lose the services and assistance of the said plaintiff, Louise E. Fielders, his wife as aforesaid.

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And thereby also the said Robert A. Fielders was obliged to and did devote and consume a large amount of time in attendance upon his said wife, and in the future will be obliged to devote and consume a large amount of time in attendance upon his said wife, and also by means of the premises the said Robert A. Fielders suffered great apprehension, anguish and anxiety of mind because of the said injuries to his said wife.

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And also by means of the premises the said Robert A. Fielders was obliged and forced to lay out and expend and did necessarily lay out and expend the sum of, to wit, One thousand dollars in and about endeavoring to cure his said wife of her said wounds, bruises and injuries aforesaid, and will in the future be obliged and forced to lay out and expend a large sum of money in the endeavor to cure his said wife of her said wounds, bruises and injuries aforesaid, to wit, at Newark, in the County of Essex aforesaid.

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To the damage of the said plaintiff, Robert A. Fielders, in the sum of Five thousand dollars.

And whereas, also heretofore, to wit, on the twelfth day of April, Eighteen hundred and ninety-nine, at Newark, in the County of Essex

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aforesaid, the said defendant was the owner and proprietor, and by its servants operated a certain railroad along which cars were propelled by electricity on certain railroad tracks of and under the control and management of the said defendant, and which said track was located on and extending along, to wit, Mulberry street, a public street or highway in the City of Newark, County of Essex aforesaid, as well as upon several other public streets or highways in the City of Newark, County of Essex aforesaid, and was engaged in the business of common carriers of passengers thereon.

And the plaintiff, Louise E. Fielders, wife as aforesaid, avers that the said public street or highway known as Mulberry street as aforesaid, at the time of committing the grievance hereinafter mentioned, and from thence hitherto, was then and there, had been for a long time, was and still is a common public street or highway for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, at their free will and pleasure.

And the said defendant, being the owner and operator of said railroad and the tracks running along said Mulberry street, a public street or highway as aforesaid, it became and was the duty of the said defendant under an ordinance of the City of Newark, entitled, "An Ordinance Regulating Street Railways and Providing for the Paving and Repairing of the Streets through which said Railways are built and operated," which ordinance was adopted September 6, 1894 and approved September 7, 1894, a copy whereof is hereto annexed, and to which reference is hereby made, and made a part hereof, it became and was the duty of the said defendant to re lay said pavement on said public street or highway between said tracks should the same become in any way disturbed, and the said defendant disregarding its-

duty in that behalf, did then and there at the time aforesaid, wrongfully, negligently, carelessly and improperly allow the said pavement on said public street or highway between the said tracks to become disturbed, and an excavation or large hole, to wit, two feet, to be and remain for a long space of time, to wit, three weeks, by reason whereof, the said street or highway became extremely dangerous and hazardous for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons, and other vehicles, and subjected said persons so travelling to unnecessary dangers and risks, and to such dangers and risks as could and ought to have been provided against by said defendant, and did then and there negligently, carelessly, wrongfully, improperly and unjustly keep and continue the same therein for a long space of time without fixing, placing or causing to be fixed or placed any warning at or near said holes or excavations to denote or ward or show persons travelling, going, returning, passing or repassing on foot or in, by and with coaches, carriages, wagons and other vehicles, that the same was then and there so dangerous and hazardous.

And the plaintiff, Louise E. Fielders, wife as aforesaid, further avers that by means of the premises and in consequence of which said negligence, carelessness, imprudence and wrong conduct of the said defendant in that respect as aforesaid then and there done by said defendant, she, Louise E. Fielders, wife as aforesaid, while then and there travelling, going, returning, passing and repassing in and along said public street or highway on foot, as she has a right to do, she, the said plaintiff, Louise E. Fielders, wife as aforesaid, did then and there fall into and upon said holes and excavations, by reason whereof, she, the said plaintiff, Louise E. Fielders, wife as aforesaid, was knocked down,

severely wrenched and otherwise greatly injured and wounded, and also by means of the premises the said plaintiff, Louise E. Fielders, wife as aforesaid, sustained severe and permanent injuries; and also by means of the premises the said plaintiff, Louise E. Fielders, wife as aforesaid, became and was sick, sore, lame and disordered and the back and spine of said plaintiff, Louise E. Fielders, wife as aforesaid, became paralyzed, bruised and injured, and the right knee cap became bruised and fractured, and so remained and continued for a long space of time, to wit, hitherto, and was otherwise greatly and permanently injured internally, and will continue in the future to be sick, sore, lame, paralyzed and disordered, during all which said time the said plaintiff, wife as aforesaid, suffered and underwent great pain, and in the future will suffer and undergo great pain, to wit, at Newark, in the County of Essex aforesaid, to her damage, Twenty thousand dollars.

And also by means of the premises the said Robert A. Fielders, plaintiff, husband of the said Louise E. Fielders, during all that time from thence hitherto lost and was deprived of the company, aid and assistance of the said Louise E. Fielders, his wife, which he might and otherwise would have had, and the said Louise E. Fielders has by reason of her said injuries become permanently disabled from rendering and affording to the said Robert A. Fielders, husband as aforesaid, in the future that aid, comfort and assistance in and about his household and domestic affairs that she otherwise could and would have done. And thereby also the said Robert A. Fielders lost the services and assistance of said Louise E. Fielders, his wife, for a long space of time, to wit, from the day and year aforesaid up to and until the present time; and in the future will lose the

services and assistance of the said plaintiff, Louise E. Fielders, his wife as aforesaid.

And thereby also the said Robert A. Fielders was obliged to and did devote and consume a large amount of time in attendance upon his said wife, and in the future will be obliged to devote and consume a large amount of time in attendance upon his said wife, and also by means of the premises the said Robert A. Fielders suffered great apprehension, anguish and anxiety of mind because of the said injuries to his said wife. 10

And also by means of the premises the said Robert A. Fielders was obliged and forced to lay out and expend and did necessarily lay out and expend the sum of, to wit, One, thousand dollars in and about endeavoring to cure his said wife of her said wounds, bruises and injuries aforesaid, and will in the future be obliged and forced to lay out and expend a large sum of money in the endeavor to cure his said wife of her said wounds, bruises and injuries aforesaid, to wit, at Newark, in the County of Essex aforesaid, to the damage of the said plaintiff, Robert A. Fielders, in the sum of Five thousand dollars. 20

And therefore, they, the said Robert A. Fielders and Louise E. Fielders, his wife, bring their suit, etc.

FREDERICK E. HODGE, 30
Plaintiff's Attorney.

Notice is hereby given that the following is a copy of the ordinance referred to in the foregoing declaration.

FREDERICK E. HODGE,
Plaintiff's Attorney.

