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New Jersey Court of Errors and Appeals

Notice of Appeal

HUDSON COUNTY CIRCUIT COURT

CHARLES E. SMITH, Administrator *ad prosequendum* of the Estate of Ethel Smith, deceased, Plaintiff, vs. BRUNSWICK LAUNDRY COMPANY, a corporation, Defendant.	Action at Law.

20

To Alex Smpson, Esq., attorney of plaintiff, and to whom it may concern:

TAKE NOTICE, that the defendant above named hereby appeals to the Court of Errors and Appeals, from the judgment entered in the above entitled cause on the 20th day of December, 1918, in favor of the plaintiff and against the defendant, in the sum of $2,000.00 and costs, upon the following grounds: 30

1. That the verdict rendered by the jury in favor of the plaintiff and against the defendant, 40

was contrary to the evidence and against the weight of the evidence.

2. That said verdict so rendered as aforesaid is contrary to the charge of the Court, and contrary to the law.

10

3. That the jury, in arriving at its verdict, was inflamed and prejudiced against the defendant, by reason of the unwarranted and unjustifiable remarks of counsel for plaintiff, in his summing up to the jury.

4. That the damages awarded by the jury in its verdict in favor of the plaintiff and against the defendant, are excessive.

Dated at Bloomfield, N. J., December 24, 1918.

20 Yours, etc.,

WILLIAM HAUSER,
Attorney of Defendant-Appellant.

Summons

The State of New Jersey to Brunswick Laundry Company, a corporation:

30

(Seal) You are Hereby Summoned to answer the annexed complaint of Charles E. Smith, Administrator *Ad prosequendum* of the Estate of Ethel Smith, deceased, in an action at law in the Circuit Court of the County of Hudson. And take notice, that unless you file your answer to said complaint with the Clerk of said Court, within Twenty Days after

40 the service upon you of this writ and the annexed

complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, LUTHER A. CAMPBELL, Judge of the Circuit Court of the County of Hudson, at Jersey City, this twenty-fifth day of September, Nineteen Hundred and Eighteen. 10

JOHN J. McGOVERN,
Clerk.

Alex. Simpson,
Attorney.,

Complaint

HUDSON COUNTY CIRCUIT COURT 20

CHARLES E. SMITH, Administrator *ad prosequendum* of the Estate of Ethel Smith, deceased, Plaintiff, vs. BRUNSWICK LAUNDRY COMPANY, a corporation, Defendant.	Action at Law.

30

The plaintiff, Charles E. Smith, administrator *ad prosequendum* of the Estate of Ethel Smith, deceased, and who resides at 78 Romaine Avenue, Jersey City, in the County of Hudson, says that:

1. He is administrator *ad prosequendum* of the estate of Ethel Smith, deceased, and brings into 40

Court Letters of Administration *ad prosequendum* granted to him upon the said estate by the Surrogate of the County of Hudson.

2. The intestate of the plaintiff, Ethel Smith, an infant, 3½ years old, on the 23d day of September, 1918, at Jersey City, in the County of Hudson, was killed by reason of the negligence of the defendant, its agents and servants.

3. The negligence of the defendant consisted in this:

The defendant, through its agents and servants, was in possession and operation of a certain truck, upon Romaine Avenue, a public highway in the City of Jersey City, and did not use reasonable care to propel said truck at a safe rate of speed; did not use reasonable care to guide and govern the motion thereof to avoid injury to persons in the vicinity thereof; did not use reasonable care to keep a lookout for persons in the vicinity of said truck; did not use reasonable care to give any warning of its intention to move the said truck but on the contrary suddenly and without warning and without keeping any lookout, backed the said truck against and upon the said Ethel Smith, who was then upon said public highway and injuring her so that she thereupon died.

4. The said Ethel Smith was at all times in the exercise of due care for her safety.

5. The next of kin of Ethel Smith, being the father of said Ethel Smith, had suffered pecuniary injury by reason of her death.

6. The within action is commenced within twenty-four calendar months after the date of the death of said intestate.

Plaintiff demands $10,000 damages.

ALEX. SIMPSON,
Attorney for Plaintiff.

Answer

HUDSON COUNTY CIRCUIT COURT

CHARLES E. SMITH, Administrator *ad prosequendum* of the Estate of Ethel Smith, deceased, Action at Law. Plaintiff, against BRUNSWICK LAUNDRY COMPANY, a corporation, Defendant.	10

The defendant, Brunswick Laundry Company, a corporation, having its principal office at Jersey City, in the County of Hudson and State of New Jersey, for its answer to the complaint of the plaintiff herein, says that: 20

I. It denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1 of the plaintiff's complaint and leaves him to establish the same as he may be advised.

30

II. It denies that plaintiff's intestate, Ethel Smith, was killed by reason of the negligence of the defendant, its agents and servants.

III. It denies each and every allegation contained in Paragraph 3 of the plaintiff's complaint.

IV. It denies each and every allegation contained in Paragraph 4 of the plaintiff's complaint. 40

V. It denies the allegations of Paragraph 5 of the plaintiff's complaint.

VI. It admits the allegations of Paragraph 6 of the plaintiff's complaint.

10 VII. It denies each and every other allegation in said complaint contained not hereinbefore specifically admitted or denied.

FOR A FIRST AND DISTINCT DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION, THIS DEFENDANT SAYS THAT:

VIII. That the death of plaintiff's intestate, Ethel Smith, was not due to nor caused by the fault, carelessness or neglect on the part of this
20 defendant, its agents, servants or employees, but was due to and caused by the neglect and omission on the part of the parents and guardians of said intestate, in failing to place and keep her in charge of some person of suitable age and discretion while the said Ethel Smith was upon the public street and highways, and that by reason of such neglect and omission of the parents and guardians of said intestate, and not otherwise, the said intestate met her death.
30

FOR A SECOND AND DISTINCT DEFENSE TO PLAINTIFF'S ALLEGED CAUSE OF ACTION. THIS DEFENDANT SAYS THAT:

IX. The death of plaintiff's intestate, Ethel Smith, was due to and caused by an unforeseen and unavoidable accident and occurrence, for which this defendant, its agents, servants and em-
40 ployees were in no wise responsible nor account-

able and which neither the defendant nor its agents, servants or employees could have or did anticipate or avoid.

Defendant prays that the complaint herein may be dismissed.

WILLIAM HAUSER, 10
Attorney of Defendant.

Judgment

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit, December 19th, 1918.

The cause having been heard and submitted to the jury they returned their verdict as follows: 20

They say they find for the plaintiff, and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of Two Thousand ($2,000.00) Dollars.

Whereupon, it is adjudged that the plaintiff recover of the defendant the sum of Two Thousand Dollars damages and his costs which are taxed at the sum of Fifty-five Dollars forty-eight cents, making in the whole the sum of Two 30 Thousand Fifty-five Dollars and forty-eight cents ($2,055.48).

Judgment entered this twentieth day of December, 1918.

LUTHER A. CAMPBELL,
Judge.

Attest:
John J. McGovern. 40

Return by Trial Judge

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Judson, and within named, the record and proceedings of the plaint whereof mention is
10 within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, New Jersey, at the day and year within contained in a certain schedule to this appeal annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

Certificate
20

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

I, John J. McGovern, Clerk of the County of Hudson, aforesaid, and also Clerk of the Circuit Court, holden therein,

Do Hereby Certify, that the foregoing is a true and correct copy of a certain complaint, answer, judgment and Notice of Appeal in the case of
30 Charles E. Smith, administrator *ad prosequendum* of the estate of Ethel Smith, deceased, vs. Brunswick Laundry Company a corporation, as the same is taken from and compared with the original as filed in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Jersey City, this twenty-third day of January, 1919.

(Seal)

JOHN J. McGOVERN,
40 Clerk.

Testimony

HUDSON COUNTY CIRCUIT COURT

Charles E. Smith, Admr., vs. Brunswick Laundry.	At Law.

10

Appearances:

Alexander Simpson, Esq., and Mr. Tumulty, for plaintiff.

William Hauser, Esq., for defendant.

This case was tried at the Hudson Circuit Court, before Judge Luther A. Campbell, December 19, 1918. 20

CHARLES E. SMITH, sworn:

Direct-examination by Mr. Tumulty:

Q. Are you the plaintiff? A. Yes.

Q. Prosecuting this suit? A. Yes.

Q. Are you the father of the child? A. Yes, sir.

Q. What was the child's name? A. Ethel.

Q. How old was it? A. About three years and seven months, I guess, about that. 30

Q. Three years and seven months when it was killed? A. I think three years and six months; between that and seven months.

Q. Where do you live? A. 54 Broadway now.

Q. Where did you live then? A. 78 Romaine Avenue.

Q. Do you know when the child was injured, what date? A. September 23d. 40

Q. What kind of a street is that? A. Well, it is a street that runs north and south, a very nice residential street.

Q. Many houses on it? A. Quite a few apartment houses; street where there ain't hardly any traffic on at all to amount to anything.

10

Q. Between what streets did you live? A. Pavonia and Fifth.

Q. Where do you work? A. Commercial Cable Building.

Q. Are you married? A. Yes.

Q. How many children have you got? A. Three.

Q. What kind of a child was Ethel; was she strong and healthy and vigorous? A. Yes; kind of a bright child for her age; anybody that knows her knows that.

20

Q. Did you depend for your subsistence on the money you earned? A. No, sir.

Q. You had no private income, did you? A. No, sir.

Q. How wide is the street there, Mr. Smith, about? A. In feet I could not judge; maybe twenty-five.

Q. You did not see this accident, did you? A. No, sir; I was at work.

30

No cross-examination.

MRS. MARY FITZPATRICK, sworn:

Direct-examination by Mr. Tumulty:

Q. Where do you live, Mrs. Fitzpatrick? A. 78 Romaine Avenue.

40

Q. Did you live near where the Smiths lived? A. I lived in that house.

Q. In that house? A. Yes.

Q. Was Mrs. Smith the janitress there? A. Yes, at that time.

Q. Now, do you remember the date when this child was injured? A. I do. 10

Q. Did you see it? A. I did.

Q. Do you remember what the date was? A. About the 24th or 25th of September, I am not quite sure what date, but I know it was in September.

Q. What time of the day was it? A. It was about quarter to five in the afternoon.

The Court: Mrs. Fitzpatrick, you will have to talk louder. You must keep in mind that the juror farthest over there must hear you. 20

Q. What? A. About quarter to five in the afternoon.

Q. Where were you when the accident happened? A. I was sitting in my window.

Q. The window looking out on what street? A. Out on the street.

Q. What street? A. On Romaine Avenue.

Q. Did you see any children in the street? A. Yes; I saw a great number of children about. 30

Q. Did you see anything else there? A. I saw the automobile.

Q. Well, now, what was the automobile doing before the child was struck, did you notice? A. The automobile? Well, I saw the automobile come back or over the road and go over the child's head. I was reading a book and I did not see it previous to that you see.

Q. Did you see—which way was the automo- 40

bile facing when you say it backed up? A. It was facing the lot opposite my house.

Q. It was not going directly down the street, was it? A. Oh, no; it was across the middle of the road like that.

10 Q. It was across the middle of the road? A. The road goes this way and the automobile was that way when I saw it. The front was facing the lot opposite the house. There is a lot opposite this house, a vacant lot, and it faced there.

Q. Did you see the machine immediately before it went over the child's head? A. No, not immediately before; I only saw it pass over the head, because there was a scream from someone outside that attracted my attention and I raised my

20 eyes off the book, and I saw the wheel pass over the little girl's head, that is all I saw.

Q. Did you see any other children there? A. I did not see the other children.

Q. You heard a scream? A. I heard a scream; I don't know from who.

Q. Before you heard the scream did you hear any horn or signal or warning? A. Oh, no, I did not.

Q. You did not? A. No.

30 Q. Well, now, what happened after you saw the automobile go over the child's head? A. I saw the man jump down.

Q. Yes. A. And come along and take the child in and bring the child into the house, and then I ran down stairs to the mother to tell her.

