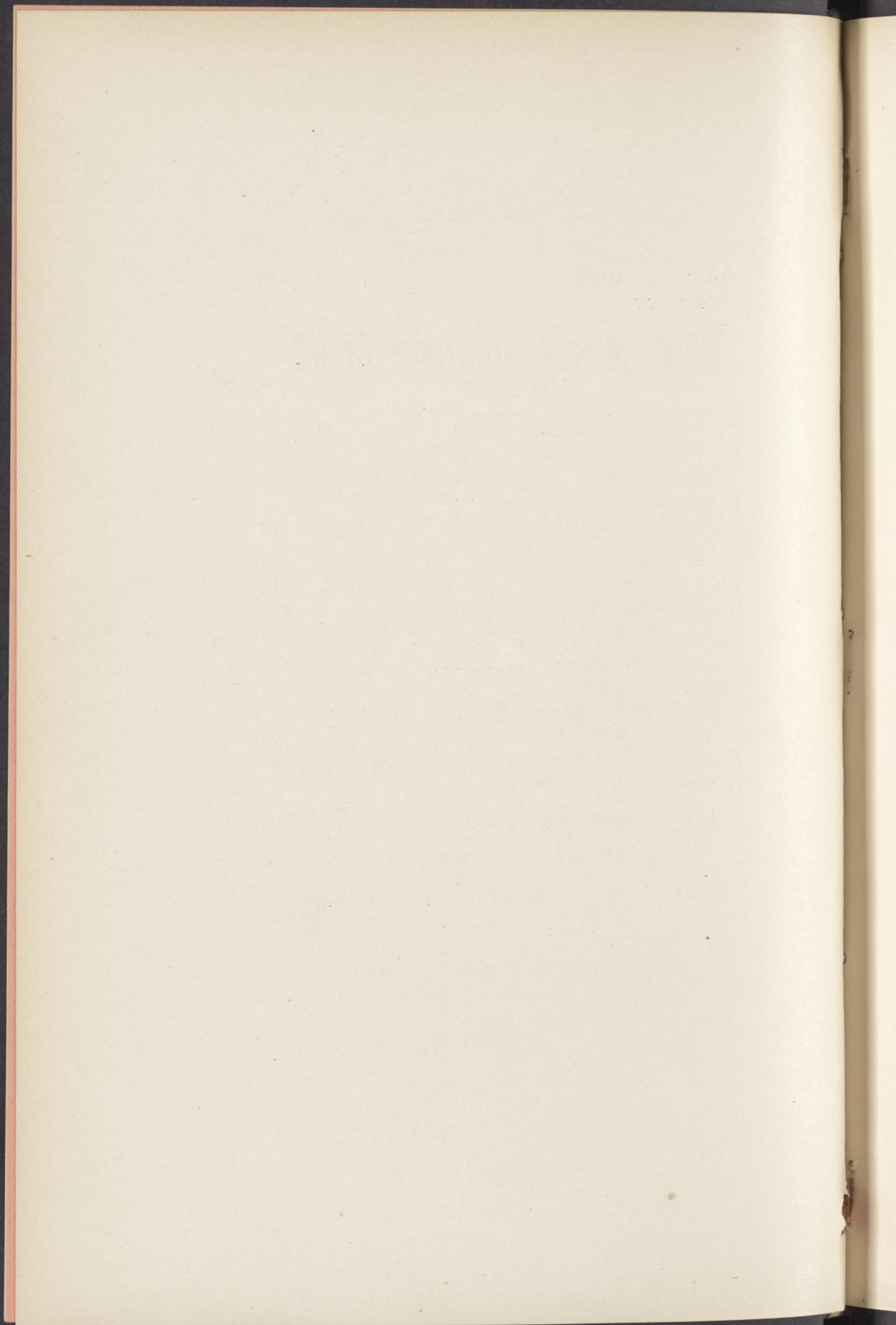


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Notice of Appeal.

Notice of Appeal.

Filed August 2nd, 1917.

New Jersey Supreme Court.

10

THEODORE KOLANKIEWICZ, by
 PETER KOLANKIEWICZ, next
 friend,
Plaintiff-Respondent,

vs.

MARY A. BURKE,
Defendant-Appellant.

*Action at
Law.*

*Notice of
Appeal.*

20

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Dated August 1st, 1917.

Yours respectfully,

PALMER BRADNER,
Attorney of Appellant.

30

TO STEIN, STEIN & HANNOCH, Esqs.,
Attorneys of Plaintiff-Respondent.

40

*Grounds of Appeal.***Grounds of Appeal.**

Filed August 25th, 1917.

New Jersey Court of Errors and Appeals

10

THEODORE KOLANKIEWICZ, by
PETER KOLANKIEWICZ, next
friend,

*Plaintiff-Respondent,**vs.*

MARY A. BURKE,

*Defendant-Appellant.**Action at
Law.**On Appeal
from the Su-
preme Court.**Grounds of
Appeal.*

20

The appellant states the following grounds of appeal:

1. The determination of the Supreme Court that there was no error in the admission in evidence of the Traffic Ordinance of the City of Newark, adopted April 6, 1912.

2. The Supreme Court sustained the refusal of the Judge of the Circuit Court to charge the first request made by the defendant specifically as requested.

30

3. The Supreme Court sustained the refusal of the Judge of the Circuit Court to charge the second request made by the defendant specifically as requested.

4. The Supreme Court sustained the charge of Judge of the Circuit Court as to the effect of the Traffic Ordinance.

40

Grounds of Appeal.

5. The Supreme Court sustained the charge of the Judge of the Circuit Court, that the infant plaintiff had a right to assume that the defendant would observe the ordinances and would use due care in the operation of her automobile.

6. The Supreme Court determined that section 13 of the Traffic Ordinance of the City of Newark, adopted April 6, 1912, was valid. **10**

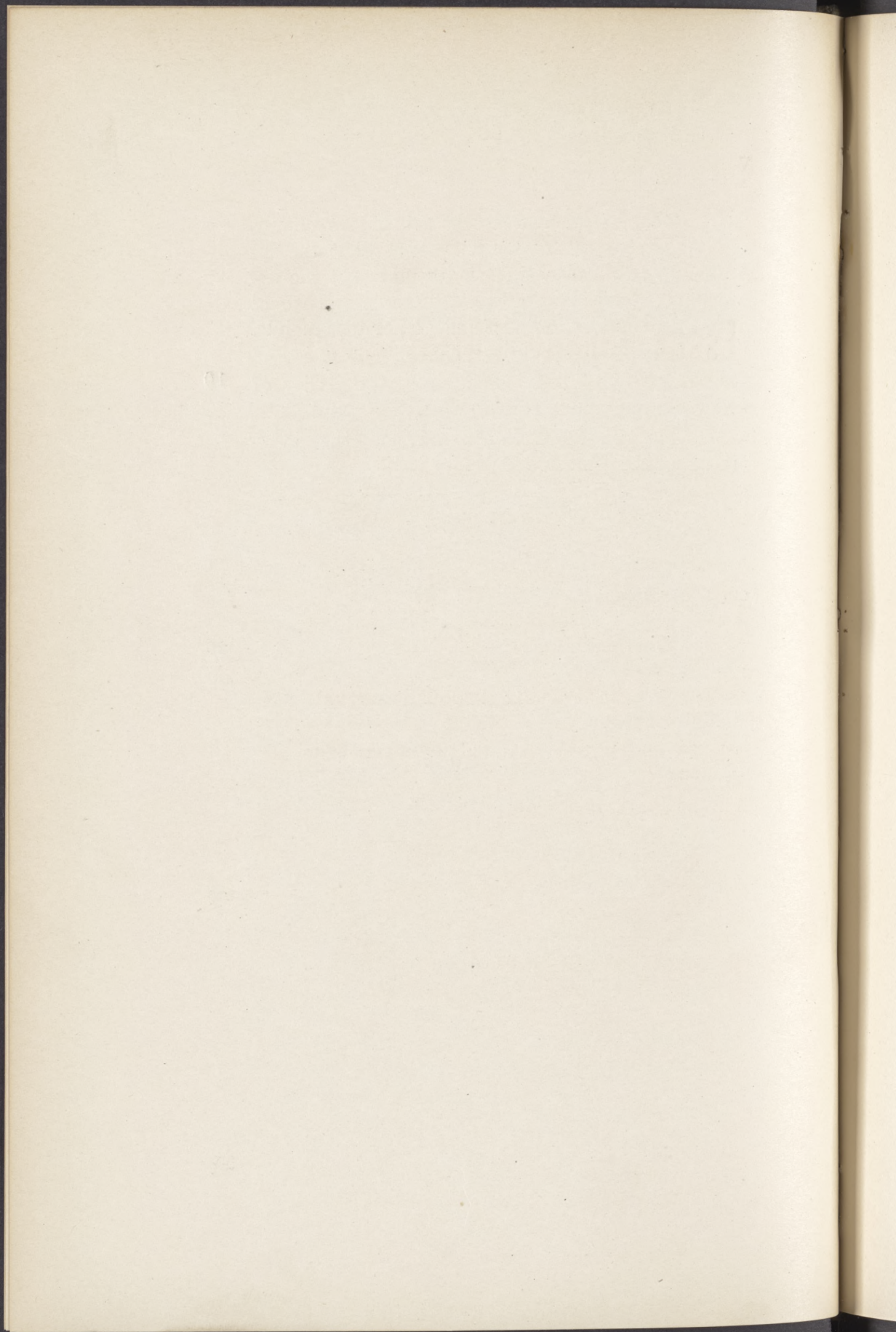
7. The Supreme Court affirmed the judgment of the Circuit Court.