An Ordinance Regulating Street Railways and Providing for Paving and Repairing in the Streets through which Street Railways are built or Operated. 40

Be it ordained, by the Board of Street and

Water Commissioner of the City of Newark, as follows:

10 Section 1. That when the tracks of any street railway have been or shall hereafter be laid in any street or avenue in the City of Newark which now is or at the time of the laying of the said tracks shall be unpaved, it shall be the duty of such street railway company or corporation laying said track or operating said railway to pave between the rails of said tracks and between said tracks and for one foot outside of each outer track with such pavement and in such manner as the Board of Street and Water Commissioners shall determine, and said pavement so laid shall, by the said company or its successors thereof, be kept in good and complete repair to the satisfaction of the Board of Street and Water Commissioners; or if not so kept
20 and maintained, the repairs thereto may be made by the said Board of Street and Water Commissioners, and the cost thereof shall be paid on demand by the said railway company to the said Board of Street and Water Commissioners, provided said board shall give at least ten days' notice in writing of its intention to make said repairs; the said notice to be served upon any officer or employee of said company who may be at the office of the company.

30 Section 2. Where the tracks of any street railway company have been or shall hereafter be laid in any paved street or avenue in the City of Newark, it shall be the duty of such street railway company laying said tracks or operating said railway to re-pave between the rails of said track and between the said tracks and for the space of one foot on the outside of each outer track and to
40 such further distance as may be necessary to bring the whole pavement of the street into proper conformity with the pavement of the street into proper

conformity with the pavement of the same character and equal in all respects and quality to the pavement with which the remaining portion of the street is paved. The said pavement shall be laid under the direction of the Board of Street and Water Commissioners, and to the satisfaction of said board. And the said pavement so laid shall, by the said company or its successors, thereafter be kept in good and complete repair to the satisfaction of the Board of Street and Water Commissioners; or if not so kept and maintained, the repairs thereto may be made by the said Board of Street and Water Commissioners, and the cost thereof shall be paid on demand by the said railway company to the said Board of Street and Water Commissioners, provided the said board shall give at least ten days' notice in writing of its intention to make said repairs. The said notice to be served upon any officer or employee of said company who may be found at the office of the company.

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Section 3. That where the Board of Street and Water Commissioners of the City of Newark shall cause any street or avenue to be paved or repaired, it shall be the duty of the said railway company owning or operating a street railway in the said street or avenue at the same time to pave or repave between its tracks and for the space of one foot on the outside of each outer track with such pavement and in such manner as the remaining portion of the street is paved or re-paved by the said board. The pavement shall be laid or relaid under the direction of the Board of Street and Water Commissioners, and to the satisfaction of said board. And the said pavement so laid shall, by the said company or its successors, thereafter be kept in good and complete repair to the satisfaction of the Board of Street and Water Commissioners; or if not so kept and maintained, the

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repairs thereto may be made by the said Board of Street and Water Commissioners, and the cost thereof shall be paid on demand by the said railway company to the said Board of Street and Water Commissioners, provided said board shall give at least ten days' notice in writing of its intention to make said repairs. The said notice to be served upon any officer or employee of said company who may be found at the office of the company.

Section 4. Where the tracks of any street railway company or any portion thereof shall be taken up by the said railway company for any reason whatever, or the pavement under the charge of the said railway company shall in any way be disturbed, it shall be the duty of the said railway company to at once relay the said pavement so disturbed or taken up, not only to the full width to which it has been so disturbed, but to such further distance as it may be necessary to again bring the whole pavement of the street into proper conformity, said work to be done under the direction of the said Board of Street and Water Commissioners, and to the satisfaction of the said board.

Section 5. That it shall be the duty of every street railway company owning or operating a street railway in the City of Newark to keep in thorough repair, to the satisfaction of the Board of Street and Water Commissioners, the crosswalks crossing said railway and for one foot outside the outer tracks of said railway, said crosswalks shall in every way be equal in quality to the remaining portion of the crosswalks. That all new crosswalks laid by said company shall consist of bridge stones not less than four feet in length and reaching between the tracks.

Section 6. That no street railway company or

company owning or operating any street railway in the City of Newark shall take up any pavement or crosswalk within the City of Newark except for the purpose of repairs, without the consent of the Board of Street and Water Commissioners, or the Superintendent of Works, and no street railway shall change the grade of its tracks or change or alter the grade of its tracks without the consent of the Board of Street and Water Commissioners. 10

Section 7. That in case any street railway company shall fail to pave any portion of its tracks pursuant to the terms of this ordinance to the satisfaction of the Board of Street and Water Commissioners, the Board of Street and Water Commissioners upon ten days' notice to the said company, may cause the said pavement to be laid or taken up and the said portion of the street to be paved or re-paved to the satisfaction of the Board of Street and Water Commissioners, and the said railway company shall upon demand pay to the Board of Street and Water Commissioners the cost thereof. 20

Section 8. The Board of Street and Water Commissioners reserves to itself the right to appoint one or more inspectors to inspect and supervise any paving or re-paving to be done by any street railway company pursuant to the terms of this ordinance, and the cost of such inspectors shall be refunded and paid to the Board of Street and Water Commissioners by the said railway company on demand, and all permits to lay down street railway tracks or to locate street railways or to open the streets for the relaying or repairing 30

of tracks shall be expressly subject to all the terms of this ordinance.

Adopted September 6, 1894.

Harrison Van Duyne,
Pres. of Board of Street and
Water Commissioners.

A. M. Linnett,
Clerk of the Board.

10 Approved September 7, 1894.

J. A. Lebknecker,
Mayor.

Frederick E. Hodge,
Plaintiff's Attorney.

20 And the said defendant by Charles L. Borgmeyer, its attorney comes and defends the wrong and injury when &c. and says that it is not guilty of the said supposed grievances above laid to its charge or any or either of them, in manner and form as the said plaintiff have above thereof complained against it, and of this it, the said defendant puts itself upon the country, &c.

C. L. BORGMEYER,
Attorney for Defendant.

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the Elizabeth and Newark Horse Railroad Company" which ordinance was approved November sixth, eighteen hundred and sixty-nine, a copy whereof is hereto annexed and to which reference is hereby made and made a part hereof and that to wit, on August eighteen, eighteen fifty-nine the Common Council of the City of Newark passed an ordinance, entitled "An Ordinance to regulate Passenger Railways" which ordinance was approved

10 August eighteenth, eighteen hundred and fifty-nine, a copy whereof is hereto annexed and to which reference is hereby made and made a part hereof and that, to wit, on the second day of February, eighteen hundred and seventy two the Common Council of the City of Newark passed an ordinance, entitled "A further Supplement to the Ordinance entitled 'An Ordinance concerning the Elizabeth and Newark Horse Railroad Company

20 Approved November sixth, eighteen hundred and sixty nine,' " which supplement was approved February second, eighteen hundred and seventy two, a copy whereof is hereto annexed and to which reference to hereby made and made a part hereof and that to wit, on the seventeenth day of February, eighteen hundred and seventy-two the Elizabeth and Newark Horse Car Railroad Company covenanted and agreed, and a copy whereof is here-