Q. What kind of an automobile was it; was it an automobile with a shed on it? A. Yes; they are covered in cars.

Q. It was closed in? A. Yes, closed in car;

40 they are all like that.

CROSS-EXAMINATION by Mr. Hauser:

Q. Mrs. Fitzpatrick, you are married? A. Yes, I am a widow.

Q. Have you a family? A. Yes; I have two boys and two girls.

Q. Do you remember the day of this accident? A. I do. 10

Q. Quite well? A. Yes, I do.

Q. What day of the week was it? A. Monday.

Q. Sure about that? A. Monday afternoon.

Q. Who was home of your family on that day besides yourself? A. One of my boys was home but he had just gone out to work. He works at night and he was just gone off to night work.

Q. Yes. How long had you been sitting at that front window reading? A. Well, I was there 20 about—oh, I was there from half-past three or four o'clock. I generally sit there at that time.

Q. You were quite intent on your reading, weren't you? A. Oh, I was there reading a book.

Q. Interesting book, no doubt? A. Yes.

Q. And until you heard the scream there was nothing— A. Well, no.

Q. —that called your attention to what was going on outside? A. Well, now and again I raised my eyes if I saw a car pass, just look at it. I didn't 30 take any notice of anything until I heard the scream.

Q. Did you see the car standing in front of your house before this accident happened? A. Well, I saw that car earlier pass down the road, as I thought.

Q. No; the question is just immediately before the accident? A. No, no.

Q. Did not see it at all? A. Did not see in front of the door. 40

Q. Do you know whether it was there in front of the door of your house before this accident happened or not? A. I don't think it came to our house at all. I think it was to a house on the opposite side.

10 Q. But you were not positive about it? A. Because it does not come to my house.

Q. You are sure about that too? A. They don't come to our house.

Q. Cannot be mistaken? A. I do not think they come to our house. I don't know anyone that gets a laundry.

Q. Let me understand. You say you do not think it comes to your house or that it does not come to your house? A. It does not come to our house.

20 There is no one in our house gets from the Brunswick Laundry. Some one did, but they don't now.

Q. Yes. And the first thing you saw after the scream— A. Was the wheel pass over the child's head. I didn't know who the child was when it happened, only afterwards.

Q. How many children did you see around there that time? A. Oh, there were no children on the road. There were children in the lots, playing in the lots.

30 Q. Mrs. Fitzpatrick, have you ever seen me before this morning? A. Yes, you called to see me one day.

Q. Yes. A. I told you all I saw at the time.

Q. Shortly after the accident? A. Yes.

Q. On the second of October of this year? A. Second of October?

Q. Yes. A. I don't remember.

Q. Well— A. I wouldn't remember the date.

Q. Well it was about ten days after this accident happened? A. I don't take things down.
40

Q. What? A. I wouldn't remember the date. I wouldn't think of it.

Q. It was about a week or ten days after this accident, wasn't it? A. Yes—well, I should think it was. I remember you.

Q. Did you ever see this gentleman before? (Indicating a man standing in the Court room.) A. I don't know. You had a gentleman with you. 10

Q. Isn't this the gentleman who was with me? A. I don't remember him, but I do remember seeing you.

Q. But somebody was with me? A. Yes, some one was with you.

Q. Do you remember the conversation? A. Well, I can't exactly. I told you what I knew at the time and I don't remember any more. 20

Q. Mrs. Fitzpatrick, don't you remember telling me that your son was home at the time of the accident and was sitting at the front window reading? A. Yes; I told you my son was home, but did I not tell you he had gone out to work?

Q. Do not argue with me, please. A. Yes.

Q. Now, hold on. Do you remember telling me that your son was at home that afternoon and was sitting at the front window reading at the time this accident happened? A. That must have been the other boy. 30

The Court: You are now being asked with respect to an alleged talk you had with Mr. Hauser that afternoon that he speaks of, and he is asking you this question.

Q. (Repeated by stenographer as follows: "Do you remember telling me that your son was at home that afternoon and was sitting at the front window reading at the time this accident happened?") 40

By the Court: Q. Any one of three answers would be made to that; who to, yes, no or you don't remember. A. Well, the eldest boy was home in the daytime.

Q. No, no, madam. A. Yes, one of the boys
10 was home.

By Mr. Hauser: Q. Didn't you tell me that your son at the time of this accident was sitting at the front window reading? Yes or no. A. Well, if I told you that at the time that was the truth, I don't remember now what I told you, because I don't quite remember how I did tell you that day.

Q. And you don't remember now exactly what you saw either on that occasion, do you? A. Oh,
20 yes; I do. I know what I saw there. I know I saw that, because—

Q. You had quite a chat out in the hall this morning with this gentleman at my right, associated with counsel in this case? A. I told the gentleman what I saw.

Q. I say you had quite a talk with him? A. Yes; he asked me some questions.

Q. Now, never mind. If you will answer my questions we will get along better. And you went
30 over your testimony with him this morning again, didn't you, what you had seen and what you were going to testify to? Yes or no. A. I don't understand what you are saying to me.

Q. You went over with him what you had seen of this accident and what you were going to tell here this morning, didn't you? A. I went over with him what I saw.

Q. Yes. Mrs. Fitzpatrick, do you remember on
40 that occasion when I was at your home with this

gentleman at my left that in addition to telling me that your son was at the window reading that you were not at the window at that time? A. Oh, I was at the window.

Q. Do you remember telling me that, is my question? A. I don't remember my telling you that I was not at the window, because I was at the window. 10

Q. No, you won't say you did not tell me that, will you? A. I was at the window—

The Court: The question is, did you say that you did not tell Mr. Hauser that you were not at the window. A. I couldn't have told him that.

Q. Answer me whether you did or not?

The Court: You say you did not tell him? A. I didn't tell him I was not at the window, because I think I told you I saw the little— 20

The Court: Answer the question. "No" would have answered it, don't you see.

Q. Didn't you tell me in the presence of this gentleman at my left on that occasion that your son called you to come to the window because something awful had happened in the street? A. No, that is not what I said. If I said that that was not the truth at the time then.

Q. Answer the question. A. Because we were— 30

The Court: It answers it.

A. He was sitting there—I was sitting there.

Mr. Tumulty: Just answer the question.

The Court: I am trying to show you just how far you are called upon to answer. Now, from what you have said you indicate to me your answer could have been, no, I did not say that to him, and no would have been a complete answer. A. Well, I didn't say that. 40

By Mr. Hauser: Q. You are just as positive about that as you are about what you saw on that occasion? A. Yes.

Q. Didn't you tell me at that time that you had no personal knowledge of what had happened and
10 did not want to mixed up in it? A. Well, I may have said I did not want to be mixed up in it, because I never was mixed up in anything before in my life of this kind, and I don't understand these things. I feel quite at sea.

Q. You come here of your own accord, Mrs. Fitzpatrick, or were you subpoenaed to come here to Court? A. I was subpoenaed to come.

Q. Were you paid for coming? A. No.

Q. Have you been promised anything? A. No.

20 Q. Who else did you see around that automobile after the accident happened that you know? A. I didn't see anyone around.

Q. Will you stand up, sir, please? Did you see that gentleman on that occasion? A. Oh, yes; that gentleman came over to the house.

Q. Oh! A. I didn't see that gentleman since until this morning—yesterday morning when we came here.

Q. Now, Mrs. Fitzpatrick, if you do not under-
30 stand my questions please say so. I asked you if you saw that gentleman at the time the accident happened? A. I saw him immediately after the accident happened.

Q. The same day or the day following or a week following? A. No, that day after—he came over to the house.

Q. He came over to the house? A. From the opposite side of the street.

40 Q. What did you see the driver do after this

accident happened? A. He took the child away and brought it down to her mother.

Q. Where was the child lying at the time he picked her up? A. On the road under the car.

Q. Under the car? A. Under the car.

Q. Which side? A. At the left hand side of the car. 10

Q. Quite sure? A. Well, the car was there and this is the side I saw the child and this is the wheel that went over the child.

Q. Which wheel, front or back? A. Back.

Q. With respect to the wheels where was the child lying at the time you saw it picked up? A. Lying on the ground on her face.

Q. With respect to the wheels where was it? A. The wheel—just passed between the two wheels. 20

Q. That is what I am trying to find out. You did not tell me that when I asked you what you saw, did you, Mrs. Fitzpatrick? A. Yes, I think so.

Q. You think so? A. I think that is what I told you, but that is what I saw.

Q. You never told me about having seen Mr.— this gentleman back here, Mr. Schwartzer? A. I don't remember him at all. I didn't know who he was until yesterday I saw him here. 30

Q. You never told me? A. I was never speaking to that gentleman, I didn't know him at all.

Q. You did not tell me when I spoke to you about what you had seen that you had seen this gentleman or that he had come over to you? A. No; he did not come to me. He did not come to me at all. He came over to the house and he was standing at the steps, but he did not come into my house. 40

Q. Were you in your apartment all that time?

A. Yes; I went downstairs when the child was carried in, I went down to see the child.

Q. And this gentleman did not go downstairs? A. I did not see him downstairs.

Q. But did you say a few minutes ago he came over and spoke to you about this? A. No, not to me. He didn't speak to me. He spoke to someone at the steps. I was not on the steps at all.

Q. That is all.

RE-DIRECT-EXAMINATION by Mr. Tumulty:

Q. When you saw the lawyer and the defendant in this suit at your house—

Mr. Hauser: I object to that, if your Honor please. There is no proof that the defendant was there.

Q. Well, this gentleman here. We will change it. Both of these gentleman were active in going to your house. You told them about the accident as you remembered it and saw it? A. At the time, yes.

Q. You are doing that this morning? A. Yes.

Q. You are not lying here? A. No.

Mr. Hauser: I object to that, if your Honor please.

EDWARD SCHWEITZER, sworn:

Direct-examination by Mr. Tumulty:

Q. Where do you live? A. 39 Romaine Avenue.

Q. What is your business? A. Ship's carpenter.

Q. How long have you lived in Jersey City? A. Fifteen years, sixteen years.

Q. Do you know this little girl that was killed? A. No, I did not.

Q. Were you there the day she was killed? A. Yes, sir.

10

Q. Did you see the accident? A. I did.

Q. Where were you when you saw it? A. I was coming home from work.

Q. On what street? A. On Romaine Avenue.

Q. Do you live on Romaine Avenue? A. Yes, sir.

Q. How near were you to the place of the accident? A. Right opposite the automobile, on the front of the automobile, across the street.

Q. You were then across the street and the automobile was facing you? A. Yes.

20

Q. You remember the automobile was facing you? A. Facing me.

Q. Was it crosswise on the street? A. What is that?

Q. Was it crosswise on the street? A. It was crosswise, yes, right across.

Q. Before the accident happened did you see the children? A. I seen one starting off quick, made a move when the automobile started to turn, made a move on that side, and then after I got on the front of the automobile, on the way when I was walking, I got in front of the automobile. I didn't see where the child exactly was.

30

Q. When you first saw the automobile what was its position on the street? A. He just started off on the front of that house, to leave that house.

Q. Was the car standing on the side of the street? A. On the side—right near the curb on the side of the street in front of that 78.

40

Q. As it was standing on the side of the street— A. Yes, sir.

Q. —were you coming toward it? A. I was coming toward it.

Q. Before it moved? A. Yes, sir.

10 Q. Then what did it do? A. It started to move—started to move, and in the meantime to turn.

Q. To turn? A. To make a turn.

Q. So that as you walked along—

Mr. Hauser: I object. Let him finish his answer, please.

The Court: Go on and tell us what he did. It started to move and go forward and also to turn.

Q. To turn—which way did it turn—towards you? A. He wanted to turn—he wanted to turn

20 south.