PALMER BRADNER,
Attorney for Appellant.

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Notice of Appeal.

Notice of Appeal.

Filed October 9, 1916.

Essex County Circuit Court.

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THEODORE KOLANKIEWICZ, by Peter Kolankiewicz, next friend, <i>vs.</i> MARY A. BURKE,	}	Action at Law. Notice of Appeal.
<i>Plaintiff,</i>		
<i>Defendant.</i>		

20

TAKE NOTICE that the defendant appeals to the Supreme Court of the State of New Jersey from the whole of the judgment entered in this cause.

Dated October 9, 1916.

Yours respectfully,

FRANK E. BRADNER, 30
Attorney of Appellant.

To STEIN, STEIN & HANNOCH, ESQS.,
Attorneys of Plaintiff.

40

Summons.

Summons.

Issued March 3, 1915.

ESSEX COUNTY,
STATE OF NEW JERSEY. } ss:

10

To MARY A. BURKE, GREETING: You are hereby summoned to answer the [L. s.] annexed Complaint of THEODORE KOLANKIEWICZ, by Peter Kolankiewicz, his next friend, in an Action at Law in the Essex County Circuit Court, and take notice that unless you file your answer to said Complaint with the Clerk of said Essex County Circuit Court within twenty days after service upon you of this writ and the annexed Complaint, the said Theodore Kolankiewicz, by Peter Kolankiewicz, his next friend, may proceed in this suit and judgment may be entered against you.

20

WITNESS: Honorable FREDERIC ADAMS, Judge of the Essex County Circuit Court at Newark, the third day of May, nineteen hundred and fifteen.

30

JOSEPH McDONOUGH,
Clerk.

STEIN, STEIN & HANNOCH,
Attorneys.

40

Complaint.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

THEODORE KOLANKIEWICZ, by
Peter Kolankiewicz, his next
friend,

Plaintiff,

vs.

MARY A. BURKE,

Defendant.

Complaint.

10

The plaintiff, residing at No. 280 West Kinney street, Newark, Essex County, New Jersey, says:

1. That on or about January 15th, 1915, the defendant, Mary A. Burke, was driving and operating an automobile on South Orange avenue, a public highway in the City of Newark, Essex County, New Jersey.

20

2. That by reason of the foregoing, it became and was the duty of the said Mary A. Burke to have said automobile safely and suitably equipped with proper appliances, horns and brakes, and to operate the said automobile carefully and without injury to persons lawfully upon said highway as aforesaid.

30

3. That on said date, the plaintiff was lawfully upon said highway and was a pedestrian on said highway and was crossing said highway at or about the intersection of said highway with Prince and Boston streets, other public highways in said municipality above mentioned.

4. That notwithstanding her duties as aforesaid, on the date, year and place aforesaid, the

40

Complaint.

said defendant, Mary A. Burke, so carelessly and negligently operated her said automobile, and had said automobile in such a poor, unsafe, unsuitable and improper condition, that at or about one o'clock in the afternoon of said day, at or about the intersection of said
10 highways above mentioned, the said defendant, Mary A. Burke, collided with and ran into and upon the person of said plaintiff, while he was crossing said highway as aforesaid.

5. That by reason of the foregoing, the plaintiff was severely lacerated, bruised and injured in and about his head, shoulders, limbs and body, whereby he became sick, sore, lame and disordered, and was confined to his bed and was unable to attend to the usual duties of
20 his business for a long space of time, to wit, two months, and cannot now attend to the usual duties of his business; and was caused great bodily pain and long suffering and sustained severe permanent injuries. All as a result of the wrongful acts of the defendant as above stated.

6. That by reason of the foregoing, the plaintiff was put to and will in the future be put to a great expense in and about endeavoring
30 to obtain and effect a cure of his said injuries as aforesaid, and that he paid or caused to be paid, and became liable for and may become liable for doctors' bills in the sum of \$500.00, druggists' bills in the sum of \$50.00, hospital charges in the sum of \$100.00, nurse's fees and charges in the sum of \$50.00.

WHEREFORE, and by reason of the foregoing, the plaintiff has been damaged in the sum of
40 \$5,000.00, and therefore brings this suit.

Complaint.

Judgment will be claimed for the said sum of \$5,000.00, besides interest and costs of this suit to be taxed.

STEIN, STEIN & HANNOCH,
Attorneys of Plaintiff.

10

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30

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Answer.

Answer.

Filed.

ESSEX COUNTY CIRCUIT COURT.

10

THEODORE KOLANKIEWICZ, by
Peter Kolankiewicz, his next
friend,

Plaintiff,

vs.

MARY A. BURKE,

Defendant.

*Action at
Law.*

Answer.

20

Defendant, residing in the City of Newark,
County of Essex and State of New Jersey, says:

1. She admits the statements in paragraph
one of the complaint.

2. She says that the said automobile was
safely and suitably equipped with proper ap-
pliances, horns and brakes, and that she did
operate the said automobile carefully.

30

3. She denies that the plaintiff was lawfully
upon said public highway, and denies that the
plaintiff was crossing said highway at the in-
tersection of said highway with Prince and
Boston streets.

40

4. She denies that she carelessly and neg-
ligently operated said automobile at the time
aforesaid, and denies that said automobile at
said time was in a poor, unsafe, unsuitable
and improper condition, and denies that at about
one o'clock in the afternoon of said day, at
the intersection of said highways she collided

Answer.

with and ran into and upon the person of the plaintiff while he was crossing said highway.

5. She denies that by reason of any act of hers, the plaintiff was lacerated, bruised and injured, as alleged in paragraph five of said complaint, and denies that the plaintiff was made sick, sore, lame and disordered, and was confined to his bed, and was unable to attend the usual duties of his business by reason of any act of hers. 10

6. She denies that by reason of any act of hers, the plaintiff was put to, or will be put to in the future any expense in and about endeavoring to obtain an effective cure of his injuries aforesaid, and denies that he has paid or caused to be paid, or has become liable for, or may become liable for any doctor's bill, druggists' bills, hospital charges or nurse's fees. 20

FIRST DEFENSE:

Defendant says, that on January 15, 1915, she was driving and operating an automobile on South Orange avenue in the City of Newark, Essex County, New Jersey, and that the said automobile was safely and suitably equipped with proper appliances, horns and brakes, and was being operated by her carefully, and that the said automobile was fully under the control of the defendant, and that after one o'clock in the afternoon of said day, while the said automobile was being driven by the defendant on said South Orange avenue, west of Prince street, a small boy, whom the defendant afterwards ascertained was named Theodore Kolankiewicz, and who was about ten years of age, was either playing in the street, or attempted to cross the street, not at a street crossing, and came in 30 40

Answer.

contact with the said automobile and was slightly injured; and that the said boy was taken to the City Hospital and was there for exactly one month until February 15, 1915, and was discharged from the hospital as fully recovered, and that for one week of said time, the said
 10 boy was detained at the hospital under quarantine, for the reason that scarlet fever had broken out in the ward in which he was confined; and that the accident was not caused by any negligence whatever of the defendant in the operation of the said automobile, or by reason of any defect in the said automobile; and that neither the said boy or his father, was put to any expense whatever for hospital charges, doctors' bills or druggists' bills or
 20 nurse's fees.