30 to annexed and to which reference is hereby made and made part hereof to and with the Mayor and Common Council of the City of Newark that it should and would in all things comply with the provisions of the ordinance of the City of Newark entitled "An ordinance to Regulate Passenger Railways" approved August eighteenth A. D., eighteen hundred and fifty-nine and the supplements thereto and the plaintiff, Louise E. Fielders, wife as aforesaid, avers that by means of the

40 premises the duty of repairing and maintaining the street pavement between its tracks was im-

posed upon the said Elizabeth and Newark Horse Railroad Company as a condition of its right to exercise its franchise and that on, to wit, the twelfth day of April, eighteen hundred and ninety-nine, at Newark, in the County of Essex aforesaid, the said defendant was possessed of and exercising the aforesaid franchise of the Elizabeth and Newark Horse Railroad Company and by its servants operated the said railroad along which cars were propelled by electricity on certain railroad tracks of and under the control and management of the said defendant and which said tracks were located on and extended along, to wit, Mulberry street, a public street or common highway in the City of Newark, in the County of Essex aforesaid, as well as upon several other public streets for highways in the City of Newark, in the County of Essex aforesaid and was engaged in the business of common carrier of passengers thereon.

And the plaintiff, Louise E. Fields, wife as aforesaid, avers that the said public street or highway, known as Mulberry street as aforesaid, at the time of committing the grievances hereinafter mentioned, and from hence hitherto, was then and there, had been for a long time, was and still is a common highway or public street for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles at their free will and pleasure.

And the said defendant, being possessed of, and exercising the aforesaid franchise of the Elizabeth and Newark Horse Railroad Company as aforesaid it thereby became and was the duty of the said defendant as a condition of its right to exercise the aforesaid franchise to repair, repave and keep in good order the said street between its tracks; yet the said defendant disregarding its duty in that behalf, did then and there at the time aforesaid, wrongfully, negligently, carelessly and im-

properly allow the said public street or highway, between the tracks of the defendants railroad to become out of repair and to contain large holes, to wit, two feet in depth in the said public street or highway between the said tracks and so to remain for a long space of time, by reason whereof the said street or highway was then and there extremely dangerous and hazardous for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, and subjected said persons so prevailing to unnecessary dangers and risks, and to such dangers and risks as could and ought to have been provided against by said defendant, and did then and there negligently, carelessly, wrongfully, improperly and unjustly keep and continue the same therein for a long space of time without fixing, placing or causing to be fixed or placed any warning at or near the said holes or excavations to denote or warn or show persons travelling, going, returning, passing or repassing on foot or in, by and with coaches, carriages, wagons or other vehicles that the same was then and there so extremely dangerous and hazardous.

And the plaintiff, Louise E. Fielders, wife as aforesaid, further avers that, by means of the premises and in consequence of which said negligence, carelessness, imprudence and wrong conduct of the said defendant in that respect as aforesaid then and there done by the said defendant, she, Louise E. Fielders, wife as aforesaid, while then and there travelling, going, returning, passing and repassing in and along said public street or highway on foot, as she had a right to do, and without any negligence, carelessness or fault on her part, she the said plaintiff, Louise E. Fielders, wife as aforesaid, did then and there fall into and upon said holes and excavations, by reason whereof, she, the said plaintiff, Louise E. Fielders, wife

as aforesaid, was knocked down, severely wrenched and otherwise greatly injured and wounded, and also by means of the premises the said plaintiff, Louise E. Fielders, wife as aforesaid, sustained severe and permanent injuries: and also by means of the premises the said Louise E. Fielders, wife as aforesaid, became and was sick, sore, lame and disordered and the back and spine of the said plaintiff, Louise E. Fielders, wife as aforesaid, became paralyzed, bruised and injured, and the right knee cap became bruised and fractured, and so remained and continued for a long space of time, to wit, hitherto and was otherwise greatly and permanently injured internally and will continue in the future to be sick, sore, lame, paralyzed and disordered, during all of which said time the said plaintiff, wife as aforesaid, suffered and underwent great pain, and in the future will suffer and undergo great pain, to wit, at Newark, in the County of Essex aforesaid, to her damage, Twenty thousand dollars.

And whereas, also, heretofore, to wit, on the twenty-fifth day of March, eighteen hundred and sixty four, Elizabeth and Newark Horse Railroad Company was incorporated by an act of the legislature of the State of New Jersey, entitled "An Act to incorporate the Elizabeth and Newark Horse Railroad Company" which act was approved March twenty-fifth, eighteen hundred and sixty-four, a copy whereof is hereto annexed and to which reference is hereby made and made a part hereof, and that on, to wit, the first day of April, eighteen hundred and sixty-nine, the legislature of the State of New Jersey passed a supplement to the foregoing act entitled "A Further Supplement to an act entitled 'An Act to incorporate the Elizabeth and Newark Horse Railroad Company'" approved March twenty-fifth, eighteen hundred and sixty-four which act was ap-

proved April first, eighteen hundred and sixty-nine, a copy whereof is hereto annexed and to which reference is hereby made and made a part hereof and that, to wit, on November the fifth, eighteen hundred and sixty-nine the Common Council of the City of Newark passed an ordinance, entitled "An Ordinance concerning the Elizabeth and Newark Horse Railroad Company" which ordinance was approved November sixth, 10 eighteen hundred and sixty-nine, a copy whereof is hereto annexed and to which reference is hereby made and made a part hereof and that, to wit, on August eighteenth, eighteen hundred and fifty-nine the Common Council of the City of Newark passed an ordinance, entitled "An Ordinance to regulate Passenger Railways" which ordinance was approved August eighteenth, eighteen hundred and fifty-nine, a copy whereof is hereto annexed and to which reference is hereby made and made a part hereof and the plaintiff, Louise E. 20 Fielders, wife as aforesaid, avers that by means of the premises the duty of repairing and maintaining the street pavement between its tracks was imposed upon the said Elizabeth and Newark Horse Railroad Company as a condition of its right to exercise its franchise and that on, to wit, the twelfth day of April, eighteen hundred and 30 ninety-nine, at Newark, in the County of Essex aforesaid, the said defendant was possessed of and exercising the aforesaid franchise of the Elizabeth and Newark Horse Railroad Company and by its servants operated the said railroad along which cars were propelled by electricity on certain railroad tracks of and under the control and management of the said defendant and which said tracks were located on and extended along, to wit, Mulberry street, a public street or common highway 40 in the City of Newark, in the County of Essex aforesaid, as well as upon several other public

streets or highways, in the City of Newark, in the County of Essex, aforesaid, and was engaged in the business of common carrier of passengers thereon.