Q. South on the street? A. Yes, sir.

Q. Now, when he started to turn which way did the machine go? A. When he started to turn the machine went west, right across the street toward me, right across the street.

Q. Then did it keep going forward or did it start back again? A. Then he started to turn his wheel and he turned back—backing.

Q. Now, at the time he started to turn back

30 where was the chauffeur sitting? A. On the front of the wheel.

Q. What was he doing? A. Turning his wheel.

Q. Turning his wheel? A. Yes, sir.

Q. When he started back did you hear any horn or whistle or signal blow? A. No, sir.

Q. Did you see the chauffeur then? A. I did.

Q. Did he look out toward the rear of his car or anything? A. He took just one look at the side, if there was anything coming against

40 him.

Q. Coming against him. Now, at that time did you see the children? A. I saw some children.

Q. Where were they? A. On the sidewalk—and yelling that the child—that my little sister got run over and yelling about that little one, and I was on the—just keeping ahead, going, and just pass the automobile and saw the child where the wheel went over the body of the child. 10

Q. Did you see the little child immediately before the wheel went over it? A. No, sir.

Q. You did not? A. I couldn't see it because I was right on the front of the automobile.

Q. Now, when you saw the machine starting back where were you standing? A. Right on the front of the car.

Q. Right in front of the car? A. Right on the front of it. When I was passing, going home, I was right on the front of the car that time. 20

Q. So that you were on the opposite side of the street in front of the car; is that right? A. This is the car, the front of the car was about as close as this gentleman sitting here.

Q. From where you were standing which direction were you looking? A. I was looking most that direction, I was looking at.

Q. Toward the car? A. Like had my eyes toward the left. 30

Q. Then at the left was where the car was? A. Where the car was.

Q. Could you see the children from where you were looking A. Not at that time—I did see the children on the side when they were hollering after that little child.

Q. But as you looked around could you see the little girl under the wheel? A. Oh, no. 40

Q. Why not? A. Oh, when I looked around I saw that little child under the wheel.

Q. What kind of an automobile was this; was it covered? A. Closed automobile.

Q. Closed automobile? A. Closed top.

10 Q. Did it have a shed on it? A. Had a shed, yes.

Mr. Hauser: What do you mean by a shed.

Mr. Tumulty: Well, an enclosure over the automobile.

Q. Did the shed extend up where the chauffeur sat? A. Well, on the front of the chauffeur is open.

Q. Yes, that is towards the sides? A. And the

20 sides is open too.

Q. But the shed behind the chauffeur is closed? A. It was closed. That was a closed shed.

Q. What did you do with the child after you ran toward it? A. Well, I felt kind of shaky myself and I seen that child run over, so I went right there where the children was dragging that child underneath the wheel and this chauffeur picked—took the child off the other children and took him inside, and I crossed over on that side where the children was.

30 Q. How many children were there at that time? A. Well, I can't tell. About three or four, and then after, when the accident happened, there was a bunch came along.

Q. But before or at the time of the accident how many were there there? A. I can't tell exactly how many of those children was there. There was a few of them there.

40 Q. That is all.

CROSS-EXAMINATION by Mr. Hauser:

Q. Mr. Schweitzer, Romaine Avenue, that place where this accident happened, is an asphalted street, isn't it? A. Not that where the accident is.

Q. It was not? A. That is a brick pavement. 10

Q. I see. The day was clear, was it not? A. Clear day.

Q. What time in the afternoon was it, about? A. About twenty minutes or a quarter to five. That is my time every day coming home from work.

Q. You were on your way home that evening from work? A. On my way home, going home.

Q. How far away were you from this automobile when you first saw it before the accident? 20 A. Well, I was about thirty—thirty feet.

Q. Further north? A. Yes, further north.

Q. On the west side of the street? A. On the other side of the street.

Q. You were on the west side going south, going towards your home? A. Yes, from south going home.

Q. Yes. Did I understand you to say when you first saw the automobile it was standing still in front of 78? A. Yes, sir; just started to move 30 when I noticed the automobile. I just got on the corner and it started to move.

Q. Were there any children on the street at that time? I mean in the roadway between the curbs? A. There was not.

Q. When you say the automobile started out? A. I don't think there was any.

Q. Was there anything between you on the west side of Romaine Avenue and this automobile 40

which prevented your seeing everything clearly? Was there any wagon standing there? A. No, no, no wagons.

Q. And no people in the street? A. Well, some further, but not right there.

10 Q. But you could see this automobile clearly? A. I did.

Q. Were there any children in front of it? A. No, sir.

Q. How did this man start his car from the time you first saw it? A. Well—

Q. I mean did he move rapidly or slowly? A. He moved slow, because it was only a short turn, the turn there; he moved slow.

Q. Do you know whether that was an electric
20 car or a gasoline car? A. Well, it was a gasoline car.

Q. Eh? A. It was a gasoline—I ain't sure, I didn't investigate what the car was.

Q. I see, but you say he moved slowly? A. Slowly.

Q. And he turned from the direction in which he was against the curb to his left to go across Romaine Avenue, did he not? A. Yes, sir.

Q. Did he come clean over to the curb? A.
30 Clean over to the curb.

Q. Did he stop his car at the curb before he made any further move? A. Why sure, he stopped.

Q. Came to full stop? A. Yes, sir.

Q. Then he backed up, did he not? A. Yes, sir; he backed up.

Q. At that time did you see this child who was killed or any child? A. I didn't see at that time any child—only before that I seen a child made
40 a move.

Q. Where was that child at that time when you saw it make a move? A. When he pulled, then I seen like on that side a child made a move. Where it moved I don't know, because I was always—like automobile was turning that move was right in front of me most of the time. 10

Q. And the first thing you knew that anything wrong had taken place was when you heard the scream? A. Yes, sir.

Q. And you heard somebody say, "My sister is under the wheels," or something like that? A. Yes, sir; and I looked and in the meantime the wheels started to go over the child.

Q. How far did that automobile go before it stopped? A. Just only so he stopped that time when the wheel was over the child. Didn't have no chance to stop quicker. 20

Q. Can you tell about how many feet from the curb he had gone before this accident happened? A. Oh, he moved from the curb about four, about four or five feet, that is about all.

Q. Now, do I understand you to say that this driver, when he started to back up, looked out on the side of the car? A. Yes, sir; he looked side—on the side, anything is in the way or so—just only looked out that way and started to turn, because headway, you know, is not on the front of him. 30

Q. Did you observe how he was handling his car, Mr. Schweitzer? Did you observe how the man drove the car, I mean with respect to whether he was careful or not, in your opinion? A. In my opinion—well, there was only a short turn; he couldn't drive fast there. He was driving slow.

Q. Was he using care, as you understand it? 40

Mr. Tumulty: I object.

The Court: I will sustain the objection.

Q. Have you told us everything the driver did on that occasion, Mr. Schweitzer? A. What is?

Q. Have you told everything that you saw the driver do on that occasion? A. I did tell you what
10 I saw.

Q. I understood you to say that you did not hear any horn? A. No; he didn't blow any horn.

Q. You mean you did not hear any? A. What?

Q. You did not hear any horn? A. No; I did not hear any horn.

Q. Is it possible that in the excitement of the moment that you have forgotten whether he sounded a horn or not? A. No; I am sure he did not.

20 Q. Quite sure he did not? A. I am sure he did not.

Q. Now, Mr. Schweitzer, from the position in which you were on that sidewalk just immediately before the acident and having observed the driver, the chauffeur, look out, can you tell us whether he could have seen any child in the back of him, if there was any there? A. Well, not the way he looked, because he didn't stick his head out and look, but just looked out; turned his head just
30 when he looked out on the side of the automobile, only he didn't stick his head out to look out, I know that.

Q. At the time you were just about in front of his car? A. Just about in the front of the chauffeur.

Q. Could you see on either side of the car? A. No, not on the other side of the car, because that was under my passing.

40 Q. Which side of the car were you nearest?

A. I was then by that time, I was nearest to the left side.

Q. But before you had reached that point could you have seen or did you see any child or children back of the car before the accident? A. No.

Q. No, and as far as you know there weren't any? A. Because I couldn't see it; I was on the front of the car. 10

Q. As far as you know there were not any there? A. Well, I don't know, I didn't see any, I know that much. There was children around there on the other side, but I don't know that time if there was any behind the car. Only I seen there was one killed there.

Q. Tell us what happened after the car stopped; what did the driver do? A. Well, I said that he picked—took the child off the other children and brought it to his mother. 20

Q. He did not make any attempt to run away, did he? A. Oh, no, because I wouldn't let him get away.

Q. Did he not say he was going to do anything? A. No, he didn't say anything.

Q. Did you see him take the child away afterwards? A. No; I left and went home then.

Q. Did you see this lady, Mrs. Fitzpatrick, on that day? A. No, I didn't see it. 30

Q. Did you go downstairs to the basement on that day? A. No, sir; I was left on the sidewalk; I stood on the sidewalk.

Q. Did you speak with either the mother of the child or with anybody else on that occasion? A. No.

Q. That is all. 40

RE-DIRECT-EXAMINATION by Mr. Tumulty:

Q. You have testified that the chauffeur looked out. Now, what do you mean by that? A. Just looked sideways if the road is clear, only he didn't look out of the automobile in the back what is behind him.

Q. So that to see children behind what would he have had to have done?

The Court: Is that necessary to be proved? From the proofs you have in it was a closed body.

Mr. Tumulty: I wanted to prove if—

The Court: To see behind you you certainly must look behind you.

Mr. Tumulty: I want to examine him.

Q. (Repeated by the stenographer.)

Mr. Hauser: I object to that question upon the ground that it is speculative.

The Court: He may tell what he saw done. I will sustain the objection.

Q. So the chauffeur did not look out of his automobile, did he?

Mr. Hauser: I object to that.

A. No, sir.

Mr. Hauser: Wait a minute. I ask that the answer be stricken out. The witness can only testify to what he saw.

Mr. Tumulty: He saw that.

Mr. Hauser: He may say that he did not see the chauffeur look out. He says he did not look out the side.

The Court: It seems to me the witness has very plainly told what the driver did; in fact, he has indicated that himself, stat-

ing as he did how the driver turned his head. That is part of the evidence as much as the respective words.

Mr. Tumulty: I believe the question is answered.

Mr. Hauser: I ask that it be stricken out. 10

The Court: It may be stricken out, because there wasn't time given to put in an objection before the answer was given.

Q. You say then that immediately after the accident happened you saw children on the street; is that right? A. Yes, sir.

Q. That is all. A. Running from the sidewalk.

Q. That is all.

Mr. Hauser: That is all.

20

LILLIAN SMITH, sworn:

Mr. Hauser: How old is this child?

The Witness: Eight years old.

The Court: Do you know what it is to tell an untruth, little girl?

The Witness: Yes, sir.

The Court: Eh!

30

The Witness: Yes, sir.

The Court: What will happen to you if you do?

The Witness: Reform School.

The Court: Yes, maybe. Anything else you think would happen to you if you told something that was not true; do you go to Sunday School?

The Witness: Yes, sir.

The Court: What will God do to you if you tell an untruth?

40

The Witness: Punish you.

The Court: Yes. Do you want this little girl sworn?

Mr. Tumulty: I think she is qualified. I spoke to her.

10 The Court: All right. Swear her.

Witness sworn by the Clerk.