SECOND DEFENSE:

Defendant says that on January 15, 1915, she was driving an automobile on South Orange avenue, in the City of Newark, Essex County, New Jersey, and that said automobile was in proper and safe condition as to appliances, horns and brakes, and was being operated by her carefully and was under her control, and that on
 30 the said South Orange avenue at a point west of Prince street, and not at a street crossing, the plaintiff, a boy about ten years of age, carelessly and negligently ran into the said automobile and was slightly injured, and that the accident was caused entirely by the negligence of the said plaintiff..

FRANK E. BRADNER,
Attorney of Defendant.

Reply.

Reply.

Filed.

ESSEX COUNTY CIRCUIT COURT.

THEODORE KOLANKIEWICZ, by
Peter Kolankiewicz, his next
friend,

Plt'ff.,

vs.

MARY A. BURKE,

Def't.

10

*Action at
Law.*

Reply.

REPLY TO FIRST DEFENSE:

20

The plaintiff denies every allegation of the first defense set forth in the answer except that he admits that the defendant drove and operated the automobile in question at or about the time mentioned, on South Orange avenue in the City of Newark, and that the plaintiff was injured by contact with said automobile, and by reason of such injuries was confined at the City Hospital for a period of one month.

30

REPLY TO SECOND DEFENSE:

The plaintiff denies all the allegations of the second defense, except that he admits the defendant was on January 15, 1915, driving an automobile on South Orange avenue in said City of Newark.

STEIN, STEIN & HANNOCH,
Attorneys of Plaintiff.

40

*Judgment.***Judgment.**

ESSEX COUNTY CIRCUIT COURT.

10	THEODORE KOLANKIEWICZ, by friend, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i> <i>On Verdict.</i> Judgment for Plaintiff: Amount, \$700.00 Costs, 65.76 <hr style="width: 50%; margin-left: auto; margin-right: 0;"/> Total, \$765.76
	<i>vs.</i>		
	MARY A. BURKE, <div style="text-align: right;"><i>Defendant.</i></div>		

STEIN, STEIN & HANNOCH,
Attys. of Plaintiff.

20

This action was tried before Nelson Y. Dungan with a jury at the Essex County Circuit on March 31st, 1916.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the plaintiff Theodore Kolankiewicz, by friend, and assess the damage against the defendant, Mary A. Burke, at the sum of seven hundred dollars.

30

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of seven hundred dollars and costs, which are taxed at the sum of sixty-five dollars and seventy-six cents, making in the whole the sum of seven hundred sixty-five dollars and seventy-six cents.

Judgment entered and signed March 31st, A. D. 1916.

WM. S. GUMMERE,
Judge.

40. Book 93, p. 411.

Rule to Show Cause.

Rule to Show Cause.

Filed April 4, 1916.

ESSEX COUNTY CIRCUIT COURT.

THEODORE KOLANKIEWICZ, by
next friend,

Plaintiff,

vs.

MARY A. BURKE,

Defendant.

Action at
Law.

Rule to Show
Cause.

10

Application having been made to the court within six days after the verdict, for a rule to show cause in the above stated case, why the verdict rendered therein should not be set aside and a new trial granted,

20

It is on this fourth day of April, 1916, ORDERED that the plaintiff do show cause before this court, at the Court House in the City of Newark, on Friday, April 28, 1916, at two o'clock in the afternoon, why the verdict rendered in the above stated case, should not be set aside and a new trial granted for the reasons assigned by the defendant.

30

It is further ordered that the exceptions noted in the record shall be reserved to the defendant and not waived by taking this rule.

On motion of

FRANK E. BRADNER,
Attorney for Defendant.

Let this rule be entered in the minutes of the court.

NELSON Y. DUNGAN,
Judge of Circuit Court.

40

Rule.

Rule.

Filed May 25, 1916.

ESSEX COUNTY CIRCUIT COURT.

10	THEODORE KOLANKIEWICZ, by next friend,	}	<i>Plaintiff,</i>	<i>Rule.</i>
	<i>vs.</i>			
	MARY A. BURKE,			

20 A rule to show cause in the above stated case why the verdict rendered therein should not be set aside and a new trial granted, having come on to be heard by the court, and the court having heard and considered the arguments of counsel, and being of the opinion that the amount of damages is excessive; it is on this 25th day of May, 1916, ORDERED that if the plaintiff will remit the sum of \$250.00 from the verdict rendered in this case the rule to show cause will be discharged and the motion to set aside the verdict will be denied; otherwise the verdict will be set aside and a new trial granted.

30 On motion of

FRANK E. BRADNER,
Attorney of Defendant.

Let this rule be entered in the minutes of the court.

40

NELSON Y. DUNGAN,
Circuit Court Judge.

Rule Reducing Judgment.

Rule Reducing Judgment, etc.

Filed June 19, 1916.

ESSEX COUNTY CIRCUIT COURT.

THEODORE KOLANKIEWICZ, by next friend, vs. MARY A. BURKE,	by <i>Plaintiff,</i> <i>Defendant.</i>	Action at Law. Rule Reduc- ing Judgment and Discharg- ing Rule to Show Cause.	10
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A rule having been entered herein on May 25, 1916, ordering that if the plaintiff would remit the sum of \$250.00 from the verdict rendered in this cause, the rule to show cause heretofore entered herein why the verdict rendered herein should not be set aside and a new trial granted, would be discharged and the motion to set aside the verdict denied, and the plaintiff by his attorney hereby consenting that the said sum of \$250.00 be remitted from said verdict as required by said rule;

It is hereby on this 19th day of June, 1916, on motion of Stein, Stein & Hannock, attorneys of plaintiff, ORDERED that the judgment heretofore entered herein on March 31, 1916, be and the same is hereby reduced from the sum of \$700.00 and costs to the sum of \$450 and costs.

And it is further ORDERED that the rule to show cause heretofore entered herein be and the same is hereby discharged and the motion to set aside the verdict be and the same is hereby denied.

NELSON Y. DUNGAN, 40
Circuit Court Judge.

Rule Extending Time.

Rule Extending Time.

Filed October 9, 1916.

ESSEX COUNTY CIRCUIT COURT.

10	THEODORE KOLANKIEWICZ, by Peter Kolankiewicz, next friend, <i>Plaintiff,</i>	}	<i>Action at Law.</i>
	<i>vs.</i> MARY A. BURKE, <i>Defendant.</i>		<i>Rule Extending Time, &c.</i>

20 It appearing to the court that the defendant in the above stated action has filed a notice of appeal from the judgment entered therein and application being made for further time to file a recognizance of bail, and the court being of the opinion that such application should be granted;

30 IT IS ORDERED that the defendant have until the 10th day of October, instant, to file in the office of the clerk of this court a recognizance of bail pursuant to the statute in such case made and provided; and that after the filing of such recognizance of bail, all proceedings on said judgment shall be stayed.

Dated October 9, 1916.

Let this rule be entered in the minutes of the court.

NELSON Y. DUNGAN,
Circuit Court Judge.

On motion of

40 FRANK E. BRADNER,
Atty. of Defendant.

Statement of the Case.

Statement of the Case.

New Jersey Supreme Court

THEODORE KOLANKIEWICZ, by
Peter Kolankiewicz, next
friend,

Plaintiff-Respondent,

vs.

MARY A. BURKE,

Defendant-Appellant.

10

*Action at
Law.*

*On Appeal
from Essex
Circuit Court.*

Plaintiff's witnesses testified as follows:

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That South Orange avenue, in the City of Newark, runs east and west, and Prince street crosses South Orange avenue running north and south, and that the westerly sidewalk of Prince street is connected with the easterly sidewalk of Boston street by a crosswalk running across South Orange avenue horizontally; and that a trolley car going east on South Orange avenue had come to a full stop at westerly side of Prince street, about five feet west of the crosswalk, running from south to north side of South Orange avenue, at westerly side of Prince street, and that passengers were alighting, and that the infant plaintiff started to walk across South Orange avenue north from the southwest corner of South Orange avenue and Prince street, and had got to a point about midway between the tracks of the trolley line for the west-bound cars; and at that point, he was struck by the

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Statement of the Case.

automobile, which was being driven by the defendant, and knocked down. The defendant was sitting on the right hand side of the automobile, and the boy was struck by the mud-guard on the right hand side. The machine went about ten feet after hitting the boy, and was turned
10 to the north curb by the defendant and stopped. The machine did not go over the boy. The boy was picked up and carried into a drug store on the corner of Boston street. He received a lacerated wound in the occipital region, that required three stitches, and it was necessary to use a drain of rubber tissue. He had a contusion of the left eye and was bleeding from the left ear. He was in the hospital for four weeks, at the end of which time he was discharged as fully cured.