And the plaintiff, Louise E. Fielders, wife as aforesaid, avers that the said public street or highway, known as Mulberry street as aforesaid, at the time of committing the grievances hereinafter mentioned, and from thence hitherto, was then and there, had been for a long time, was and still is a common highway or public street for all persons to go, return, pass and repass on foot, in, by and with coaches, wagons and other vehicles, at their free will and pleasure. 10

And the said defendant, being possessed of, and exercising the aforesaid franchise of the Elizabeth and Newark Horse Railroad Company as aforesaid, it thereby became and was the duty of the said defendant as a condition of its right to exercise the aforesaid franchise to repair, repave and keep in good order the said street between its tracks: yet the said defendant disregarding its duty in that behalf, did then and there at the time aforesaid, wrongfully, negligently, carelessly and improperly allow the said public street or highway, between the tracks of the defendants railroad to become out of repair and to contain large holes, to wit, two feet in depth in the said public street or highway between the said tracks and so to remain for a long space of time, by reason whereof the said street or highway was then and there extremely dangerous and hazardous for all persons to go, return, pass and repass on foot, in, by and with coaches, carriages, wagons and other vehicles, and subjected said persons so travelling to unnecessary dangers and risks, and to such dangers and risks as could and ought to have been provided against by said defendant, and did then and there negligently, care- 20 30 40

lessly, wrongfully, improperly and unjustly keep and continue the same therein for a long space of time without fixing, placing or causing to be fixed or placed any warning at or near the said holes or excavations to denote, warn or show persons travelling, going, returning, passing or repassing on foot or in, by and with coaches, carriages, wagons or other vehicles that the same was then and there so extremely dangerous and hazardous.

10 And the plaintiff, Louise E. Fielders, wife as aforesaid, further avers that, by means of the premises and in consequence of which said negligence, carelessness, imprudence and wrong conduct of the said defendant in that respect as aforesaid then and there done by the said defendant, she, Louise E. Fielders, wife as aforesaid, while then and there travelling, going, returning, passing and repassing in and along said public street or
 20 highway on foot, as she had a right to do, and without any negligence, carelessness or fault on her part, she the said plaintiff, Louise E. Fielders, wife as aforesaid, did then and there fall into and upon said hole and excavation, by reason whereof, she the said plaintiff, Louise E. Fielders, wife as aforesaid, was knocked down, severely wrenched and otherwise greatly injured and wounded, and also by means of the premises the
 30 said plaintiff, Louise E. Fielders, wife as aforesaid, sustained severe and permanent injuries; and also by means of the premises the said Louise E. Fielders, wife as aforesaid, became and was sick, sore, lame and disordered and the back and spine of the said plaintiff, Louise E. Fielders, wife as aforesaid, became paralyzed, bruised and injured, and the right knee cap became bruised and fractured and so remained and continued for a long space of
 40 time, to wit, hither to and was otherwise greatly and permanently injured internally and will continue in the future to be sick, sore, lame, para-

lyzed and disordered, during all of which said time the said plaintiff, wife as aforesaid, suffered and underwent great pain, to wit, at Newark, in the County of Essex aforesaid, to her damage, Twenty thousand dollars, and therefore she brings her suit, etc.

FREDERICK E. HODGE,
Plaintiff's Attorney.

Notice is hereby given that the following are copies of the laws and ordinances and agreements referred to in the foregoing declaration.

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FREDERICK E. HODGE,
Plaintiff's Attorney

An Act to incorporate the Elizabeth and Newark Horse Railroad Company.

1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That Benjamin Williamson, Joseph P. Bradley, Richard P. Haines, Amos Clark, Jr., Joseph Cross, William J. Magie, John Chetwood, Anthony Q. Keasby, Joseph C. Young, John McGregor, Joseph Battin, and such other persons as may hereafter be associated with them shall be, and are hereby made, constituted and declared a body politic and corporate, in fact and in law, by the name of "The Elizabeth and Newark Horse Railroad Company," and by that name shall be capable of purchasing, holding and conveying lands, tenements, real estate, goods and chattels, necessary or proper for the object of said corporation.

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2. And be it enacted, That the amount of the capital stock of said corporation shall be Fifty thousand dollars, with the privilege of increasing the same to One hundred thousand dollars, and shall be divided into shares of Twenty-five dollars each which shall be deemed personal property, and

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transferable in such manner as the said corporation shall by their by laws direct.

3. And be it enacted, That the above named persons, or a majority of them, shall be commissioners to open books, to receive subscriptions to the capital stock of said corporation at such time or times, and place or places, in the City of Elizabeth or Newark, or both, as they or a majority of them think proper, giving at least
10 twenty days' notice of the same, in one newspaper published in each of the cities of Newark and Elizabeth respectively; and at the time of subscribing ten per centum of the value of each share subscribed shall be paid to the commissioners, or one of them; and as soon as Thirty thousand dollars of the capital stock shall be subscribed, said commissioners shall give like notice for a meeting
20 of the stockholders to choose seven directors, a majority of whom shall be residents of this State, and citizens thereof, and such election shall be made at the time and place appointed, by such of the stockholders as shall attend for the purpose, either in person or by proxy, each share of the capital stock entitling the holder thereof to one vote; and the above named persons, or any three of them, shall be inspectors of the first election of
30 directors of the said corporation, and shall certify under their hands, the names of the persons duly elected; and deliver over the subscription books and all moneys paid in (after deducting all expenses previously incurred), to such directors so elected; and annually after said first election of directors, at a time and place to be fixed by the by-laws of said corporation there shall be a meeting of the stockholders to choose seven directors, a majority of whom shall be citizens of this State,
40 which election shall be conducted in accordance with the rules fixed by the by-laws of said cor-

poration, and which directors shall hold their office for one year after their being so chosen.

4. And be it enacted, That in case it shall happen that an election of directors should not be held upon the day when, pursuant to this act it ought to be made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time, giving ten days' notice, in the manner provided by law, and the directors for the time being shall continue in office until others shall have been chosen in their place; and in case of the death, resignation or removal of any director during the year for which he may have been chosen, such vacancy may be filled by the remaining directors, or a majority of them. 10

5. And be it enacted, That four directors of said corporation shall be competent to transact all business of said corporation, and shall have power to call in the capital stock of said corporation, to be paid by such installments, and at such times as they may direct, and in case of the non payment of such installments, or any of them, to forfeit the share or shares upon which such default shall arise, or at their option to sue for and recover the installments due and unpaid; to make such by-laws, rules and regulations as shall appear proper, concerning the business of said corporation, and to appoint such officers, clerks and servants, and fix for them such salaries and wages as to them shall seem proper. 20 30

6. And be it enacted, That said corporation shall have power and authority to lay down and construct a railroad, with the necessary turnouts and switches, from some point on Broad street, within the boundaries of the City of Elizabeth, at or near the present depot of the New Jersey Railroad and Transportation Company, on Morris 40

street; thence along Broad street and the Newark road to the boundary of the said City; thence through such streets and roads as are now or may hereafter be opened in the township of Clinton and City of Newark, in and to such terminus in the City of Newark as shall be selected by said corporation, not being north of Chestnut street in said City of Newark; provided, that the right to
 10 construct the said railroad through any of the streets or roads within the City of Elizabeth shall not vest in the said corporation until the consent of the City of Elizabeth shall be first had and obtained of the City Council.