DIRECT-EXAMINATION by Mr. Tumulty:

Q. Where do you live? A. 54 Broadway now.

Q. 54 Broadway now. Where did you live on the day that your little sister was killed? A. 78 Romaine Avenue.

Q. At the time that your sister was killed were
20 you with her? A. Yes, sir.

Q. Talk up loud now. Where were you? A. We were coming from the lots.

Q. Yes, and where were you when your sister was killed? A. We were coming from the lots in back of the automobile.

Q. Where were you going? A. We were going home.

Q. Had you crossed the street? A. Yes, sir.

Q. Then when you were in the back of the auto-
30 mobile what happened? A. He backed up.

Q. He backed up? A. Yes.

Q. Then what happened? A. She went to go on the sidewalk and he tripped her.

Q. Then what happened? A. And he backed up first and then he went ahead to back over again.

Q. What did the wheel do to your sister? A. It went over her and killed her.

Q. Killed her. Did you hear any horn blow?
40 A. No.

Q. Any noise at all? A. No noise at all.

Q. Did you see the man in the front of the automobile? A. No.

Q. Could you see him? A. No.

Q. Why couldn't you see him? A. Because he was in front of the automobile; he was steering. 10

Q. So he did not call to you, did he, before your sister was killed? A. No, sir.

Q. Who else was with you? A. My brother.

Q. Is your brother here in Court? A. Yes.

Q. Is that your brother here? A. Yes.

Q. Anybody else with you? A. No.

Q. Any other children on the street? A. No other children on the street.

Q. Did you have your little sister by the hand? A. No; my brother had her by the hand. 20

Q. That is all.

CROSS-EXAMINATION by Mr. Hauser:

Q. Now, little girl, where are these lots that you say you were playing in before this thing happened? A. We was playing in the lots.

Q. Which lots? A. Across the street from my house.

Q. Across the street from your house; that is on the other side of Romaine Avenue, is it? A. Yes. 30

Q. How long have you been playing there? A. I don't know how long we was playing there.

Q. Do you know what time you went out that afternoon? A. No, sir.

Q Did you go to school on that day? A. Yes, sir.

Q. What time did you get out of school? A. Half-past twelve. 40

Q. What did you do after you come home from school? A. We went over in the lots and we was knitting.

Q. Do you know how long you were there? A. No, sir.

10 Q. Was anybody else in the lots playing? A. Yes.

Q. Who? A. I don't know the names.

Q. Will you stand up please? Do you remember seeing that boy playing there that day? A. No.

Q. Have you ever seen him before? A. Yes, sir.

Q. Do you know this little girl here, Helen Miller? A. No, sir.

20 Q. Don't you know her? A. No, sir.

Q. Was she there that day? A. I don't know.

Q. You don't know. When did you first see the automobile? A. When we was coming across from the lots.

Q. Where was it then? A. It was standing in front of the door.

Q. At your house? A. Yes.

Q. Standing still, wasn't it? A. Yes.

Q. Was the driver on it when you saw it first? A. No; he was coming out of the house.

30 Q. Yes. Did you cross the street then over on your side? A. Yes.

Q. You got on the sidewalk didn't you? A. No; we was crossing the street in back of the automobile.

Q. Why did you go in back of the automobile? A. We was crossing from the lots.

Q. Well, I know, but the street was—there was

40 no other automobile there, was there? A. No.

Q. Why was it necsessary for you to go back of this automobile to get to your side of the street? (No answer.)

Q. Why did you do that? (No answer.)

Q. Eh? Why did you go back of this automobile? A. Because we had to get home. 10

Q. Well, but you had plenty of room without going close to the automobile, hadn't you? A. Yes.

Q. Why didn't you go further away, eh? (No answer.)

Q. Didn't you know that that might possibly move and you might get hurt if you were close to it? A. I thought it was going ahead.

Q. What? A. We thought he was going to go ahead first. 20

Q. You say he was not on the automobile when you crossed, he was coming down the stoop? A. Yes; he had come down the stoop and then when we was crossing to get on the sidewalk he backed up.

Q. Now, my dear, who told you what you were to say here this morning? A. Nobody.

Q. Nobody? A. No.

Q. Are you sure about that? A. Yes, sir.

Q. How long ago is it since this accident happened? 30

The Court: She may not know.

Q. Do you know what month it was when this accident happened? A. September the 23d.

Q. Yes. Who told you what day it was? (No answer.)

Q. Eh? A. Nobody told me.

Q. Now, I want you to let these gentlemen know exactly where your little sister was when 40

this automobile backed over her. A. She was coming across the street and we were coming across the street from the back of the automobile.

Q. Yes; and the automobile was standing at the
10 curb in front of your house, wasn't it? A. No; it was standing about the middle of the gutter.

Q. About where? A. About the middle of the gutter, only a little bit the other—

Q. What do you mean by the middle of the gutter? A. He was standing a little bit up by the curb.

Q. Let me see if I can help things. Just think that this is Romaine Avenue, understand this is on the east side and this is the west side, No.
20 78 is over here on my right now, the east side of Romaine Avenue, you understand me? A. Yes.

Q. Your house is right here, you see, and here is the curb in front of your house and here is a curb on the other side. Now, was the automobile near the curb in front of your house? A. No.

Q. Where was it? A. It was about up above the curb.

Q. Which way? Just point to it with my pencil. Just show me about where the automobile
30 was. A. About there.

Q. Make a mark there? (Witness indicates with pencil.)

Q. How was the automobile headed? A. It was facing 23 School, this way.

Q. Facing ahead? A. Yes.

Q. It was not at the curb? A. No.

Q. Do you mean these gentlemen shall under-
40 stand you to say that this man left his automobile

standing in the middle of the roadway while he went into the house? A. Yes, sir.

Q. Eh? A. He was near the middle of the gutter.

Q. Near the middle of the street, you mean? A. Yes.

Q. You are sure about that; and he left it standing there and he went in the house? 10

Mr. Tumulty: I object. She did not testify to that.

Q. You saw him coming out of the house while the automobile was standing there, didn't you? Do you remember seeing Mr. Schweitzer that day; this gentleman, who was last on the stand? A. No.

Q. What did you see the man do before this accident happened? A. Well, I just saw him come out of the house. 20

Q. Yes; did you see him get on the automobile? A. Yes, sir.

Q. Could you see him from where you were? A. No.

Q. Where were you at that time? A. We was in the lots and then we was coming across.

Q. I am talking of just after you started to cross the street and before your sister got hurt; where were you? A. We run on the sidewalk then. 30

Q. All of you? A. No, sir, only me and my brother and then she went to run on the sidewalk too and got her foot caught in the automobile tire.

Q. Didn't you tell us a few moments ago in answer to this gentleman that your brother had your little sister by the hand? A. Yes, he had her by the hand. 40

Q. Then how did she come to get entangled in the automobile tire as you just now stated? A. Because she tripped.

Q. How could she trip? How did she trip? Eh? How did she trip? What made her trip? A. We was coming across from the automobile, in back of the automobile, and we was near the automobile when we was coming across and he went to back up and then we tripped her—he tripped.

Q. But you said at that time you were crossing the street and saw the automobile there the man was coming down the stoop? A. Yes; he was coming down the stoop and then he—

Q. You didn't go right straight across the street, did you, Lillian? A. No.

Q. You stopped in the street, didn't you? A. Yes.

Q. Back of the automobile? A. Yes.

Q. You were taking a hitch on the car weren't you? A. No, sir.

Q. Sure about that? A. Yes, sir.

Q. Did you ever do that? A. No.

Q. Sure? Do you remember the day your little sister was buried? A. Yes, sir.

Q. Didn't you hitch on behind an automobile that selfsame afternoon?

Mr. Tumulty: I object to that as immaterial.

The Court: What is the materiality of it?

Mr. Hauser: Merely to show that the witness is not telling the truth. It is a pretty hard thing with a child of this kind, and I appreciate the situation and I don't like—

The Court: I know, but how far may we be expected to go with such a thing as this? You might ask her again whether she ever did, as many of us did, take an apple that did not belong to her, and then ask her on a certain day of she didn't do a certain thing, and then so on and so on. 10

Mr. Hauser: I won't press the matter.

Q. How far away from the back of the automobile were you when you crossed the street? A. It was about that far (indicating with her hands).

Q. Why did you come so close to it, eh? A. Because we was crossing the street.

Q. Well, I know, but it wasn't necessary to go so close to that automobile, was it? Why did you do it then? Who was nearest the automobile as you crossed the street, you or your brother or your little sister? A. My little sister. 20

Q. And your brother had her by the hand? A. Yes.

Q. Do you know whether the top or the body of that car came out further than the wheels? A. No.

Q. You don't know? A. No.

Q. Did you ever notice whether the box of the car comes back of the hind wheels or not? You don't know? A. No. 30

Q. Now then tell us how your little sister got tripped over the wheels? How did she come to get near the wheels? A. She was in the back of the car.

Q. Yes. A. And then she got her foot caught in the wheels.

Q. How did she get her foot caught in the wheels? A. I don't know. 40

Q. Don't know. And your brother had her by the hand all this time? A. Yes, and when she got under the automobile he tried to pull her out, too.

Q. That was after the accident happened, wasn't it? A. Yes.

Q. But I am speaking now of before the accident happened. Now, my dear, let me ask you this: Do you remember the automobile heading right across the street so it was stopped against the gutter on the other side? A. Yes.

Q. Don't you know that your little sister wasn't hurt until after the automobile had crossed the street and had stopped? A. Yes.

Q. Then how in the world did you get back of the automobile if it was heading front when he had gone across the street? Aren't you mistaken? Eh? Aren't you mistaken? A. No, sir.

Q. Did you speak with anybody about what you were going to tell here today? A. No, sir.

Q. Never? A. No.

Q. Are you sure about that? A. Yes.

Q. Did you speak to this gentleman here this morning? A. Yes.

Q. Then what do you mean by telling me that you did not speak to anybody about it? Now you told the Judge that you knew what it meant if you did not tell the truth? Haven't you kept that in mind? A. Yes.

Q. Don't you know that you would be punished for telling what isn't so? Well, then why did you tell me that you did not speak with anybody and now you say you did speak with this gentleman this morning? (No answer.)

Q. Haven't you been told by your mother or your father what to say? A. No.

Q. Sure about it? A. Yes, sir.

Q. Did the three of you ever get over to the sidewalk in front of this place before this accident happened? A. No, sir.

Q. Sure you didn't? A. Yes, I am sure.

Q. Isn't it a fact that after the automobile started from in front of your house the three of you ran after that automobile, didn't you, run half-way across the street? A. No, we didn't run, but she got under the automobile. 10

Q. Yes, but you ran after it first, didn't you, the three of you, and you and your brother got out of the way and your little sister couldn't; isn't that a fact? A. Yes, sir.

Q. That is all.

RE-DIRECT-EXAMINATION by Mr. Tumulty: 20

Q. When the automobile backed up what did it do to your little sister? A. It killed her.

Q. It killed her. Did it strike her? A. Yes.

Q. And knocked her down. Now you say that when you were crossing the street, the automobile first went ahead, is that right? A. No, it backed up first.

Q. Backed up first. Was that when it struck your little sister? A. Yes. 30

Q. That is all.

Plaintiff rests.

MOTION FOR NON-SUIT

Mr. Hauser: If the Court please, I move for a non-suit upon the ground there 40

has been no negligence on the part of the driver established in this case whatsoever. That the mere happening of the occurrence establishes no liability. There is not any proof that what he did was not what a reasonably prudent man would have done under the circumstances. There is no proof that the automobile was operated at an unreasonable speed, nor that he did not use reasonable care to guide or govern the motion of the automobile or that he did not use reasonable care to keep a lookout for persons in the vicinity of it. That on the entire case as presented by the plaintiff there is no proof whatsoever warranting the submission of the matter to a jury and calling upon the defendant for proof. Further, that there is no proof of the damages established.

The Court: What proof would you say there should be of damages? The testimony up to this time is that this child was in good health and bright.

Mr. Hauser: But the decisions are uniform that the only loss for which damages can be recovered is such pecuniary loss as has been sustained by the plaintiff.

The Court: Or will in reasonable contemplation be sustained.

Mr. Hauser: Yes.