20 The evidence further shows on the part of the plaintiff, that the defendant had been coming east on South Orange avenue behind the trolley car, and that when the trolley car came to a stop, she turned her automobile to the left and came east on the west-bound track, and that at the point of collision, it was impossible, because of the narrowness of the street for defendant to pass the trolley car at a distance of
30 four feet from the right hand running board or lowest step of said car. Defendant did not bring her automobile to a full stop until the car had taken in and discharged its passengers and again started.

Plaintiff offered in evidence the Traffic Ordinance of the City of Newark, adopted April 6, 1912. The ordinance was objected to by the defendant, upon the ground that it was not relevant to the issue, and that there was no statute which
40 authorized it and made it evidential. The ordi-

Statement of the Case.

nance was admitted in evidence by the court, and the defendant's objection noted as grounds of appeal.

Defendant's witnesses testified as follows:

That the defendant was driving her automobile easterly on South Orange avenue, and that she was a considerable distance behind the trolley car, which had stopped at Prince street, and had proceeded easterly some time before she reached the street west of Prince street. At a point about midway between Prince street and the next street to the west, as her car was proceeding slowly, the boy ran out from the pavement and ran into the car and was knocked down.

At the close of the plaintiff's case, a motion was made to non-suit the plaintiff, upon the ground that the plaintiff had failed to prove that the defendant had been negligent.

At the close of the whole case, the defendant moved for the direction of a verdict upon the same ground.

Both motions were denied, and the objections of the defendant were noted as grounds of appeal.

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30

40

Charge to Jury.

Charge to Jury.

The Court charged the jury as follows:

DUNGAN, *J.*

10 Gentlemen. On January 15th of last year, on South Orange avenue in this city, a few blocks above the court house, this little boy, the plaintiff in this case, was seriously injured through a collision with an automobile owned and driven by the defendant, Mrs. Mary A. Burke; so seriously injured, the doctor says, that when he was first brought into the hospital it appeared to be a fatal case.

20 It is insisted on behalf of the plaintiff, and witnesses have been produced who testify to that fact, that this accident occurred on the north side of South Orange avenue, which would be the left hand side of the street as the defendant's automobile was proceeding, and on the crosswalk over South Orange avenue from the west side of Prince street to the east side of Boston street, and while an eastbound trolley car was standing a few feet west of that crosswalk; that the defendant's automobile came from behind the trolley car, and passed its left side, and struck the boy.

30 Mrs. Burke, the defendant, has been sworn in her own behalf, and also eight additional witnesses, all of whom testified that the accident did not occur at the place where the plaintiff's witnesses say it did; that is, all who testify upon that point say that. And all who testify upon that point say there was no trolley-car there at that time. And all who testify upon that point say that the accident occurred, not on the west-bound track, but on the south side, or the right hand side of the street, as Mrs. Burke was proceeding.

40

Charge to Jury.

To call your attention to the testimony on behalf of the defendant at this point in some detail, Mrs. Burke says that she was following a trolley car, and was stopping and starting with the trolley car for some distance; that the last place where she stopped was at Norfolk street, which was, on the north side of the street, two blocks, and on the south side of the street, two and a half blocks from Prince street. She says that she does not know anything about the car after it started from Norfolk street; that is, the car stopped at Norfolk street, and she stopped beyond that point; that the car then proceeded on ahead, and that when she arrived at the point of collision she does not know where the car was. She says that she had just passed Rankin street when this little boy started out, and her son, who, she says was riding in the automobile with her, on the right side, her automobile being a left hand drive machine, seated on a stool on the right side of the machine, called to her to "Look out." Then she turned sharply to the left, and this little boy, the plaintiff, ran into the mud-guard. Her son, Halsey Burke, testifies to his position in the car, and says that he saw this little boy on the south sidewalk of South Orange avenue for a brief space of time, and that just a little below Rankin street he suddenly ran out, and ran into the rear mud-guard; and he says that this boy, when he first saw him, was nearer to Rankin street, which is the next street above Prince street, than to Prince street, and that he was skipping on the sidewalk.

Mr. Honigfeld was putting up an awning north of Richmond street. Richmond street, you will remember, is the street just west of Boston street; so that from Boston street he was just a little more than a block away. He says he was

Charge to Jury.

up on a step ladder putting up an awning. I think he said it was the corner store; that would be the northwest corner of Richmond and South Orange avenue. However, you will remember about that, if I am wrong about it. And he says that the boy was playing from Beacon street, running in and out. Beacon street is the second street above Prince street. And this little boy was playing there, running in and out. And that when the automobile was opposite the hardware store, a little above the moving picture place, he saw the boy run out, and run into the automobile. He testifies that the position of the automobile was on the right side, or the south side, of South Orange avenue, with one wheel between the tracks, and one near the curb, which is the testimony of several witnesses who testified upon that point.

Mr. Weiss, the next witness, says that he was on the corner where the grocery is. That appears to have been the northwest corner of Boston street and South Orange avenue. He said he was standing there, and he saw the boy dart out from the sidewalk into the automobile, which was on the right side of the street.

Mr. Dickson says he was on the north side of South Orange avenue, above where the moving picture place is, and that his attention was attracted by the tooting of the horn, and then he looked and saw this boy jump from the side walk to the gutter, and that the mud-guard, or the hub of the wheel, hit him.

Dr. Drastal, and Mr. Lawrence, you will remember, were coming up in a carriage east of Boston street. Dr. Drastal says he was attracted by the tooting of the horn, and looked up and saw the boy running down the right hand side of South Orange avenue, on the walk and in the

Charge to Jury.

gutter, and then he ran out, and came out very quickly into the street; and it looked to him, he says, as if he was trying to steal a ride on the running-board.

Mr. Lawrence says that he saw the plaintiff run from the sidewalk, and the next thing he knew he saw the boy hit, and it looked as if he ran into the fender of the car. 10

Mr. Sears says that he was walking down South Orange avenue back of the place where the accident happened; that is, he was walking east, but was up toward Richmond street; and he noticed the boy skipping from the pavement into the street, and about 30 feet from Rankin street he skipped out into the gutter, and the right fender struck him. I understood him to say on direct examination that it occurred about opposite the moving picture place, but on cross examination he said it was above the moving picture place. 20

Mr. Mulvaney, another witness, who did not see the accident, says that he was on the rear platform of the trolley car, and that he was observing the automobile because he was personally acquainted with Mrs. Burke, and that he noticed that when the trolley car stopped the automobile stopped; and that the last he saw of her was at Norfolk and Beacon streets. He says that he went forward after the car stopped at those places to get off at the front platform; and he says that before he went forward and when the car stopped at those streets, he saw Mrs. Burke back at Jones street. He says that he got off the trolley car and walked 50 or 75 feet into Prince street; he is a fireman, you will remember, and was going to the fire house on Prince street; and he walked 50 or 75 feet in Prince street, and saw people running in the direction of South Or- 30 40

Charge to Jury.

ange avenue, and then he turned and went back to South Orange avenue, and saw a man carrying this boy, and at that time, he says, he was in front of the grocery store.

10 Here, including the defendant herself, Mrs. Burke, are nine witnesses in all, two of whom say that there was no trolley car there when the boy was struck; and eight of whom say that they saw the accident, and that it was not at the crosswalk, but was between Prince street and Richmond street, or on the other side of the street, between Prince street and Rankin street; and that the boy suddenly came out from the south side of South Orange avenue, that is, out from the sidewalk, and in this way was struck by the automobile; or, rather, some say it was he who ran into the automobile, and not the automobile that
20 ran into him.

If you are satisfied with the defendant's theory of this case as stated by her and her witnesses, that she was driving the automobile carefully on the right-hand side of the street, and that the boy ran into it, stepped off the sidewalk, and walked or ran down against the side of the automobile and was knocked down, the defendant was not negligent, and your verdict should be in favor of the defendant.