7. And be it enacted, That the track laid by said corporation shall be of the same width as the wagon track now established by law, and the same shall be laid, in all streets within the limits of
 20 said Cities of Newark and Elizabeth, level with the surface of said streets, and in conformity with the grades thereof, which now are or hereafter may be established by the municipal authorities of said cities respectively; and in all cases the rails of such track shall be so laid as to present no unnecessary obstructions to, or in any way interfere with the wagons or other vehicles turning in or crossing said streets or roads through or over which said road or its turnouts or switches may
 30 be laid.

8. And be it enacted, that the said corporation may purchase, have and hold real estate at each terminus of its road, and at such places, not exceeding two, along the line of said road, as they may desire, not however exceeding three acres at each place, or twelve acres in the aggregate, and may erect and build thereon houses, depots, ware-
 40 houses, stables, machine shops, and such other buildings and improvements as may be necessary for carrying out the objects of the said corporation.

9. And be it enacted, that the president and directors of said corporation shall declare and make such dividends as they may deem prudent and proper, from time to time, out of the net profits of the said railroad.

10. And be it enacted, that the president and directors of said corporation shall have power to purchase, or to have constructed with the funds of said corporation all such machinery, cars, wagons, carriages or other vehicles, for the transportation of persons or property on their railroad, as they may think fit, expedient or right, and also to purchase such horses or mules as they shall deem fit for the purpose of said corporation, provided however, that no steam power shall be used as a motive power upon said railroad, except that known as the dummy engines and that they are hereby authorized to demand and receive such sum or sums of money for the transfer of persons or property upon said railroad as they shall think reasonable and proper; provided, that not more than thirteen cents shall be demanded or received for conveying any person from any one point to another upon said railroad.

11. And be it enacted, that if any person or persons shall willfully or maliciously impair, injure, destroy or obstruct said railroad or any of its works, turnouts, switches, carriages, animals or machines, such person or persons shall forfeit and pay therefor to said corporation three times the amount of damage sustained by means of such injury, to be recovered in the name of said corporation, with costs of suit, in any court having cognizance of the same.

12. And be it enacted, that the said corporation shall have power to borrow such sum or sums of money, from time to time, as shall be necessary to build, construct, repair or equip said road, and to

secure the payment thereof, by bond and mortgage or otherwise, on the said railroad, lands, privileges, franchises and appurtenances of the said corporation, at a rate of interest not exceeding seven *per centum* per annum.

13. And be it enacted, that it shall be lawful for said corporation at any time to make contracts and engagements with any other corporation, or with
 10 individuals, for operating said railroad, for transporting or conveying any kind of goods, merchandise, freight or passengers, and to enforce the fulfilment of such contracts, and to demand and receive for such transportation by them carried over the road of any other company the same rates of fare and tolls as said corporation are entitled to receive by virtue of this act for transportation and passage over their road; and also to connect with
 20 any railroad or railroads in said City of Newark, or in said City of Elizabeth, now incorporated, or hereafter to be incorporated, upon such terms and conditions as may be agreed upon between them, and not inconsistent with their respective charters.

14. And be it enacted, that as soon as the railroad is finished, the president of said corporation shall file, under oath or affirmation, a statement of the cost of the said railroad including all expenses, in the office of the secretary of state; and
 30 annually thereafter he shall, under oath or affirmation, make a statement to the legislature of the proceeds and expenses of said road; and as soon as the said corporation shall declare to the stockholders dividends equal to seven *per centum* per annum from and after the commencement of the building of said road, and so long as said corporation pays dividends of seven per centum per
 40 annum, said corporation shall pay to the treasurer of this state a tax of one-half of one per centum on the cost of the said road, to be paid annually,

on the first Monday in January; provided, that no other tax or impost shall be levied or raised from said corporation by virtue of any law of this state.

15. And be it enacted, that said company shall, within the limits of the City of Elizabeth, in all things be subject to the provisions of the charter and ordinances of said city now or hereafter to be in force; whenever any street or road in said city, occupied by said company with their tracks or turnouts, shall be paved by order of the city council, the said company shall pay the cost and expense of paving between the rails of their tracks and turnouts, and three feet on the outer side of said rails, the said cost and expense to be assessed upon the said company as directed by the city charter for assessing the cost and expense of paving any street in said city, and the said assessment shall become a lien upon the property of said company within the said city, in the same manner that similar assessments are a lien upon real estate therein; and that whenever the said company shall occupy with their tracks or turnouts any street within said city, which before the time of such occupation had been paved, they shall pay to the said city such amount of the cost and expense of said pavement as may have been expended in paving between the rails of said tracks and turnout, and three feet on the outside of said rails, and shall relay said pavement and place the same in as good repair as the same was at the time of such occupation by them; the said money shall be paid by the said city to the persons owning property along said street at the time of said payment, proportionately to the amount of the whole original cost and expenses of said pavement actually paid by the owners of said property; and further, that said company shall keep the pavement between their rails and three feet on the outside thereof in repair, at their own expense.

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16. And be it enacted, that the governor, chancellor, judges of the Supreme Court, and the members and officers of the legislature, be entitled to ride free on said road.

17. And be it enacted, that it shall be competent for the legislature of this state to alter, amend or repeal this act or any portion thereof.

10 18. And be it enacted, that this act shall take effect immediately.

Approved March 25th, 1864.

A further supplement to an act entitled "An Act to incorporate the Elizabeth and Newark Horse Railroad Company" approved March twenty-fifth, eighteen hundred and sixty-four.

20 1. Be it enacted by the Senate and General Assembly of the State of New Jersey, that the Elizabeth and Newark Horse Railroad Company be and they are hereby authorized, in addition to the railroad and branches authorized to be constructed by the act to which this is a supplement and the several supplements thereto, to lay down and construct a railroad, with all the necessary turnouts and switches thereto, and with a single or double track upon and along any street or streets now open or hereafter to be opened in
30 the City of Newark, lying east of Broad street in said city, from the terminus of the road of said company within the said city, now authorized by said act and the several supplements thereto to a point at or near the depot of the New Jersey Railroad and Transportation Company, called the Centre street depot, and thence to a point at or near the depot of the Morris and Essex Railroad Company; provided, that the right to construct
40 the said road or roads through any street within the City of Newark shall not be vested in the said corporation until the consent of the common council of said city shall first be had and obtained.

2. And be it enacted, that in the construction, equipment, management, running and operation of said additional road, the said corporation shall have and possess all the powers, authority and privileges granted to or conferred upon them by said act and the several supplements thereto, in relation to the railroad, extensions and branches authorized thereby.