The Court: Could you, in a case of this character, Mr. Hauser, say that this child was earning money? No, you could not. All you do would be to put a witness on the stand and ask what in his judgment it

was reasonably probable she might earn; which would be a very difficult thing, if not impossible, and therefore in the case of every minor under earning age there never could be a recovery, could there?

Mr. Hauser: Well, not unless there could be some proof brought to establish the earning capacity when it arrived at an age when it could earn, less the charges for proper maintenance and support. 10

The Court: How could you ever get to that? Certainly if the witness was put on the stand and asked when in his judgment, knowing the child, it would commence to earn, and he said at the age of fifteen, I think you would object immediately, and if you did not at that time, when he was asked what he thought or what in his judgment the child would be able to earn when she started to earn, I think you would object, and I think I would sustain your objection. 20

Mr. Hauser: I ask your Honor further for a non-suit upon the ground that it has not established that any act of the driver in this case was the proximate cause of the injury inflicted. 30

The Court: Mr. Hauser, I had in mind this, the Traffic Act which is in existence in this state. While the mere violation of either one or any of these provisions is not *prima facie* negligence, yet the highest Court in this state has said that it, with similar acts, is given by the Legislature to the reasonably prudent person, as a 40

table, as it were, or a rule, which he might use for his guidance in determining what he should do as a reasonably prudent person, and in that act, under Section 3, title 3, there is this: "Before backing ample
10 warning should be given, and while backing unceasing vigilance shall be exercised not to injure those behind."

Now we have the testimony at least of Mr. Schweitzer I think it was—I am not passing upon the verity of it, of course, but I am taking it as it is. He says no signal was given, and he does say the driver looked out as he started to back, but as he indicated, looked directly to his
20 side. You have also the testimony, whatever it may be worth, of one of the other witnesses, Mrs. Fitzpatrick, that she heard no signal given. Under those circumstances I do not see how I can grant your motion on the ground of negligence.

Mr. Hauser: It is also urged that the plaintiff shall at all times exercise due care for her safety, and I maintain on the testimony of the sister who was with her at
30 the time quite the contrary has been established. I recognize the fact that the testimony of a child at the age of this last witness should not be subjected to the extreme scrutiny of that of an adult, but I think the plaintiff has failed to make out the facts of those charged with her care; but I say the negligence of the parents in permitting her to go around the street under such circumstances is attributable to
40 her.

The Court: That is not the rule in this state, I do not think, Mr. Hauser, unless you can show me that there is some opinion by the Court of Errors and Appeals later than Hone vs. Consolidated Traction Company, appearing in 60 N. J. Law at 444. In that case the Court of Errors and Appeals was evenly divided upon the question coming to it from the Supreme Court. The Court said: "This suit was brought under the statute (that is the Death Act) by an infant of the age of four years and seven months (here the infant was three years and six months) to recover the damages with reference to the pecuniary injury resulting to the plaintiff, as the next of kin, from the death of this minor child, which was caused, as is alleged, by the negligence of the traction company The father who instituted the suit below, is not only the personal representative, but is also the sole next of kin of the deceased infant. (So there flatly in line with this case)."

The first question was the one you are raising, and the Court of Errors says:

"In regard to the first question this Court is equally divided, and therefore no opinion is expressed," and the Supreme Court, Chief Justice Beasley reading the opinion, holds that that doctrine does not apply. Now, unless you can show me something later than what I have, I am assuredly bound by the opinion of Chief Justice Beasley as being the rule applicable in this state.

Mr. Hauser: I want to add that inasmuch as the statute, the Traffic Act, is not pleaded—while I appreciate the fact that the Court may take judicial cognizance of the laws on the statute books—that that is not available to the plaintiff, and the defendant of course is not prepared to answer that point.

The Court: If you look at Evers vs. Davis, I think you will find that if it had been pleaded it would not have been available; that a mere violation of a penal statute such as this does not form a basis for an action of this character, but one is relegated back to his common law rights; and in that case, Evers vs. Davis which was a tenement house case, very analogous to all these penal statutes—I think it was Justice Garrison writing the opinion—you will see just what the availability is of such a statute. Concisely it is what I told you, a violation does not make *prima facie* negligence.

Mr. Hauser: No; I appreciate that.

The Court: For the reasons I have indicated, Mr. Hauser, I will decline your motion to non-suit.

Mr. Hauser: Your Honor will allow me an exception?

The Court: You may have it.

Defendant's Testimony

MRS. PHOEBE WALSH, sworn:

Direct-examination by Mr. Hauser:

Q. Where do you live, Mrs. Walsh? A. I live now at 282 Magnolia Avenue, but I lived at 95 Romaine Avenue. 10

Q. You were living at 95 Romaine Avenue during the month of September last? A. Yes, sir.

Q. Do you recall the occurrence in which this little Smith girl met her death? A. Yes, sir.

Q. Where were you on that day in the afternoon? A. I was on my own sidewalk.

Q. And on which side of the street is that or was that? A. On the opposite side. 20

Q. You mean the west side of Romaine Avenue? A. Yes.

Q. About what time in the afternoon did you observe the occurrence? A. Say about 5 o'clock. o'clock.

Q. Which way were you looking? A. I was looking right down that way.

Q. Number 78 is a few doors below where you were living, on the other side? A. Three doors.

Q. Did you at that time before the accident see the Brunswick Laundry automobile? A. Yes, sir. 30

Q. Where was it? A. It was stopped up against the—backed up to the curb stone in front of the house.

Q. In front of 78? A. Yes, sir.

Q. Which way was the car headed? A. The car was headed across the street.

Q. At that time—I am speaking now before 40

the accident happened, Mrs. Walsh? A. Yes, sir.

Q. At that time did you see these children or any of them? A. Yes, sir.

Q. Where were they? A. They were on the sidewalk.

10 Q. Which side of the street? A. Right on their own side.

Q. The east side? A. Yes, sir.

Q. Did you see the driver of the automobile start up? A. Yes, sir.

Q. Which direction did he go? A. South, he started the car south.

Q. Well, I understood you to say that he was at first at the easterly curb? A. Yes, sir.

Q. He was then headed north, was he not? A.

20 Yes, he was driving—turning—he started—he had quite a good piece and he was trying to back up.

Q. Had he at that time come across Romaine Avenue. A. Well, he was quite a good piece from the curbstone. He had pulled up quite a good piece —and those little children,—there was one of the child's little sisters, and there was another one and there was three of them altogether hooked on the back of the car.

Q. They hooked on the back of the car? A. Yes.

30 Q. You saw them? A. Yes, sir.

Q. Then what happened? A. Well, as he backed up again—when he came out of the house first there wasn't anybody on the car; he got out of the house and he got into his car and he looked all around, both ways, back and front, and he got into his car and he started his car going and as he drove out a piece to back up the three children

40 honked on the back and one of the children fell

down, the smallest one fell down and the wheel went over it.

Q. What did you see the driver do then? A. I heard somebody holler "There is something under your wheel," and he jumped from the car; he didn't take time to walk down, but he jumped clean out back and he picked the little child up in his arms and he took it down inside, and then I saw the lady come up with him and get into the car and they drove off. 10

Q. Before he jumped off to pick up the child had he stopped the car? A. Oh, yes, he had stopped the car.

Q. The car standing still then? A. The car was standing still, yes.

Q. Did I understand you correctly to say that when he started to cross Romaine Avenue, these children were on the sidewalk, on the other side, on the east side? A. Yes, in the back of the car on the sidewalk, yes, sir. 20

Q. When he started to cross the street they took hold? A. He started out a good piece—he pulled the car out quite a good bit to back up, and they jumped on.

Q. Mrs. Walsh, what you have told this morning, is that the same that you told me on October 2d, when I went to see you? A. Yes, sir. 30

Q. And until I served you with a subpoena yesterday, did you see me in the meantime? A. No, sir.

Q. Have you had any talk with any one representing the Brunswick Laundry other than myself? A. No, sir.

Q. Are you interested in this case in any way? A. No, sir; I am just merely telling what I seen 40

at the time. I don't know the woman nor I don't know the Brunswick Laundry.

Q. You received a subpoena fee, did you not, when you were served with a subpoena? A. Yes, sir.

10 Q. Have you been promised anything for testifying here? A. No, sir.

Q. And expect to get anything? A. No, sir.

CROSS-EXAMINATION by Mr. Tumulty:

Q. You don't know the other gentleman there, do you? A. No, sir, I do not.

Q. Never saw him before? A. I never saw him before this morning, no, sir.

Q. Wasn't there somebody else with the law-
20 year when he went to your house? A. No, sir.

Q. Who did you tell—who was the first you told your story to? A. First I told my story to was that gentleman over there sitting in the chair?

Q. He went to your house? A. Of course.

Q. You told it to nobody else before he went to your house? A. No, sir.

Q. You told nothing until he went to your house? A. No, sir.

Q. And then you told this remarkable story?
30 A. Yes, sir; I told the truth.

Mr. Hauser: I object to the characterization.

The Court: It is a little bit late, but it was a remarkable characterization.

Q. What were you doing?

Mr. Hauser: I take an exception to the Court's saying that. I do not think it is quite the thing.

The Court: What do you take an ex-
40 ception to?

Mr. Hauser: Your Honor's remarking that it was a remarkable characterization.

The Court: Put your exception on the record if you want to be as technical as that.

Mr. Hauser: I have no intention— 10

The Court: You have manifested it. You have your exception if you want to have it there.

Q. What were you doing this day at the time of the accident? A. I was out on the sidewalk with a broom sweeping the leaves up.

Q. And you paid particular attention to the chauffeur's coming out of the house? A. Yes, I was looking right down.

Q. You were so careful that you saw him look down by the automobile to see if anybody was there? A. I seen him looking around all the car, yes. 20

Q. Did you see the children there? A. I saw the children then on the sidewalk.

Q. Did you notice what kind of a car it was? A. It was a covered car.

Q. How high was the body from the street? A. I couldn't just say, sir, how high the body was.

Q. Didn't you notice that? A. I am not much of a judge. 30

Q. You looked at the body? A. Yes.

Q. Isn't your memory as accurate about that as it is about all the other details you told us? A. That is all right; I couldn't tell you that because I—

Q. Did you see how small this little child was that was killed? A. Yes, sir. 40

Q. How big was the child? A. Well, I should judge about that size (indicating). I cannot—I am no hand to go by feet or anything like that.

Q. Could you tell what age you thought the
10 child was? A. I would judge it to be about three years old, because I have one myself.

Q. You have one yourself? A. Yes.

Q. Is your child that is three years of age able to hitch on back of automobiles?

Mr. Hauser: I object.

A. My child isn't.

The Court: I will sustain the objection.

Q. Do you mean to tell this jury this child three years old hitched on back of the automobile?
20 A. That is what she was doing.

Q. She was holding on to it? A. She was trying to hold on to it.

Q. She didn't have hold of it then? A. Yes, she had hold of it.

Q. Well, you just told us she was trying to hold? A. I said she was hanging on the back of the wagon, the three of them.

Q. How near were the children to the machine when the chauffeur came out? A. They wasn't
30 near to it when the chauffeur came out; they were on the sidewalk.

Q. How near? A. How near? They were quite a good piece back on the sidewalk.

Q. So your story is then that he did start across the street, did he, to turn? A. He started his machine to go across the street to back the car.

Q. He did start across the street; that is right?
40 A. Yes.

Q. Then he backed up? A. Yes; I suppose he backed it.

Q. I suppose you heard him blow his horn? A. No; I wouldn't say that.

Q. Well, did you? A. No; I wouldn't say I heard him, because I did not hear him.

Q. You did not hear him? A. No, I didn't hear no horn. 10

Q. Did you notice what he was doing when he was turning? A. I just saw his head go out of the car and look behind.

Q. You saw it? A. I saw him look.

Q. You saw his head go out of the car? A. Yes, sir.

Q. Sure of that? A. Yes.

Q. Did you see where the children were then? A. The children wasn't on the car; they were on the sidewalk. 20

Q. They were on the sidewalk when he looked out? A. Yes.

Q. Then did he back up immediately? A. He drove out a piece, quite a good piece from the curbstone, and the children wasn't on when he was driving out from the curbstone, but as he got out quite a piece and he started to back up, that is the time they got on.