30 But, as suggested at the outset, it is insisted on behalf of the plaintiff that this is not the way the accident happened. And I should state that more must appear, before there can be a verdict against the defendant, than the mere fact that an accident happened, for which no one might be responsible. Accidents sometimes happen notwithstanding the exercise of due care on the part of ourselves and others. More than the mere fact that this boy was injured by being struck by
40 Mrs. Burke's automobile must appear in the

Charge to Jury.

case. It must affirmatively appear that she was negligent. One test of negligence is how an ordinary careful and prudent person would have acted under the same circumstances and conditions. If a person in driving an automobile fails to do, or to omit, what an ordinary prudent and careful person would do, or omit, under the same circumstances and conditions, the law says that person is negligent. 10

At that time there was in force in the city of Newark an ordinance known as the traffic ordinance, the third section of Part 2 of which provides that a vehicle overtaking another shall pass on the left side of the overtaken vehicle, and not pull over to the right until entirely clear of it. But Part 1 of this same ordinance defines what a vehicle is, and excludes street railway cars, which are, therefore, not comprehended in Section 3 of Part 2 which I first read, as a vehicle which is to be passed on the left. Section 13 of Part 2 relates to street railway cars, and is as follows: 20

“Every driver or operator of any vehicle following any street car, when passing such street car while it is stopping to take on or discharge passengers, shall keep at least four feet from the right-hand running-board or lowest step of said car.” While this does not say in the plainest language, perhaps, that street railway cars must be passed on the right, it is quite clear that that is what is meant by what follows, which is, “If by reason of the presence of other vehicles at the place where such car is stopping, or by reason of the narrowness of the street, or for any other reason, it is not possible to preserve such distance of four feet, then such driver or operator shall bring his vehicle to a full stop until the car shall have taken on or discharged its passengers, and again started.” That this section means 30 40

Charge to Jury.

that vehicles which are following trolley cars must pass to the right, is further corroborated by Section 4 of Part 4, which is "Any driver or operator of any vehicle on the street car tracks, preceding or following a street car, shall keep at least 15 feet from said car, and when following a street car shall turn off the track when the car stops, and proceed as provided for in Part 2 of Section 13," which is the one I last read. While Section 13 of Part 2 does not use the word "shall," this section does use it, and says "shall turn off the track when the car stops, and proceed as provided for in Section 13 of Part 2"; and Section 13 of Part 2 provides that they shall proceed to the right of the car when there is room for them to do so, leaving four feet between the running board or step of the car; and when they cannot do that they must stop until the trolley car proceeds, and then the vehicle may proceed.

However violent the presumption may be, every one is presumed to know the laws of their state, and the ordinances of their city, and no one is excused for ignorance of such law or ordinance; and if such law or ordinance is violated, no one can come into court and be heard to say, as an excuse for such violence, "I did not know that was the law." Indeed, Mrs. Burke makes no such pretense in this case. She frankly says she knew the rules of the road. As has been tersely said, "Danger reasonably to be foreseen at the time of acting is an established test of negligence." And as was said by Mr. Justice Garrison in *Evers v. Davis*, 86 N. J. Law, p. 196. at page 194, "When the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned the 'ordi-

Charge to Jury.

nary prudent man' ”—and you will observe I have used the word “ordinary prudent person.” That is, that it is the duty of a person to act as an ordinary prudent person would under the same circumstances and conditions. If the legislature has forewarned the ordinary prudent person that to act otherwise is dangerous, and that for a breach of such a statute the defendant is charged with knowledge, and injury ensues, such person will have acted at her peril. I am not quoting this exactly, but am adapting it to this case. While it is the construction of a statute, it is equally applicable to a valid ordinance. An ordinance establishes a rule of conduct, and the dangers of a violation of that rule of conduct are presumed to be known by the defendant.

On the part of the plaintiff three witnesses have been produced who say that they saw this accident. William Sokobin is the first, and he says that he was on the west side of Prince street, opposite the east side of Boston street. According to the testimony of these witnesses that would be about exactly opposite, across the other side of South Orange avenue. He says that there was a trolley car going east, and that this trolley car came up to that corner and stopped in front of the saloon, about five feet west of the crosswalk, which, he says, was about five feet from the corner; and that it was about ten feet from the front end of the trolley car to the corner. That while the trolley car was standing there this little boy came to the curb, and stopped before crossing, and that when people commenced to get off he went across in front of the trolley car on the crosswalk; and that when he had reached a point on the westbound tracks the defendant's automobile came from behind the trolley car into the westbound tracks, and to this

Charge to Jury.

10 crosswalk, and struck this little boy; and he says that it was the right hand mud guard that struck him. Upon cross examination, you will recollect—of course the evidence is for the jury, and, while it is inexcusable for the Court to misquote testimony, if the Court should do so the jury should disregard such misquotation. I understood him to say upon cross examination that the accident happened about 35 feet down from the trolley car, and subsequently, upon re-direct examination, he said that it was 35 feet from the trolley car to where the boy was after the accident. He also said that the impact of the automobile knocked him about three feet. Of course, the testimony is for the jury, as I shall presently mention.

20 Samuel Klasner says he was on Prince street, going to South Orange avenue, on a wagon; that he had just about reached the southeast corner of Prince and South Orange avenue, when he saw an eastbound trolley car standing at the first corner going down; that he saw a boy—he does not recognize him—crossing on the crosswalk in front of the trolley car, and that when the boy was about two feet from the car, two feet beyond the car, to the north of the car, he saw this automobile come from back of the trolley car and strike the boy.

30 Jack Urback, another witness, says that he was on the east corner of South Orange avenue and Boston street, the drug store corner, and that he saw the car standing at the corner of Prince street, going east, the saloon corner; that he saw this boy on the crosswalk going from Prince street to Boston street; that is, he says, from the saloon corner to the drug store corner; that as the boy was crossing the westbound track, just getting into the west rails, he saw this auto-

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Charge to Jury.

mobile, which he had previously seen coming behind the car, turn to the left on the westbound track, run past the trolley car, and strike the boy.

Mr. Schmitt, one of the firemen, says that he was at the fire house, and that Urback was in front of the store next door, where he works, and that he said to him "There is something doing at the corner," and invited him to go with him down to South Orange avenue; and he says that they went together from that point down to South Orange avenue, and at that time the accident had occurred; it was all over. 10

Of course, if the statement of Schmitt be true, then Urback was not where he says he was, on the drug store corner, and did not see what he said he did. However, this is denied by Urback.

The burden of proof, the burden of establishing his case, is upon the plaintiff; and it is necessary, before the plaintiff is entitled to recover, that negligence on the part of Mrs. Burke should be established by the preponderance of the evidence; that is, by the greater weight of the evidence. That does not mean, necessarily, the greater number of witnesses. Witnesses see accidents from different, and more or less advantageous, viewpoints. Witnesses sometimes show interest and bias. Sometimes you may conclude that one witness is more intelligent than another, better able to tell what he saw. You may conclude that from the point of view of the witness he saw an accident better, and knows better what happened, than another witness. So, as I have said, the fact that the number of witnesses testifying on one side or the other is greater, does not necessarily, alone, determine that the preponderance of the evidence is on the side on which the larger number of wit- 20 30 40

Charge to Jury.

nesses testified. But after fairly and impartially considering and weighing all the evidence in the case, you are at liberty to decide that the preponderance of the evidence is on the side which, in your judgment, is sustained by the more intelligent, the better informed, the more interested, the more creditable witnesses, even though that side has produced a less number of witnesses than the other side. But you have no right to capriciously disregard the testimony of the larger number of witnesses, or to refuse to give whatever consideration in your judgment should attach naturally to the fact that the larger number of witnesses testifying one way. The element of numbers should be considered for whatever, in your judgment, that element is worth; and the evidence of the smaller number cannot be taken by you in preference to that of the larger number, unless you can conscientiously say that the evidence of the smaller number of witnesses is more reasonable, more truthful, more disinterested and more creditable.