3. And be it enacted, that the said corporation may purchase, have and hold such real estate as they may desire, along the line of the additional road hereby authorized, at not more than three places, and not to exceed ten acres in all, in addition to the real estate they are authorized to hold by said act and said supplements thereto. 10

4. And be it enacted, that said corporation be and they are hereby authorized to increase their capital stock one hundred thousand dollars in addition to the capital stock now authorized by said act and said supplements thereto, which increase shall be divided into shares of twenty-five dollars each, and be deemed personal property and transferrable as directed by said act; and that in regard to the construction, equipment and repair of the additional road hereby authorized, the said corporation shall have the same powers and authority to borrow money therefor, and to secure the payment of the same as by Section twelve of said act is conferred upon them in regard to the railroad authorized by said act and by the supplements thereto. 20 30

5. And be it enacted, that this act shall take effect immediately.

Approved April 1, 1869.

An ordinance concerning the Elizabeth and Newark Horse Railroad Company. 40

Be it ordained by the Common Council of the City of Newark, as follows:

Section 1. That consent be and is hereby granted to the Elizabeth and Newark Horse Railroad Company to lay one railway track with proper and necessary switches and turnouts from the southerly line of the city limits, through Elizabeth avenue to Miller street, through Miller street to Pennsylvania avenue, through Pennsylvania avenue to Thomas street, through Thomas street to New Jersey Railroad avenue, through New Jersey Railroad avenue to Mulberry street, and through Mulberry street to Centre street as provided by their charter, provided that the right and privilege hereby granted shall be subject to all and singular the terms, limitations and restrictions, provisions and conditions contained in the ordinance entitled "An Ordinance to regulate Passenger Railways" and further supplements thereto not inconsistent with the provisions of this ordinance and provided further that the said track, switches and turnouts shall be laid with such width and form of rail or rails and in such manner as shall be approved by the committee of the common council on horse railroads and under the supervision of the Street Commissioner and City Surveyor.

Passed November 5th, 1869.

Approved November 6th, 1869.

30 An Ordinance to regulate Passenger Railways.

Be it ordained by the Common Council of the City of Newark, as follows:

Section 1. That all passenger railroad companies in the City of Newark, and all individuals to whom any right or privilege of laying down any railroad track or tracks in said city shall be granted, shall be (as shall such grant also be) subject to the limitations, provisions, terms and conditions herein-
 40 after set forth and provided, and every such company and all such individuals shall be held and deemed to hold their rights and privileges to lay

and use such track or tracks under, upon, and subject to all and singular the said terms, limitations, restrictions, provisions and conditions.

Section 2. It shall be the duty of every such company and all such individuals to employ careful, sober and prudent agents, conductors and drivers, to take charge of their cars when upon their road, and for the violation of any ordinance of the city, on the part of any such officer or officers, employee or employees upon said road, and for all injuries caused by any neglect, misconduct or carelessness of its agents, servants or employees, or any of them, the company or individual, proprietor or proprietors, of the road shall be liable to all fines, forfeitures, penalties and damages arising therefrom, or by ordinance attached thereto, provided, however that nothing in this ordinance shall be deemed or taken to excuse, discharge, or in any manner free any such officer or employee from the penalties or responsibilities of any such violations or other acts by them committed.

Section 3. The running speed of the cars upon any city passenger railroad shall not at any time be at a greater rate than six miles an hour in the paved or built up portions of the city, nor shall said cars incommode the crossways, nor stop at the corner of any street or elsewhere, to solicit passengers. It shall also be the duty of the conductors and drivers of the cars to give ample notice to drivers of vehicles and pedestrians of their approach, and also to afford all reasonable opportunity for them to avoid collision or accident; and any neglect by any such conductor or driver to comply with the provision of this section shall be punishable by a fine of five dollars, to be recovered before any police justice of the city, and paid into the city treasury; and the mayor of the

city is, in case of the violation of either of the provisions of this section, empowered to revoke the license of any car, the conductor or driver whereof shall be guilty of such violation of the provisions of this section or either of them, and such car shall not be permitted to be again placed on the road until such license is renewed.

- 10 Section 4. Should any such company, corporation or individual proprietor or proprietors neglect to run cars upon their road or roads for the accommodation of the public, for the space of three consecutive months, the common council reserve the right to rent the said road or roads to any other person or persons, company or companies, who will be willing to run cars on the same; or in the event of the common council being unable so to rent said road, or to place cars upon the same for
 20 six months after the same shall have been abandoned, as aforesaid, by the company or individual or individuals owning the same, then, and in such case, the common council reserve the right to cause the said road or roads to be removed from the streets or highways of the city, and to sell or dispose of the materials thereof, and after paying thereout all expenses of such removal and sale and of repairing said street or highway, pay the balance, if any, to the legal representatives of said
 30 defaulting company or owner or owners.

- Section 5. Every passenger railroad company, and all individuals to whom any authority shall be granted to lay down a railroad track or tracks in the City of Newark, shall file or cause to be filed in the office of the City Clerk a written obligation duly executed by themselves or their proper and lawful officers to comply with the provisions of this ordinance; and no railroad company
 40 now incorporated shall be authorized to commence work upon any of the streets or highways of the

city until the foregoing provision of this section has been complied with by them; and a failure to file such written obligations within thirty days after the approval by the mayor of the ordinance granting to any company or companies, individual or individuals, the right to lay a track or tracks shall be taken and deemed as a refusal so to do on the part of such grantee or grantees, and thereupon all right and privilege to them granted by such ordinance shall forever cease and be at an end. 10

Section 6. No greater sum shall be charged or received as fare or toll for the carrying of passengers for any distance within the city limits than five cents for each passenger, and the common council shall have the power to prescribe the frequency of the trips of the cars when in their judgment necessary or proper for the public convenience. 20

Section 7. Bells of proper size and tone to notify foot passengers and others passing in or crossing the streets or highways in which any railway shall be constructed, of the approach of the cars, shall be attached to the horses drawing each car.

Section 8. No motive power other than horse or mule power shall be used on any such railway.

Section 9. The conductors and drivers of all railroad cars shall be subject to the same penalties as hackmen, omnibus drivers, and cabmen in the City of Newark are subject to under the ordinances of the city, for any violation of good order and decency, and for any act prohibited to hackmen, omnibus drivers, cabmen, or any of them, by any ordinance of the City of Newark. 30

Section 10. The cars used upon all railways in the City of Newark shall be of proper and convenient size and number for the proper accommodation of the travellers thereupon, and shall be in all re- 40

spects convenient for the purpose. No cars shall be run upon any such railway track on Sunday.

Section 11. The proprietor or proprietors of every such passenger railway shall lay flag-stones or crossings of not less than two feet in width across the entire width of all paved streets occupied by them, as each and every public lane, street, or alley opening upon any street or highway upon which the rails are laid, and where no such street, lane or alley opens thereon, then the said flagging shall be at distances of not exceeding two hundred and fifty feet.

Section 12. All streets or highways which are unpaved at the time of laying any railway tracks, shall be kept in repair and in good travelling condition by the company or individuals owning the railroad, until the same shall be ordered to be paved by the common council; and, in all streets which are paved at the time of making such grant, they shall be required to keep in good order the width of the tracks (and if there are double tracks, between the same), and for the space of five feet on the outside of said tracks. When the same shall be so ordered, said streets or highways shall for the width of the tracks (and if there are double tracks, between the same), and five feet outside of said tracks be paved, and afterwards repaved, repaired and kept in good order at the expense of said company or individuals. All street or highways which require grading preparatory to laying of said tracks, shall be graded by, or at the expense of said company or individuals, to the same extent as in the case of paving above mentioned and afterwards kept in repair as above directed—all such work to be done under the direction of, and on notice by the street commissioner.