Q. But when you say he looked out of this machine—A. There was no children on. 30

Q. Just a minute. Don't be too anxious, please. We will get—A. I am only too anxious to get out of here, to tell you the truth.

Q. When the chauffeur looked out of the automobile as you say where were the children? A. They were on the sidewalk.

Q. On the sidewalk? A. Yes. 40

Q. Was that when the automobile was up against the curb? A. No, sir; the automobile had driven out a piece and they were still on the sidewalk.

Q. Was that when the machine was in the middle of the street? A. Yes—it wasn't quite in the middle of the street.

The Court: Wait until he finishes.

Q. When the machine was in the middle of the street and immediately before it backed up you say the children were on the sidewalk? A. I say they were on the sidewalk.

Q. Well, how many of them were there? A. There were three.

Q. Then at that time the machine was out how far from the curb? A. About that far (indicating).

Q. It was only that far from the curb? A. Yes; when he started to back.

Q. When he started to back. You have testified here he started to turn before he started to back. A. Yes; of course you would get out so far and start to turn. (Indicating).

Q. You say the back of the automobile was about that far from the sidewalk? A. The back of the car was about that far from the sidewalk. (Indicating).

Q. That is the time he looked out? A. That is the time when he started to back up he looked out, yes.

Q. He looked out? A. Yes.

Q. That is all.

RAYMOND BAYLOR, called:

By the Court: Q. How old are you? A. Ten.

Q. Do you know what it is to tell the truth? A. Yes.

The Court: All right. Swear him. 10

(Witness sworn by the Clerk).

Direct-examination by Mr. Hauser:

Q. Raymond, I want you to speak up so the last gentleman in the box can hear every word you say. Where do you live? A. 104 Romaine Avenue.

Q. Is that on the east side of Romaine Avenue? That is on the left-hand side as you go down? A. No, sir; on the east side. 20

Q. The east side of Romaine Avenue? A. Yes.

Q. Did you know this little Smith girl? A. No, sir.

Q. Do you remember the day this accident happened? A. Not quite.

Q. I mean you remember that there was an accident? A. Yes, sir.

Q. You remember what month it was in? A. September.

Q. Yes, and what time of the day? A. Late in the afternoon. 30

Q. Where were you just before this accident? A. I was in the lots and I was running up onto the street.

Q. Which lots were those? A. On the west side.

Q. How near to number 78 was that? A. Right across the street. 40

Q. Were you playing in the lots? A. Yes, and then I ran up on to the street.

Q. On which side? A. I run in the street.

Q. Into the street? A. Yes.

Q. Did you see the automobile at that time? A. 10 Yes, sir.

Q. Where was it? A. The street was here and the automobile was over there.

Q. From where? A. Right in front of 78.

Q. Standing at the curb? A. Yes.

Q. Was it standing still or was it moving when you saw it? A. Standing still.

Q. Did you see the driver then? A. No, sir; he was in the house.

Q. I see. Did you see these three children at 20 that time? A. Yes, sir.

Q. Where were they? A. They were on the sidewalk.

Q. On which side? A. Right in front of the house, playing.

Q. I see. Did you see the driver come out of the house? A. No, sir.

Q. Well, when did you see the automobile next? A. I saw him get in the automobile and then he started off and when he left the curb the children 30 got on back.

Q. You saw that? A. Yes.

Q. Which way did he go? A. He went over this way to turn.

Q. In which direction, toward the other side of the street? A. Toward the west.

Q. And did he stop his car when he got over there? A. Yes.

Q. What did he do then? A. He looked back on 40 the one side that—on the left-hand side, to see

whether any children were on the back, and he couldn't see them.

Q. Yes; did you see them there then at the back? A. Yes, sir.

Q. Just when from the time that the driver started to cross the street to turn around was it when the children ran after the car? A. He had just got in the car and started to move from the curb and they jumped on behind. 10

Q. How many of them had hold of the body of the car? A. The two big ones got on and when the car got half way across the litle one came up and got—and tried to get on.

Q. Did she actually have hold of it? A. Yes.

Q. Which part? A. The bar that runs in the back.

Q. Was that down pretty low? A. It was—just as high as the body. It was the piece that that board goes down—tailboard goes down. 20

Q. Now, what did you see happen after that, after the man stopped at the westerly side? A. He turned—he looked back to back up and he went to back up and he backed up and then these two big—the big boy and girl run away and they —the car ran over the child's head and they yelled, "Oh, my sister, oh, my sister" and then he jumped out and said, "Where does the child live," and none of them—he had to wait a couple of minutes and then they told him where he lived. 30

Q. Did you see him pick the child up from the street? A. Yes, sir.

Q. Where did he take him? A. Into the house.

Q. Raymond, do you remember the first time you saw me? A. Yes, sir.

Q. How long ago was that, do you know? A. A few days after the accident. 40

Q. I see. Did you see me after that until yesterday? A. No, sir.

Q. Whom have you told this story to that you have told this morning? A. You.

Q. Anybody else? A. No, sir—to my mother,
10 yes.

Q. Just told your mother; anyone else? A. No, sir.

Q. Did you speak to your uncle about it? A. He—my mother told him.

Q. Were you there at the time? A. Yes, sir.

Q. Did she tell it the same way that you told me? A. Yes.

CROSS-EXAMINATION by Mr. Tumulty:

20 Q. What is your name? A. Raymond Baylor.

Q. Where were you standing when the automobile started to back up? A. I was in the street.

Q. Near where the children were? A. No, sir.

Q. How far away? A. About thirty feet.

Q. Eh? A. Thirty feet.

Q. Were you standing in the street or on the sidewalk? A. In the street, in the middle of the street.

Q. Come down here, sonny; point out here how
30 high the back of that automobile was. A. Right up to here (indicating).

Q. Are you sure of that? A. Yes.

Q. Did you measure it? A. No, sir.

Q. Did you ever see the automobile since? A. Yes, sir.

Q. When did you see it? A. Many times. My mother trades with the Brunswick Laundry.

Q. You looked at the back? A. Yes, sir.

Q. You say it is only as high as that? A. Just
40 about that high, yes.

Q. So your mother trades with the Brunswick Laundry? A. Yes.

Q. Your mother has spoken about this accident since, hasn't she? A. Yes, sir.

Q. What side of the machine were you standing on when it crossed on the street? A. The left-hand side. 10

Q. On the left-hand side? A. Yes.

Q. What side of the machine did the man look out of? A. Left-hand side.

Q. The side you were on? A. Yes.

Q. Where were the children then? A. They were on the back of the automobile.

Q. You could see them? A. Yes, sir.

Q. You were how far away? A. About thirty feet.

Q. Who did you tell this story to before you saw this gentleman? A. My mother. 20

Q. Your mother? A. Yes, sir.

Q. Is your mother in Court? A. No, sir.

Q. Do you know this lady that was just on the stand? A. She lives near me.

Q. Did you say you were standing at the street or on the sidewalk? A. In the street.

Q. In the street? A. Yes.

Q. Were you near this lady? Did you see her at the street? A. No, sir; she was on the other side; she was up sweeping off the sidewalk. 30

Q. Well, she saw you, didn't she? A. I don't know.

Q. Or you see her? A. No, sir.

Q. You did not see her? A. No, sir.

Q. How do you know she was sweeping up the sidewalk? A. Every day I went by there. I went by. I run by when I was going down to the lots and I saw her sweeping off her sidewalk. 40

Q. Did you see these children on the sidewalk before the accident? A. Yes.

Q. What were they doing? A. Playing, running around on the sidewalk.

Q. Were they near the automobile? A. Yes, sir.

10

Q. Right near it, weren't they? A. Yes; so they could easy get hold of it when it started.

Q. So when the chauffeur came out they were standing right near the automobile? A. Yes, sir.

Q. That is all.

BERTHA MILLER, sworn:

20

Direct-examination by Mr. Hauser:

Q. Bertha, how old are you? A. Ten and a half.

Q. Where do you live? A. Ninety-one Romaine Avenue.

Q. Do you know the Smith children? A. Yes, sir.

Q. Do you remember the accident which happened in September, in which the little girl was killed? A. Yes, sir.

30

Q. Where were you that afternoon? A. I was just across the street from it.

Q. Do you mean on your side of the street? A. Yes, sir.

Q. You live on the west side, don't you, the west side of the street? A. Yes, sir.

Q. Did you see Mrs. Walsh on that day? A. Yes, sir.

40

Q. Where was she? A. She was sweeping the leaves.

Q. At that time she lived next door to you, didn't she? A. Yes, sir.

Q. About how many houses away was your house from where the Smiths' lived? A. About two or three.

Q. But on the other side of the street? A. Yes, sir. 10

Q. What were you doing out there that afternoon on the street? A. I was skating and I had a race, I was taking a race.

Q. Roller skates you mean? A. Yes.

Q. Did you see this automobile before the accident happened? A. Yes, sir.

Q. Where did you see it? A. I saw it in front of the house.

Q. Which house? A. Seventy-eight.

Q. That is on the east side? A. Yes. 20

Q. That is where the Smiths' lived? A. Yes.

Q. Did you see the driver at that time, the chauffeur? A. No, sir.

Q. Did you see him afterwards? A. Yes, sir.

Q. When? A. When he went in the car.

Q. Yes. Where were the children at that time? A. They were on the sidewalk playing.

Q. In front of their own house? A. Yes, sir.

Q. Were they very close to the automobile? A. Yes, sir. 30

Q. But they were on the sidewalk? A. Yes.

Q. Not on the street? A. No, sir.

Q. Now, what did you see the driver do? A. I saw the driver when he came out of the house, he looked behind his car if anyone was there and he saw no one, so he went in and started to back, and the children hopped on, and as he tried to back, why, the little— 40

Q. Before he tried to back where did he go? A. He went south. I saw go south.

Q. Did he go across the street first? A. Across the street.

Q. And did he stop his car then before he backed up? A. Yes, sir.

10

Q. Now, then, tell us as he started to back what happened? A. The three children hopped on and the little one fell off and was caught under the wheel.

Q. Do you know which wheel it was? A. The left hind.

Q. I see. Now, before he started to back what did you see the driver do? Did he look around? A. Yes, he looked on both sides.

20

Q. Sure about that? A. Yes.

Q. The back of that automobile was closed? A. Yes.

Q. It had what they call a closed top on it? A. Yes.

Q. It was a delivery wagon, wasn't it? A. Yes.

Q. Was the automobile moving slowly or rapidly? A. Slowly.

Q. How far did he go before you saw anyone or heard anyone? A. He didn't go very far.

30

Q. Did you hear anybody scream or call out? A. Yes; he heard the big girl scream that her sister was under the wheel.

Q. What did he do then? A. He jumped off the wagon and took the girl into the house and he told the mother to go, and the mother and the little girl and the man, why, they went to the hospital.

Q. You mean you saw them drive off? A. Yes.

Q. Before the driver got off the car did he stop his car? A. Yes, sir.

40

Q. Had you ever seen these children hanging on behind any cars on that street before?

Mr. Tumulty: I object.

The Court: How is it relevant? We are trying this issue.

Mr. Hauser: I am trying, if your Honor please, merely to show that that was a habit with them and that it was known. It was persisted in notwithstanding the visible danger. 10

The Court: I will sustain the objection.

Mr. Hauser: Exception.

The Court: You may have it.