So much upon the question of whether or not Mrs. Burke was negligent. If you decide that she was not, then, of course, that ends your consideration of this case, and your verdict must be in her favor. But if you find that she was negligent, then it becomes the duty of the Court to say to you that a person crossing a street must exercise care for his own safety. He cannot go heedlessly along without paying any attention, by looking and listening, for approaching cars, or vehicles. And that was the duty of this boy. However, he had a right to assume that the defendant would observe the ordinances, and would use due care in the operation of her automobile. But even if she did not, that did not excuse him from exercising some care for his own

Charge to Jury.

safety. If a child is possessed of that degree of intelligence, prudence and caution which will cause him to know and appreciate and understand the dangers incident to himself from his wrongful act or omissions, the law requires him to exercise care for his own safety. And it does not appear in this case that the plaintiff was not possessed of that degree of intelligence. As I suggested to you when this boy was called as a witness in the case, and rejected by the Court, you have no right upon this point to take into consideration anything that developed in that examination. It was not under oath; it is not evidence in the case, and could have been as well conducted out of the hearing of the jury as in its hearing, and is, therefore, to have no weight with you in determining this point. Since there is no testimony upon this point, this boy is presumed to have had the intelligence and capacity of a normal boy of nine years of age, which was his age at that time. Manifestly the law should not, and does not, require from such a boy the same degree of care and caution as it does from an adult. Children are required to exercise only that degree of care and caution which persons of like age, intelligence and capacity, could reasonably be expected to naturally and ordinarily use in the same situation and under like circumstances.

So, in this case, even though you find that Mrs. Burke was negligent, yet, if you believe from the evidence that this boy, this plaintiff, failed to exercise that degree of care and caution which persons of his age, capacity and experience, may reasonably be expected to use in the same situation, and under like circumstances, and that but for the failure to use such care and caution the injury to him would not

Charge to Jury.

have happened, the plaintiff was guilty of contributory negligence, and in that case the law is that he cannot recover.

10 So if you decide that Mrs. Burke was negligent, but that this boy was guilty of contributory negligence, your verdict must be for the defendant. A verdict for the plaintiff can be rendered only in the event that you find that Mrs. Burke was negligent, and that there was no negligence on the part of the boy, as I have defined it to you, which contributed to the accident and to his injury.

If you determine that to be the situation in this case, then, and not until then, do you come to the consideration of the question of damages.

20 If this boy is entitled to recover, he is entitled to recover compensation for the injury, and for the pain and suffering which he has undergone as the result of those injuries. That is very shortly said, but it often presents a very difficult proposition to a jury. It is very easy for a jury, when they are considering a case on a promissory note, to figure up and say what will be compensation to the plaintiff. It is the face of the note, and the interest. It is very easy, where a book account is in controversy. The jury can say such and such items the plaintiff is entitled to be compensated for, add the interest to that, and that is the plaintiff's compensation. But in these cases, compensation still gives the measure of the plaintiff's right of recovery. You cannot award any damages against the defendant by way of punishment for her negligent act. The punishment may be administered in another kind of action. If a person drives an automobile with such gross negligence as to be criminally liable that wrong is redressed in another kind of action. You cannot consider that

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Charge to Jury.

at all in an action of this kind. You are limited in an action of this character to what will be compensation, that is, a money return, a return in dollars and cents, for these elements of damage, which it is most difficult, often, for jurors to measure. Yet, notwithstanding its difficulty, that is the province, and that is the duty of the jury—to determine what will be a return to this little boy in dollars and cents for the injury he has sustained, and for the pain and suffering which he has undergone. 10

There has been no proof in this case but that he is entirely cured of the results of his injuries. So you need not consider future injuries, future pain and suffering, which is sometimes an element in these cases. It does not appear that there has been any expenditure of money by reason of attempts to cure this plaintiff. He appears to have had free treatment, for anything that has developed in this case. So you are limited to these elements of damage, the injury, and pain and suffering. 20

He was brought to the hospital, Dr. Balson says, unconscious. At that time, he says, he suspected a fracture at the base of the skull. It was regarded as a serious case, and this boy was unconscious for some days, the doctor said at first, limiting it afterwards to probably two days. He said that there was a cut in the back of his head, in which it was necessary to take three stitches, and to put a rubber drain. He said there were contusions and abrasions—that is, at first he said contusions, afterwards he said they were abraded, contusions being bruises, and abrasions being scratches and cuts—on the head. There was an injury over the eye; that the left ear was bleeding; that the drum of the ear was 30 40

Charge to Jury.

ruptured. It appears that he was admitted to the hospital on January 15th, and the record shows that he was discharged from the hospital on February 14, 1915, "Result cured."

10 These are the elements of the plaintiff's damages. If you find that he is entitled to your verdict at all, you will compensate him for the injury, and for the pain and suffering which he has undergone as the result of those injuries.

I am requested by the defendant to charge:

1. In order to recover the plaintiff must prove by the weight of the evidence, that the defendant drove her automobile to the left of the trolley car, and that the trolley car was stationary, and that the defendant drove her automobile carelessly, that is, so fast that if the boy had
20 seen it coming, or heard it, he did not have time to get out of the way, or was placed in such a position of sudden danger that he did not act in the best manner to save himself.

That I decline to charge except as I have charged. I think that it ignores, and is probably intended to ignore, the situation created by the ordinances; so that it would be inconsistent with what I have said about the ordinance to
30 charge that request.

2. If the jury are satisfied that the defendant drove her automobile to the left of the trolley car standing at the crossing, and that the boy could have seen it coming towards him, or could have heard it, and had time to get out of the way, but went on carelessly and thoughtlessly, and was struck, he cannot recover.

I charge you that with this qualification; that
40 if by the exercise of reasonable and ordinary care he could have seen it coming, or have heard it coming; and also qualifying it as I have

Exceptions to Charge.

in my main charge, with reference to the age of the boy, and the degree of care and prudence which is ordinarily to be expected from a normal boy of nine years of age.

The third request I have already charged you; I used those exact words in the main charge.

4. If the jury is satisfied that the boy was careless in that he did not look to see if any automobile was coming, or did not heed the blowing of the horn, they should find in favor of the defendant, although the defendant may have been driving her automobile too fast, or too close to the sidewalk.

I charge you that.

Mr. Bradner. I desire to take an exception to your Honor's refusal to charge the first request specifically as requested.

(The exception is noted by the defendant as ground of appeal.)

Mr. Bradner. I also desire to take an exception to your Honor's refusal to charge the second request specifically as requested.

(The exception is noted by the defendant as ground of appeal.)

Mr. Bradner. I also desire to take an exception to your Honor's charge as to the effect of the ordinance.

(The exception is noted by the defendant as ground of appeal.)

Mr. Bradner. I also desire to take an exception to your Honor's charge that the boy had a right to assume that the defendant will observe the ordinance.

(The exception is noted by the defendant as ground of appeal.)

Ordinance—Exhibit for Plaintiff.

EXHIBIT FOR PLAINTIFF.

10 Extract from an Ordinance of the City of Newark, entitled: "An Ordinance to regulate the use of the public streets of the City of Newark, by vehicles, automobiles, street cars, equestrians and other draft animals, and to regulate and control the public traffic thereon." (Adopted April 4, 1912, and approved April 6, 1912.)

Part I. Section 1-B.—The word "vehicle" includes equestrians, led horses and everything on wheels or runners, except street railway cars and baby carriages, unless otherwise specified.

Part II. PASSING, TURNING, CROSSING AND STOPPING.

20 Section 3.—A vehicle overtaking another shall pass on the left side of the overtaken vehicle and not pull over to the right until entirely clear of it.

30 Section 13.—Every driver or operator of any vehicle following any street car, when passing such street car while it is stopping to take on or discharge passengers, shall keep at least four feet from the right hand running board or lowest step of said car; shall give audible indication of approach to said car, and shall exercise due precaution not to interfere with or injure the passengers getting on or off the car; if by reason of the presence of other vehicles at the place where such car is stopping, or by reason of the narrowness of the street, or for any other reason, it is not possible to preserve such distance of four feet, then said driver or operator shall bring his vehicle to a full stop until the car shall have taken on or discharged its passengers and again started.

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Ordinance—Exhibit for Plaintiff

Part IV. RIGHT OF WAY.

Section 4.—Any driver or operator of any vehicle on the street car tracks preceding or following a street car, shall keep at least fifteen feet from said car, and when following a street car, shall turn off the track when the car stops, and proceed as provided for in Part II, Section 13. 10

Part XI. PENALTIES.

Section 1.—Every person violating any of the provisions of this Ordinance shall forfeit and pay a fine not exceeding the sum of \$25.00 in the discretion of the magistrate imposing the same, and in default of payment of any fine imposed, the person offending, may be committed to jail until said fine is paid, but not exceeding the period of ten days. 20

Part XII. TIME WHEN ORDINANCE TAKES EFFECT.

Section 1.—This ordinance shall take effect immediately.

Grounds of Appeal.

Grounds of Appeal.

Filed November 4, 1916.

New Jersey Supreme Court.