Sec. 13. The proprietor or proprietors of every passenger railroad shall remove any gravel, dirt,

material or other obstructions placed by him or them on any street, within forty-eight hours after notice shall have been given to him or them, or to any officer of said proprietor or company, by the street commissioner, and if he or they shall fail to comply with the provisions of this section according to the terms of the notice served upon him or them, the street commissioner shall cause such paving, repaving and repairing said streets to be done and remove such gravel, dirt, materials or other obstructions, the cost of which shall be collected of and from said proprietor or proprietors by the City of Newark. 10

Sec. 14. Each and every passenger railway company, or the individuals or individual owning any such passenger railway, shall pay to the city clerk, in the month of January of each year, for the use of the City of Newark, Ten dollars for each car to be run on their road, and for each and every car placed upon any road before the time herein provided for paying the license, a proportionate sum shall be paid until the succeeding January, and that no car shall be placed or run upon any road or street, until it shall be regularly licensed, and a certificate duly numbered hung in a conspicuous place in said car. 20

Sec. 15. No connection of one railroad with another shall be made in the City of Newark without the consent and authority of the common council first had and obtained; and the common council may authorize any such connection at their discretion for the purpose of completing a route or making a circuit, and also the use for such purpose by the owners of any railroad of the railroad wherewith the same shall be so connected, from the place of said connection for any distance not exceeding one mile, the owner or owners of the railroad with which such connection may be so 30 40

made to receive from the owner or owners of the connecting railway such compensation, and that road to be used on such terms and conditions as they may mutually agree upon for such use of the railway with which such connections may be made, or in case of their failure to come to a mutual agreement thereupon, them on such terms and conditions and for such sum as may be fixed therefor by the Mayor of the City of Newark, and two indifferent persons to be chosen by the proprietors of the railways (one by each party) or a majority of them.

10 Sec. 16. No passenger railway shall, at any time, be used for any other purpose than for passenger travel.

20 Sec. 17. The track or tracks to be laid down for any railway shall be five feet two inches gauge, of the best and most approved pattern and description for city railways, and shall be approved by the common council, shall be such as to present the least obstruction in every respect to ordinary wagon travel, and calculated and laid to facilitate as much as is practicable the use thereof by ordinary wagons and vehicles.

30 Sec. 18. Whenever and wherever it may be found necessary to lay iron plates or other material across any gutter along the line of any railroad, the same shall be laid by and at the expense of the proprietor or proprietors of such railroad, from curbstone to curbstone, under the direction and supervision of the street commissioner of the City of Newark, and the proprietor or proprietors so laying the same, or whose road passes over such crossings, shall be required to keep the said gutter at all times open and free from all obstructions, whether by dirt, ice, or from any other
40 cause: and they shall be required to keep a passageway for carts and vehicles clear of snow in the

winter season, on each side of their track or railway.

Sec. 19. All persons driving vehicles on any passenger railway in this City, in the direction that the cars travel on said roads, shall have the right to the railway track when meeting any other vehicle when going in the opposite direction; and the driver of the vehicle going in the opposite direction shall be compelled to turn entirely off the track, under a penalty of Five dollars, to recover before any police justice of the City in any suit or action brought to recover the same, which penalty shall be paid into the City treasurer, for the use of the City; provided, that the railroad cars shall in all cases have the first right of way, subject to like penalty. 10

Sec. 20. Whenever it shall be found necessary for the City of Newark to occupy all or any portion of any street or highway, whereupon a passenger railroad may be constructed, for the purpose of making improvements thereon, such as culverts, laying of water or gas pipes, or any other alteration or improvement that may from time to time be found necessary, the said City shall have full and entire power and authority to make such alteration or improvement without recourse on the part of the proprietor or proprietors of any railroad against the said City, for any obstruction or embarrassment that the said proprietor or proprietors of said railroad may meet with, consequent upon such alteration or improvement; provided, however that on the occasion or any alteration or improvement as hereinabove recited, directed to be done, or to be performed by the authority of the common council, no unnecessary delay shall be made or caused in any manner that shall work prejudicially to the interests of the railroad company or proprietor or proprietors. 20 30 40

10 Sec. 21. For each and every violation of any of the foregoing provisions of this ordinance, to which a penalty is not hereinbefore attached, such railroad company or other proprietor or proprietors of any railroad, shall pay a penalty of Fifty dollars, and for every continued violation of any of the provisions thereof, after notice by the street commissioner, the penalty shall be Five dollars for each and every day the violation continues; and the street commissioner shall have authority, when directed by the common council, to stop the running of all cars upon any road whose company or proprietor or proprietors refuses or refuse to pay the penalties or any of them as provided in this ordinance.

20 Sec. 22. The common council reserve the power to make such further regulations, in regard to said railways, as they may deem expedient and requisite, and the same when so made shall be deemed and taken to be part of this ordinance; and also at any time to order the removal of, and to remove any such railway track or tracks at their discretion, and to sell or dispose of the materials thereof, and after paying thereout all expenses of such removal and sale, and of repairing said street or highway, pay the balance, if any, to the legal representatives of said company or owners.

30 Sec. 23. Nothing in this ordinance contained, nor any grant of any right to lay a railway in the City of Newark, should be deemed, construed, or held in any way to impair the right of the common council, to grant any right, to lay and use any other railway whatsoever in the City of Newark; nor shall any grant by the common council of any right or privilege to lay a railroad track or tracks in the City of Newark confer or be deemed, 40 construed, or held to confer any right to the grantees thereof to affect the grade of any street or highway, except by and with the consent and au-

thority of the common council; but all railroad tracks shall be laid on the streets or highways at the established grade thereof, and shall be without delay taken up and relaid by the proprietor or proprietors thereof at his or their own expense and costs, and without recourse to the City for any damages on account or by reason thereof, conformably to the grade of streets and highways through which the same shall be laid upon the alteration by the common council of the grade of such streets and highways. 10

Approved August 18, 1859.

A further Supplement to the Ordinance entitled "An ordinance concerning the Elizabeth and Newark Horse Rail Road Company.

Approved November 6th, 1869.

Be it ordained by the Common Council of the City of Newark, as follows: 20

Sec. 1. That permission be and the same is hereby given the Elizabeth and Newark Horse Rail Road Company to file in the Office of the City Clerk within twenty days from and after the date of the passage of this ordinance the written obligation required to be filed in and by Sec. 5 of the ordinance entitled "An Ordinance to regulate Passenger Railways" approved August 18th, 1859, and that the filing by them of said written obligation properly executed within said twenty days shall be deemed and taken to be as full a compliance with said requirement of said Sec. 5 as if said obligation had been filed within the time in said section named: All ordinances or parts of ordinances as to the contrary notwithstanding. 30

Passed February 2d, 1872.