Q. Helen, you saw me, didn't you, some short time after the accident happened? A. Yes, sir.

Q. At your house? A. Yes.

Q. Did you tell me then the same thing you said this morning? A. Yes. 20

Q. When did you see me after that, again? A. I haven't seen you since.

Q. Not until you came here in Court this morning, did you? A. No, sir.

Q. Did anybody tell you what to tell here? A. No, sir.

Q. Did I make any suggestions to you what you were to say here this morning? A. No, sir. 30

CROSS-EXAMINATION by Mr. Tumulty:

Q. You are sure you saw this chauffeur look on both sides of the car? A. Yes, sir.

Q. Just show us how he did it? A. He went this way first and then he turned around the other way.

Q. He couldn't look on both sides by simply doing that? It was a closed car. A. He went a little ways out of the car. 40

Q. He stuck his head right out on both sides? A. Yes.

Q. Sure of that? A. Yes, sir.

Q. Does your mother deal with the Brunswick Laundry, too? A. No, sir.

10 Q. Does your father? A. No, sir.

Q. Who did you tell this story to before you saw the lawyer? A. My father—my mother.

Q. Your mother. When this gentleman came to your house did he ask for you or your mother? A. He asked for me.

Q. He asked for you. Your mother was there, wasn't she? A. Yes.

Q. You had told your mother about this accident, and then this gentleman came to your house? A. Yes.

20 Q. Now, you say that when the wheel went over her, her sister screamed; is that right? A. Yes.

Q. Where was her sister when she screamed? A. She was going downstairs.

Q. Now understand what I am saying: when the little girl was under the wheel and you heard the scream where was her sister?

Mr. Hauser: Whose sister?

Q. The little child's sister, Ethel's sister. When she was under the wheel where was she when she

30 screamed? A. Going downstairs, telling the mother.

Q. So she was on the sidewalk going downstairs to her mother's house? A. Yes.

Q. Sure of that? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Hauser:

Q. Bertha, just a second. You saw these three children run for the automobile when he started to

40 cross the street? A. Yes.

Q. What did you see them do? A. I saw them hitch on the back.

Q. All of them? A. Yes.

Q. Did you see whether the little one had hold of the car at all or not? A. Yes, sir.

Q. You are sure about it? A. Yes, sir. 10

Q. Were you some distance away from the automobile so that you could see that? A. I was just across the street from it.

Q. Now, then, you just told this gentleman that when you heard the sister scream that she was going down the stairs into the basement. Are you sure about that? A. Yes.

Q. How far was that from where the little one had been run over? A. About seven feet.

Q. So she only had a few steps to run down in the basement? A. Yes, sir. 20

Q. Is that it? A. Yes, sir.

By Mr. Tumulty: Q. She was going down the stairs, wasn't she? A. Yes.

Q. You saw them hop on? A. Yes, sir.

JOSEPH OLNOWACH, sworn:

Direct-examination by Mr. Hauser: 30

Q. What is your occupation? A. Superintendent of routes.

Q. Do you recall going with me on the 2d of October to Mrs. Fitzpatrick's house, Seventy-eight Romaine Avenue? A. Yes.

Q. You were present this morning when she testified? A. Yes.

Q. And you heard what she had to say about 40

what took place in her rooms when we were there? A. Yes, sir.

Q. I was present, with you, during that conversation? A. Yes.

Q. Tell us exactly, if you can either the exact words or the gist of what took place in Mrs. Fitz-
10
patrick's rooms that day?

Mr. Tumulty: I object to that as immaterial.

The Court: No; I think it is material, Mr. Tumulty, but probably is not the exact way of getting at what Mr. Hauser is undoubtedly trying to get at, as he is endeavoring to contradict the witness, Mrs. Fitzpatrick.

Mr. Hauser: Yes.
20

The Court: The proper way to do that was, as you laid a foundation for it, to ask her whether or not at the time you spoke to her she did not state certain things which she denied or said she did not remember which were contrary to the testimony she had given. The proper way now is to put that before the witness, whatever it be, and ask the leading question. It is perfectly proper, because it lays the foundation for
30
it.

Q. Do you recall me having had a conversation with Mrs. Fitzpatrick in your presence? A. Yes.

Q. Do you remember whether she told me at the time of this occurrence she was in her dining room doing ironing? A. Yes, sir.

Q. Do you remember her saying her son was sitting in the front room at the window reading
40
at the time? A. Yes, sir.

Q. Do you recall that she told me also immediately after the occurrence happened he called to her to come to the window saying something awful had happened? A. Yes.

Q. Have I given you practically the words which she used to me on that occasion in your presence? I mean have I given you practically the words which she told me as to where she was and where her son was and what had taken place? A. Well, she was not at the place she testified over here. 10

Q. You mean she told us she was not there? A. Yes.

Q. What did she say, as you recall it? A. Why, she told us that she was ironing the clothes in the dining room and her son called her to the parlor and he said something terrible had happened and when she asked her son if he saw the accident he said he was reading the book and he saw it after it happened, but she was not there. She admitted she was kind of nervous when we went in to see her. 20

Q. Do you recall her saying that she had not seen anything here and did not want to be mixed up in it? A. Yes.

CROSS-EXAMINATION by Mr. Tumulty:

Q. You were with the lawyer when you were in her house? A. Yes. 30

Q. What was your object in bothering everybody around that neighborhood?

Mr. Hauser: I object to it. Do not answer.

The Court: Your objection sustained.

Q. What were you so busy about that day?

Mr. Hauser: I object. You may ask 40

what I was doing there. I have no objection.

The Court: Yes; I do not think the question is proper, Mr. Tumulty. You are characterizing his acts, which you have no right to do.

10

Q. What were you doing in this lady's house? A. To show the gentleman where the party lived. He is a stranger here.

Q. You were building up your case?

Mr. Hauser: I object.

A. No, sir.

Mr. Hauser: I object and ask that counsel be warned against a repetition of this.

Mr. Tumulty: I cannot see any objection to that question.

20

The Court: He is objecting to the manner in which you characterize these acts and so forth.

Mr. Tumulty: I have to characterize what they were doing.

Q. You were going there to get evidence, weren't you? A. No, sir.

Mr. Hauser: I object.

The Court: Why is that objectionable?

30

Mr. Hauser: Because that doesn't appear to be cross-examination. He may ask what he was doing there, and I have no objection.

The Court: No, it goes to the character or standing that may be given to the witness' testimony as to his interest in the case. I will overrule the objection to that question.

Q. You were going there to get evidence? A.

40 No, sir; it was his business to do that.

Q. You were with the lawyer? A. Yes, sir.

Q. What were you doing? A. Showing him where the people lived.

Q. Did you know where they lived? A. I knew where the accident happened.

Q. Now, will you kindly tell us how you found out where they lived? A. Why, through the neighborhood over here such and such a lady saw it or a relative saw it and so on. 10

Q. So before you appeared in the neighborhood with the lawyer you had been there yourself? A. Yes.

Q. You found out the people to go to; is that right? A. Well, not all of them. The only one I called on was Mrs. Fitzgerald over there.

Q. Fitzpatrick. A. Or Mrs. Fitzpatrick, and Mr. Schweitzer and Baylor also, but none of the others. 20

Q. When you appeared in this lady's home with your lawyer she was nervous, wasn't she? A. Yes.

Q. And told you that she was ironing clothes? A. Why, she didn't tell me that—oh, yes, she told me that she was ironing clothes at that time when the accident happened, but she was not ironing clothes when we were in there.

Q. She did mention somebody was at the window reading a book? A. Yes. 30

Q. Did you write down her statement? A. No, sir.

Q. Or the lawyer? A. No, sir.

Q. Didn't you go into—you saw the boy that was here and testified, didn't you? A. Yes.

Q. You were in his home too, weren't you? A. Yes. 40

Q. Before the lawyer was there? A. Yes.

Q. You spoke to his mother? A. Yes.

Q. She deals with your company? A. That I can't say.

Q. You know her father—you know the boy's father, don't you? A. No, sir; not anybody.

Q. So all the witnesses that yourself and the lawyer interviewed you had seen before he got there; is that right? A. No.

Q. But you had their names? A. Two I saw.

Q. What witnesses were those? A. Why, Mr. Schweitzer and Baylor.

Q. You work for the Brunswick Company do you? A. Yes.

Q. Have you got that chauffeur working for you now?

Mr. Hauser: Yes, he is here.

Q. That is all.

WILLIAM HEITMAN, sworn:

Direct-examination by Mr. Hauser:

Q. Mr. Heitman, are you in the employ of the Brunswick Laundry? A. Yes, sir.

Q. At the present time? A. Yes.

Q. Were you on September 23, 1918? A. Yes, sir.

Q. Are you single or married? A. Married.

Q. Have you any family? A. I have two children.

Q. Young? A. Yes, sir.

Q. How long have you been a chaffeur for the Brunswick Laundry? A. Oh, about seven or eight months, something like that.

Q. At the present time or before this accident? A. At the present time.

Q. What kind of a car were you driving on this particular day? A. A closed electric car.

Q. A delivery wagon? A. Yes.

Q. About what time in the afternoon did you arrive at 78 Romaine Avenue? A. Somewheres around 5 o'clock, quarter to five, something like that. 10

Q. What were you doing there? A. Why, I had occasion to collect a bill from a lady there.

Q. You had customers in that house? A. One customer, yes, sir.

Q. So the statement of Mrs. Fitzpatrick that you did not call at that house is not true, is it? A. No, sir.

Q. Had you been in the habit of calling there regularly? A. Well, I was trying to get this particular lady for two or three weeks. 20

Q. How often had you called there? A. Very seldom.

Q. How? A. Very seldom.

Q. But you had called there before this day in question? A. Yes, sir.

Q. Reached that address on that day—how did you dispose of your car, what did you do with it? A. Why, I had it standing facing north in front of the house. 30

Q. At the curb? A. At the curb, yes, sir.

Q. Was the power on or off? A. Power was off; the car was dead.

Q. And the brakes? A. Brakes were on.

Q. After you had transacted whatever business you had in that house what did you do after coming out? A. Why, I had occasion to go south on 40

the street again and I crossed to the other side.

Q. Well, before doing that did you observe any children nearby? A. Why, some children sitting on the stoop of the house, I think.

Q. How many? A. Why, I don't know exactly.
10 I know I had to get out of their way to get down the stairs.

Q. Do you know whether these two in court this morning were among those? A. I couldn't tell you. I didn't take any particular notice of the children.

Q. You don't know that the little child who was killed was one of them, do you? A. No, that I do not.

Q. Might have been without your recalling at
20 the moment? A. Certainly.

Q. Did you then get on your car? A. Yes, sir, sure.

Q. Before getting on your car what did you do with respect to looking out or near your car? A. Well, when I came out to the car the children were sitting on the stoop apparently nothing in the street, I didn't see anything in the street when I crossed to the other side.

Q. Was there anything back of you when you
30 started your car? A. Not that I took notice of.

Q. At the time you got on your car you saw the road immediately back of it, did you not, at the curb? A. At the time I got on the curb.

Q. Just before you got on, you saw—A. There was nobody in back of the car and nobody in front of the car.

Q. All right. Now, then, you got on and you started your car, did you? A. Yes, sir.

Q. And in which direction did you head it? A.
40 West to cross on the other side.

Q. It was your intention to turn the car and go south? A. Yes.

Q. Did you reach the curb on the other side? A. I did.

Q. What did you do then with your car? A. Stopped the car; could not make a full turn on the street. 10

Q. Did you then arrange to back up? A. I did, yes.

Q. Before you started to back what did you do? A. Why, I looked out on the left-hand side of the car.

Q. Yes; did you see anything back of you? A. I did not, no, sir.

Q. See any children near you? A. I did not see a soul on the street. 20

Q. Hear anything of any kind? A. Not until I heard the child scream.

Q. I mean before that? A. No, sir.

Q. Then you started to back? A. Yes, sir.

Q. At what speed? A. First speed, about five miles an hour.

Q. How far did you back before you heard anything? A. Why, I guess I was about in the center of the street.

Q. Yes; and what did you hear? A. Heard the children—heard some people screaming and said a little child was run over, and I stopped the car and got down and picked the child up and brought it in. 30

Q. Then you carried it in the house? A. I carried it in to its mother.

Q. And then what did you do? A. Why, I took the child and the mother to the City Hospital.

Q. Following that what did you do? A. I went to the police station on Montgomery Street. 40

Q. Reported it? A. Yes.

Q. And surrendered yourself? A. Yes.

Q. Now, Mr. Heitman, will you describe the general construction of the top of your automobile, I mean the body of it? A. Well, it is much
10 similar to a large box with covering over the front of it, don't you know.