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THEODORE KOLANKIEWICZ, by
Peter Kolankiewicz, next
friend,

Plaintiff-Respondent,

vs.

MARY A. BURKE,

Defendant-Appellant.

*Action at
Law.*

*On Appeal
from Essex
Circuit Court.*

*Grounds of
Appeal.*

20

The appellant states the following grounds of appeal:

1. The admission in evidence of the Traffic Ordinance of the City of Newark, adopted April 6, 1912.

2. The denial of the motion to non-suit, which was based upon two grounds:

30 (a) That the evidence does not prove that the defendant was negligent.

(b) That the evidence shows that the little boy was negligent and contributed to the injury.

3. The denial of the motion to direct a verdict in favor of the defendant, which was based upon the same grounds as the motion for non-suit, and the additional ground, that a verdict for the plaintiff would be so clearly against the preponderance of evidence, that the court would be obliged to set it aside.

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Grounds of Appeal.

4. The refusal of the court to charge the first request made by the defendant specifically as requested.

5. The refusal of the court to charge the second request made by the defendant specifically as requested.

6. The charge of the court as to the effect of the Ordinance.

7. The charge of the court that the infant plaintiff had a right to assume that the defendant would observe the Ordinances and would use due care in the operation of her automobile.

FRANK E. BRADNER,
Attorney of Appellant.

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Opinion.

Opinion.

Filed June 19, 1917.

NEW JERSEY SUPREME COURT.

<p>THEODORE KOLANKIEWICZ, by his next friend, <i>Plaintiff and Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>MARY A. BURKE, <i>Defendant and Appellant.</i></p>	<p>10</p>
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Submitted February Term, 1917; decided June 19, 1917. 20

On appeal from the Essex County Circuit Court.

Before Justices Trenchard and Black.

For the appellant, Frank E. Bradner.

For the respondent, Stein, Stein & Hannoeh.

Per Curiam:

Plaintiff, a boy ten years old, was struck by defendant's automobile while he was crossing a street, at an intersecting street crossing, in front of a trolley car which was discharging passengers. 30

Defendant's automobile had been following the trolley car and, when the trolley car stopped, pulled out and passed and so hit and injured the plaintiff.

The defendant appeals from the plaintiff's judgment.

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Opinion.

The only question here to be determined is this: Was the ordinance of the City of Newark requiring automobiles under certain circumstances to stop while cars are discharging passengers a valid ordinance and admissible in evidence?

10 Upon the authority of *Irwin v. Atlantic City*, 100 Atl. 565, we hold that it was.

The judgment will be affirmed, with costs.

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Rule Affirming Judgment.

Rule of Affirmance.

Entered June 21, 1917.

NEW JERSEY SUPREME COURT.

<p>THEODORE KOLANKIEWICZ, by PETER KOLANKIEWICZ, his next friend, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>MARY A. BURKE, <i>Defendant-Appellant.</i></p>	}	<p><i>Action at Law on Appeal from Essex County Circuit Court.</i></p> <p><i>Affirmance.</i></p>	<p>10</p> <p>20</p> <p>30</p> <p>40</p>
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This cause having been argued at the last November term of this court on the errors assigned, and the court having duly considered the same and being of the opinion that there is no error in the judgment and proceedings of the court below;

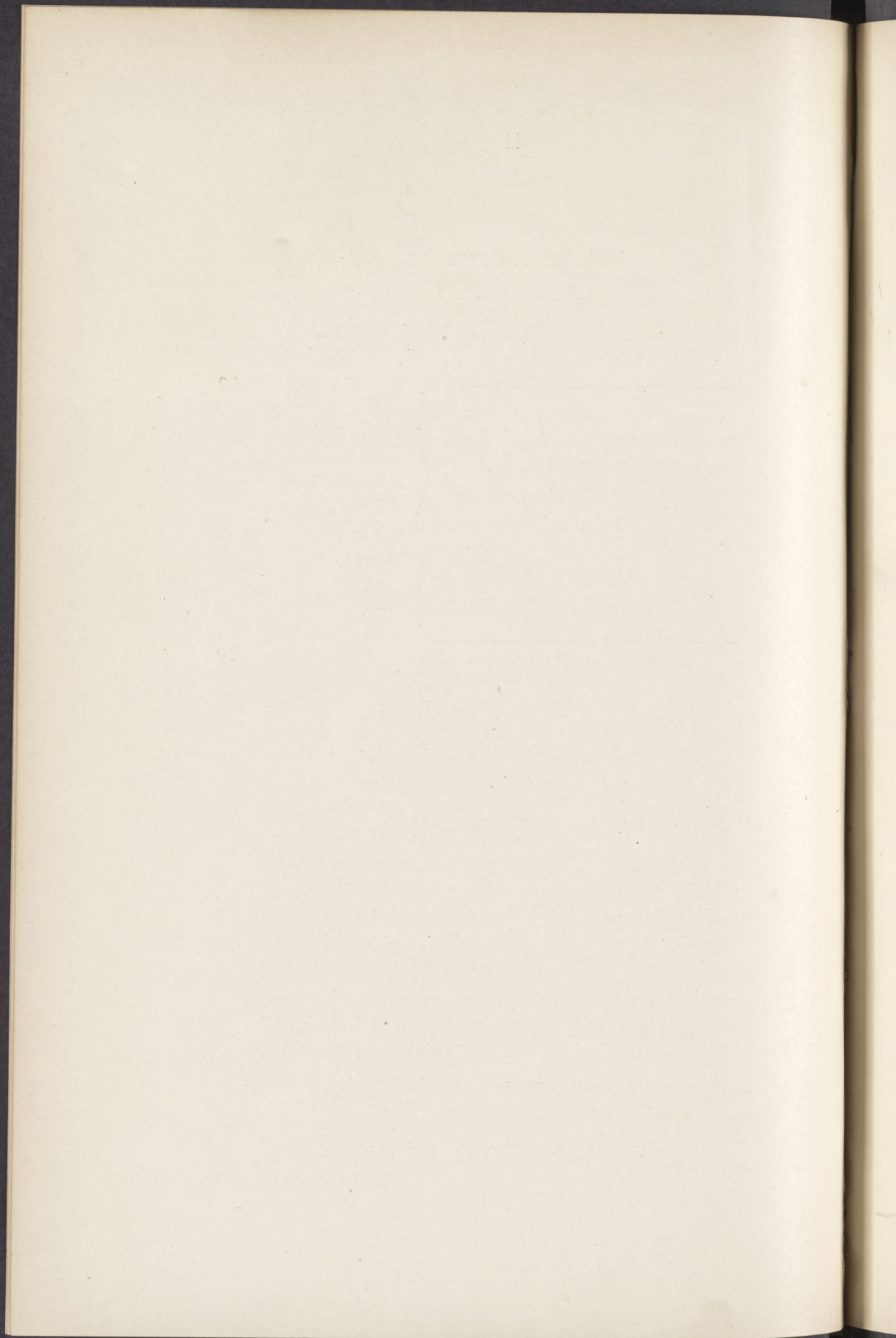
It is on this 21st day of June, 1917, on motion of Stein, Stein & Hannoeh, attorneys of the plaintiff-respondent, ORDERED, that the judgment of the Essex County Circuit Court be, and the same is hereby, in all things affirmed with double costs to the respondent to be taxed, and

It is further ORDERED, that execution on said judgment and costs, both in the court below and in this court, do issue out of this court therefor.

Entered June 21, 1917.

On motion of

STEIN, STEIN & HANNOCH,
Attorneys.



New Jersey Court of Errors and Appeals

THEODORE KOLANKIEWICZ, by
PETER KOLANKIEWICZ, next
friend,

Plaintiff-Respondent,

vs.

MARY A. BURKE,

Defendant-Appellant.

*On Appeal
from the
Supreme
Court.*

Brief for Appellant.

Abstract of the Case.

This is an appeal from a judgment of the Supreme Court affirming a judgment of the Essex County Circuit Court rendered on the verdict of a jury in an action brought to recover damages for injuries to the infant plaintiff, alleged to have been caused by the negligent conduct of the defendant in driving an automobile owned by her.

Briefly, the essential facts are as follows: The plaintiff's case was—that the infant plaintiff, a boy about ten years old, was crossing South Orange avenue, going north, at the corner of Prince street, in front of a trolley car, which had stopped on the east-bound track, and from which passengers were alighting. He had gotten to a point about midway between the rails of the west-bound track when he was struck by the right-hand mud guard of the defendant's automobile, which was being driven by her, and going east, and knocked down. The automobile went on about ten feet after hitting the boy, and was turned to the north curb by the de-

fendant and stopped. The automobile did not go over the boy.