Approved February 2d, 1872. 40

Elizabeth and Newark Horse Rail Road Company.

10 Whereas The Mayor and Common Council of
 the City of Newark have by an ordinance entitled,
 "A supplement to the Ordinance concerning the
 Elizabeth and Newark Horse Car Rail Road
 Company," approved November 6th, 1869 which
 said supplement was approved August 20, 1870
 20 empowered the Elizabeth and Newark Horse Car
 Rail Road Company to extend their railway track
 with proper and necessary switches and turnouts,
 from the present terminus of the road at Centre
 street through Front street to Fulton street
 through Fulton street to Front street through
 Front street to South Bridge street through South
 Bridge street to Ogden street through Ogden
 street to Harvey street and through Harvey
 street to Belleville avenue. Now therefore The
 30 Elizabeth and Newark Horse Car Rail Road Com-
 pany in consideration of the premises and in pur-
 suance of the Ordinance approved February 2d,
 1872 hereby covenants and agree to and with the
 Mayor and Common Council of the City of New-
 ark that the said The Elizabeth and Newark Horse
 Rail Road Company shall and will in all things
 comply with the provisions of the Ordinance of
 the City of Newark entitled "An Ordinance to
 Regulate Passenger Railways," approved August
 18th, A. D., 1859 and the supplements thereto.

In Witness Whereof the said Elizabeth and
 Newark Horse Car Rail Road Company have here-
 unto affixed their corporate seal and caused the
 same to be signed by their secretary this 17th day
 of February, A. D., 1872.

[SEAL.]

AMOS CLARK,
 President.

40 Attested, Edward Cleveland,
 Secretary.

FREDERICK E. HODGE,
 Plaintiff's Attorney.

And the said defendant by Werts & Runyon, its attorneys comes and defends the wrong and injury, when &c. and saith, that the said third, fourth, fifth, sixth and seventh counts of the said declaration (said sixth and seventh counts being the counts added to said declaration, pursuant to the order of said court, bearing date March 16th, 1903) and the matters in said counts severally contained, in manner and form as the same are in said counts severally above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain her aforesaid action thereof against the said defendant and the said defendant is not bound by law to answer the same, and this the said defendant is ready to verify; wherefore by reason of the insufficiency of the said several counts and each of them in this behalf the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining her aforesaid action against it the said defendant, &c.

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WERTS & RUNYON,
Attorneys of Defendant.

Therefore let a jury thereupon, come before the judge aforesaid, at Newark aforesaid, the 1st Tuesday of April, who neither, &c., to recognize, &c., because, &c., and the same day is given to the parties here, &c.

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At which time before the judge aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the sheriff hath not sent here the writ to him in this behalf directed, nor hath he done anything thereupon.

And now at this day, that is to say, the 2d day of May, A. D., 1904, to which day the issue as aforesaid joined had been continued before the judge aforesaid, at Newark aforesaid, come the parties aforesaid, by their attorneys aforesaid, and by their consent the court proceeded to hear

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the evidence and argument and determine the cause, and having so heard the evidence and the arguments of counsel, it is considered, determined and adjudged by the said court, that the said plaintiffs take nothing by her said writ and that the said defendants do go therefore without a day, and that the said defendants do recover against the said plaintiffs the sum of Twenty-seven dollars and sixty-three cents as for their costs and charges by them about their defence in this behalf laid out and expended by the court now here adjudged to, with their assent according to the form of the statute in such case made and provided, and that they have execution thereof, and the said plaintiffs in mercy, &c.

Judgment signed May 2, 1904.

WILLIAM S. GUMMERE,
Judge.

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The State of New Jersey to Frederic
[SEAL.] Adams, Judge of our Essex
County Circuit Court.

Greeting:

Such as in the record and proceedings, and also in the giving of judgment in a certain plaint, which was in our said Essex Circuit Court, before you, between Louise E. Fielders, plaintiff, and
30 North Jersey Street Railway Company defendant, in an action in tort, manifest error hath intervened, to the great damage of the said ~~defendant~~^{plaintiff}, as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your
40 seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in

all causes, at Trenton, on the thirty-first day of May, 1904, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton 10
aforesaid, the sixth day of May, 1904.

S. D. DICKINSON,
Clerk.

Frederick E. Hodge,
Attorney.

State of New Jersey, }
County of Essex, } ss.:

I, Arthur Horton, Clerk of the Circuit Court, in and for Essex County, New Jersey, do hereby 20
certify and return to the Court of Errors and Appeals the court of last resort the judgment read and proceedings together with all things touching and concerning the same as by the within writ to me directed I am commanded.

Witness my hand and official seal of said court and City at Newark, 24th day of May, A. D., 1904.

ARTHUR HORTON, 30
Clerk.

[SEAL.]

ESSEX COUNTY CIRCUIT COURT.

	<hr/> LOUISE E. FIELDERS, Plaintiff,	}	In Tort.
	vs.		
10	NORTH JERSEY STREET RAILWAY COMPANY, Defendant. <hr/>		

Sir:

Take notice, that you are hereby required to furnish me a specification of the cause or causes of the demurrer which you have filed in the above-stated cause upon which you intend to rely at the hearing of the argument.

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Dated May 2nd, 1903.

Yours respectfully,

FREDERICK E. HODGE,

Attorney of Plaintiff.

To

Hon. George T. Werts,
 Attorney of Defendant, or
 whom it may concern.

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ESSEX COUNTY CIRCUIT COURT.

LOUISE E. FIELDERS

vs.

NORTH JERSEY STREET RAIL-
WAY COMPANY.

} In tort.

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The following is a specification of the causes of demurrer intended to be relied upon on argument of the demurrer filed in above stated case.

That the said third, fourth, fifth, sixth and seventh counts of the said declaration do not nor does either of them disclose any legal cause of action against the said defendant.

That the said leases, agreements, proceedings and ordinances respectively set out in said third, fourth, fifth, sixth and seventh counts of the said declaration do not establish any liability of the said defendant to the said plaintiff for her alleged injury.

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That the said defendant was not legally bound or required by any matter or thing set out in the said third, fourth, fifth, sixth and seventh counts of the said declaration or either or any of them to maintain or keep in repair the said public highway at the point or place where plaintiff sustained her injury.

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That the said matters and things respectively stated and set out in said third, fourth, fifth, sixth and seventh counts of the declaration, do not constitute any legal cause of action against the defendant.

That for any matter or thing stated and set out in said third, fourth, fifth, sixth and seventh counts of the declaration or any or either of them

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the said defendant is not legally accountable or responsible for the plaintiff's alleged injury.

Dated May 21st, 1903.

Yours, &c.,

GEO. T. WERTS,
Attorney for Defendant.

To

10 FREDERICK E. HODGE,
Attorney for Plaintiff.

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