The defendant, on her part, showed, that she was following the trolley car, and that it had gone on and had disappeared before she reached the street west of Prince street, and at a point about midway between Prince street and the next street to the west, as her car was proceeding slowly, the boy ran out from the sidewalk and ran into the car and was knocked down.

The plaintiff, in support of his case, offered in evidence an ordinance of the City of Newark, which was adopted April 4th, 1912, and approved April 6th, 1912 (p. 34). It was objected to on the two following grounds:

1. That it was invalid, because not authorized by any statute.
2. That it was not relevant to the issue.

Defendant's motions for non-suit, and direction of verdict, both upon the ground that there was no proof of defendant's negligence, were denied.

The Court charged the jury that the ordinance established a rule of conduct, and by its terms required the defendant to come to a full stop behind the trolley car, and prohibited her from turning out and passing the car, to the left, and that the boy had the right to assume that the defendant would not violate the ordinance.

Exception was taken to the charge of the Court as to the legal effect of the ordinance, and that infant plaintiff had the right to make such assumption. Exceptions were also taken to Court's refusal to charge defendant's requested charges, specifically as requested.

Grounds of Appeal.

1. The determination of the Supreme Court that there was no error in the admission in evidence of the Traffic Ordinance of the City of Newark, adopted April 6th, 1912.

2. The Supreme Court sustained the refusal of the Judge of the Circuit Court to charge the first request made by the defendant specifically as requested.

3. The Supreme Court sustained the refusal of the Judge of the Circuit Court to charge the second request made by the defendant specifically as requested.

4. The Supreme Court sustained the charge of the Judge of the Circuit Court as to the effect of the Traffic Ordinance.

5. The Supreme Court sustained the charge of the Judge of the Circuit Court, that the infant plaintiff had a right to assume that the defendant would observe the ordinances and would use due care in the operation of her automobile.

6. The Supreme Court determined that section 13 of the Traffic Ordinance of the City of Newark adopted April 6th, 1912, was valid.

7. The Supreme Court affirmed the judgment of the Circuit Court.

Brief of Argument.

POINT ONE.

THE ORDINANCE OF THE CITY OF NEWARK SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE AS IT WAS INVALID.

a. *There was no statute authorizing it.*

The right to control the use of the city streets was vested in the Board of Street and Water Commissioners by the statute adopted in 1891—cited—Boggs, Newark City Charter, page 717, C. S. 1910, vol. I, page 975, sec. 12, which provides that said board shall have the power to pass ordinances.

“II. To regulate and control the use of streets and public places by foot passengers, vehicles, railways and engines.”

However, the right to limit or control the use or speed of motor vehicles was expressly taken away from municipalities by the Motor Vehicle Act, adopted in 1906 (C. S. 1910, vol. III, page 3436), which reads as follows:

“No city, town, township, borough or other municipality shall have power to make any ordinance, by-law or resolution limiting or restricting the use or speed of motor vehicles, and no ordinance, by-law or resolution heretofore or hereafter made by any city, town, township, borough or other municipal or local authority, by whatever name known or designated in respect to or limiting the use or speed of motor vehicles, shall have any force, effect or validity.”

This section of the Motor Vehicle Act of 1906 clearly deprives the board of any power to regulate the use of motor vehicles. The

opinion of the Supreme Court in this case was based upon the decision in the case of *Irwin v. City of Atlantic City*, 100 Atla, 565. In that case a writ of certiorari issued to determine the validity of an ordinance of the City of Atlantic City, relating to the use of automobile jitney buses. The common council had power under the city charter to regulate the use of streets. By the act 1916, page 283, the state legislature passed an act concerning operation and use of jitney buses. In August the common council passed an ordinance further regulating jitney buses. The Court upheld the validity of the ordinance—but it is noteworthy that, that decision is not in point in this case. The act of 1916 referred to in the Irwin case *contained no express or implied repealer of any sort nor anything to show the legislature's intention to deal de novo with the subject*. Whereas, in the present case, the legislature with the greatest clarity *distinctly forbids the municipality to pass ordinances, or declares them invalid when they limit or regulate the use or speed of motor vehicles* (C. S. 1910, vol. III, page 3436). Could anything be stronger than the intent of the legislature, in that statute, to entirely control the use and speed of motor vehicles itself. Furthermore, this Court is not bound by the decision in the Irwin case, for that was a Supreme Court decision.

b. *The ordinance is invalid because it conflicts with the statute.*

The statute provides at page 3435, sec. 22, that drivers of carriages, vehicles, etc., shall keep to the right when overtaken by another vehicle. *There is nothing in the statute which prohibits the driver of a motor vehicle from passing an-*

other motor vehicle which runs upon rails or tracks, to the left, and manifestly, the vehicle on tracks could not turn out to the right.

The ordinance also provides that a vehicle overtaking another, shall pass on the left side of the overtaken vehicle, complying with the statute in force, and with the law of the road.

Section 13 of the ordinance provides, that:

“In passing a street car while it is stopping to take on or discharge passengers, the motor vehicle must leave four feet of space between it and the right-hand running board, or the lowest step of the car and if by reason of the narrowness of the street, or for any other reason, it is not possible to preserve such distance of four feet, the motor vehicle shall come to a full stop until the car shall have taken on or discharged its passengers and again started.”

This section of the ordinance establishes a rule as to the *use* of a motor vehicle, which is not authorized by the statute and which the defendant was not obliged to obey. That the legislature did *not* intend municipalities to pass such rules, and did intend to govern such acts solely through its own undelegated power is clearly shown by the fact that in the Motor Vehicle Act of 1915 the legislature incorporated a section relating to passing vehicles on rails, and clearly forbids municipalities to pass ordinances relating to the use and speed of motor vehicles in such cases.

It must be further noted, however, that the ordinance does *not* expressly forbid vehicles from passing to the left of a car.

POINT II.

EVEN THOUGH THE ORDINANCE IS ASSUMED TO BE VALID, DEFENDANT IS NOT GUILTY OF NEGLIGENCE FOR ITS BREACH.

The principle, that a person who breaks an ordinance is thereby *prima facie* guilty of negligence is based upon the rule that negligence involves the violation of a legal duty which one person owes to another in respect to care for the safety of the person or property of that other. That legal duty may be based upon common law principles and precedents, or it may be statutory. *Evers v. Davis*, 86 N. J. L. 196. When the legal duty is statutory, it is clearly evident that the duty was created by the legislature to be due and owing to a certain class of people and under certain circumstances, namely, those who come under the conditions of the particular statute. Consequently the purpose and intent of the legislative body in passing the ordinance, must be examined into to determine *by whom* the legal duty is owing and *to whom* it is due.

First it should be noted that the law of the road, the statute and the ordinance all permit a motor vehicle overtaking another vehicle *not on rails* to pass to the left of that vehicle. What then is the significance of the ordinance in compelling the vehicle to stop behind a street car when loading or unloading? Surely, there can be only one answer. The street car carries passengers, who must be protected in getting on and off cars from vehicles going by on the side on which they board the cars. The ordinance was undoubtedly *intended to protect passengers getting on or off street cars, as passengers*. As noted before, the ordinance does

not expressly prohibit a motor vehicle from passing on the left-hand side of a car, but only lays down a rule of conduct for passing on the right, and *for not passing on the right side at all when the street is too narrow*. So, therefore, the legal duty established by the ordinance is owing *only to a person who is getting on or off a street car, or approaching it from the right with the intention of becoming a passenger*. If this is the correct interpretation of the ordinance, then it was not only improperly admitted in evidence, because irrelevant, but also the Court erred in charging the jury as to its legal effect.

The infant plaintiff, as the pedestrian and not a passenger, or intending to become one, had no right to assume that no vehicle would come to the left of the car, because under the ordinance no legal duty was owing to him. Consequently, the Court was in error in its charge, and in its refusal to charge the defendant's requests. Apart from the ordinance which was construed by the Court in effect to make out a *prima facie* case of negligence, there was absolutely no other evidence of negligence on the defendant's part. Such being the case, as the ordinance was improperly admitted, it was the duty of the Court either to grant a non-suit, or direct a verdict for the defendant.

It is respectfully submitted that the judgment should be reversed.

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