Q. Yes. A. Just a panel on the side where you can look out and see what is going on.

Q. Large enough for you to put the entire head and shoulders out? A. Stick your body out a little bit and look behind you.

Q. On which side of the car is your steering wheel? A. On your left-hand side.

Q. So you naturally sat on that side? A. On
20 the left-hand side.

Q. Was it open on your left-hand side so you could look over there? A. Yes; the car is open on the left-hand side.

Q. And if I am not repeating too much, before you started back you did look out? A. Just looked out you know. I saw as far as the back of the car. You cannot see any further than that.

Q. Could you and did you at that time see the rear of your car? A. Why, I see on the left-hand
30 side only. I did not look out on the right-hand side.

Q. As your car was facing right straight across you could see whether anything was approaching you from your right-hand side, couldn't you? A. Oh, yes.

Q. Was there anything? A. From the right-hand side?

Q. Was there anything coming to you from your
40 right? A. No, sir.

Q. Then, as you told us, you started to back up and then the thing happened. Now, was your car in good working order that morning and that day in fact? A. Yes, the car was all right.

Q. Was it in good running order at the time of the accident? A. Yes, sir. 10

Q. Did you have any difficulty in stopping it immediately say when something loomed up? A. No, sir.

Q. Did you immediately stop it? A. Why, sure.

Q. As you started to cross the street, Mr. Heitman, were these children still on the stoop as far as you know? A. Why, that I couldn't answer for. I didn't see them.

Q. But when you last saw them before getting into the car? A. When I last saw them they were 20 sitting on the stoop. All the children I seen in that neighborhood that I paid any attention to, because they were in my road going down from the stoop.

Q. What happened after that with respect to these children you don't know, do you? A. No, sir.

CROSS-EXAMINATION by Mr. Tumulty:

Q. You don't know whether you saw those children before the accident or not, do you? A. No, sir; I don't know any of them at all. 30

Q. When you looked out the left-hand side of your car you only saw the left side? A. That is all.

Q. Did you blow your horn? A. I don't believe I did blow my horn, no, to tell the truth.

RE-DIRECT-EXAMINATION by Mr. Hauser:

Q. Had you any reason to believe just before you started to back that there was any one in the 40

back of your car? A. Why, it is a continuous habit of the children of the neighborhood, to hitch behind, all along there.

Q. But you don't answer my question. Had you any reason to believe as you were about to back that there was anybody on the rear of your car? A. Why, no, I didn't know there was anybody there.

10

Q. That is all.

RE-CROSS-EXAMINATION by Mr. Tumulty:

Q. You often saw children playing on the street before? A. Oh, that is a continuous habit in the neighborhood; you have a line of children on behind all the time.

Q. Got to be careful? A. Yes.

20

RE-DIRECT-EXAMINATION by Mr. Hauser:

Q. Were you careful on this occasion, Mr. Heitman? A. Yes, sir; I used all precautions with the exception, as I think, I did not blow the horn, I don't think.

Q. But you are not positive now whether you did or did not? A. No; I don't quite remember. The accident kind of took that away from my memory. I couldn't speak the truth on that. If I said yes I wouldn't really know whether it was so or not.

30

Q. You were completely unnerved as a result of that? A. Certainly, that is enough to upset anybody.

Mr. Hauser: Our other two witnesses have not arrived yet. One was ill and the other is Mrs. Hendricks with a small child and cannot get here until after recess.

40

Defendant rests.

W. C. SCHWEITZER, re-called in rebuttal on behalf of plaintiff:

Direct-examination by Mr. Tumulty:

Q. You told us you saw the automobile just at the time it went over those girls? A. Yes, sir. 10

Q. Now, where were her two sisters then? A. I saw them running from the sidewalk to pick up that little one.

Q. So you saw them running from the sidewalk toward her? A. From the sidewalk toward the automobile.

Q. At that time they were on the sidewalk? A. Yes, sir, at that time they were on the sidewalk running to pick up the little one.

Mr. Tumulty: That is all. 20

Mr. Hauser: That is all.

(Witness excused.)

LILLIAN SMITH, re-called in rebuttal on behalf of plaintiff:

Direct-examination by Mr. Tumulty:

Q. Lillian, were you hitching on this automobile? A. No, sir. 30

Q. Did you take hold of it? A. No, sir.

Q. Were you riding on it? A. No, sir.

Mr. Tumulty: That is all.

CROSS-EXAMINATION by Mr. Hauser.

Q. But Lillian, you told me before when I asked you before that the three of you were hanging on that car— 40

Mr. Tumulty: I object to that.

Q. Didn't you? A. No, sir.

Q. When you were on the stand before I asked you that as your last question, if the three of you were not running after that automobile, and you
10 told me yes. I asked you if that was not a fact and you told me yes. Do you remember that? A. Yes.

Q. You did say that. Why do you say something different now? Who told you to? A. Nobody.

Q. What? A. No, sir.

Q. Nobody. That is all.

RE-DIRECT-EXAMINATION by Mr. Tumulty:
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Q. Did you have hold of the automobile?

Mr. Hauser: I object. That has been answered several times.

Mr. Tumulty: That is all.

Defendant's Motion for Direction of Verdict

Mr. Hauser: If your Honor please, I move for a direction of verdict in favor of the defendant
30 upon the ground that the negligence of the defendant charged has not been in anywise established; that the utmost that can be said here, particularly in view of the fact that your Honor has said quite properly with respect to the rule regarding contributory negligence of the parents that that is not attributable to the children in this state—the utmost that can be said here is that an accident happened for which the driver, at least,
40 was not to blame, an unavoidable occurrence un-

looked for and an unpreventable occurrence so far as he was concerned. There is no dispute at all of the fact that the driver used reasonably prudent care in the operation of his automobile. The matter is open—I daresay it is a question of fact, if that be the only question in here, as to whether or not the horn was sounded. Some witnesses say that they did not hear any; others say that there was not any given. The driver himself says he was unnerved and does not recall whether he did or not, but feels in truth that he did, but he is not positive. I submit that the plaintiff has not made out the case that should go to the jury by a preponderance of the evidence, and that the defendant is entitled to a direction of verdict in his favor.

The Court: It is purely a question of fact, Mr. Hauser, as you have quite rightly said; and at this time it is not a matter which I can pass on. It is a matter for the jury to pass on. I will decline the motion.

Mr. Hauser: It seems to me, your Honor, that the facts with the exception of the matter of the horn are not in dispute. The testimony clearly established by the preponderance of the evidence that these children were running after this automobile; that they hung on behind. There is no rebuttal of that testimony, either by the two children who saw it, who certainly told their story in a straightforward way, and also by Mrs. Walsh. If I have leave of the Court to call two other witnesses that would be simply further corroborated. That was the sole reason for having them here.

The Court: But let me stop you. Possibly you

do not comprehend just what I have in my mind. It is not for me to pass upon the weight of the testimony at this time. Only, as I understand it, may I direct a verdict where the testimony taken at its full worth can only lead to one direction—
10 that the plaintiff has not made out a case. I cannot say that I am in that position in this case. As to whether or not it bears your way or the plaintiff's, I have in my own mind a perfectly made up idea, which, of course, I will not express—I cannot express. It is not for me to pass upon that question at this time. It is purely a jury question which I have no right to take away from them.

Mr. Hauser: Your Honor will permit me a for-
20 mal exception.

Mr. Hauser sums up to the jury on behalf of the defendant.

Mr. Tumulty sums up to the jury, on behalf of the plaintiff.

During the Summing Up

The Court: State your objection, Mr. Hauser.

30 Mr. Hauser: If counsel will repeat for the purpose of the record what he said concerning my failure to produce a picture I will note an objection.

Mr. Tumulty: Don't you remember it?

Mr. Hauser: In my words.

Mr. Tumulty: Remember it in my words.

Mr. Hauser: I cannot, unfortunately.

Reference has been made by counsel in sum-
40 ming up to the fact that no picture of the automo-

bile was produced in evidence, and to this reference counsel for the defendant makes objection on the ground that it is improper and not based upon any testimony taken in the case, and bound to influence the jury.

The Court: Your objection is upon the record. Proceed. 10

Mr. Tumulty: Evidently the lawyer is very much afraid of that. I don't blame him, because it is something that a normal lawyer would try to do in an important case like this.

Mr. Hauser: I object. I want to renew my objection.

The Court: All right, spread it upon the record.

Mr. Hauser: I object to comments of counsel as to the actions of defendant's attorney, on the ground it is uncalled for and unjustified, and uttered for the purpose of influencing the jury. 20

The Court: Very well; your objection is upon the record. Go ahead.

Mr. Tumulty: Proceed again! The important thing, as I said before, gentlemen, and this gentleman knows it, was the size of this car, what kind of a car it was, how high it was from the ground. That is the important thing, and they could have shown how high the automobile was in the street and how likely it was for this child to have tampered with it or to play with it, but they have not done it, and I tell you they have not done it because they knew that if they did bring a photograph into Court it would show that the child could not hitch on. That is plain enough for Mr. Hauser to understand, and it is not as if he never heard of it before, as he knew it before, and the reason he knew it before is evident, because he 30 40

did not bring in the dimensions or a photograph of the car to show this very important and material fact for his own client's benefit, and no need of getting away from it, and it is a fact in this case and I have a right to comment on it because I think it is something that he has withheld from you.

10

Mr. Hauser: Now, if your Honor please, I wish to ask for a nonsuit and the withdrawal of a juror, rather, upon the ground that this statement of counsel is inflammatory and is not based upon any facts produced in Court, and is unjustified and for the purpose of solely influencing the jury against the defendant.

The Court: I am not going to withdraw a juror, because I am not going to spend this time, and counsel has put his objection upon the record. I will say to Mr. Tumulty if he is looking for an error he is progressing very nicely, if he wishes to keep it up. I have nothing more to say. You may continue to take your objection as you think it should be taken and it may be entered upon the record.

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Mr. Tumulty concluded his summing up to the jury without further objection.

30

Recess.

After recess.

Charge to Jury

Gentlemen of the jury:

This is an action brought by Charles E. Smith, the administrator of Ethel Smith, for the pur-

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poses of prosecuting this action against Brunswick Laundry Company, in which the plaintiff is seeking to recover damages for the death of the child, his daughter, who, I believe, was three years and six months or thereabouts of age at the time of the occurrence, which was in September past. 10

The plaintiff is seeking a recovery for her death under the death act, growing out of an occurrence which he alleges was due and brought about and was the proximate result of negligence upon the part of the servant or agent of the defendant company.

Before I go into what I shall have to say upon the issues proper, permit me to say some few things which I think will be for your better guidance if I speak to you of them at this time. 20

In the first place, you must keep in mind at all times that in the trial of a case you are to be guided in your deliberations and your findings are to be based upon the testimony and such rules and principles of law which the Court shall give you. By that I mean, gentlemen, that you are not to turn aside from your plain duty, as shown you by your oath, and attempt in any manner because of prejudice or sympathy or for any other reason, to put into the case something that is not there and which does not grow out of the trial of the issue by and through the testimony as it has been given to you by the several witnesses. If you will just let your minds go back a short distance this morning to when the oath was administered to you, you will see immediately the force and effect of that oath and its purpose. 30

In line with that let me say to you that because 40

as in this case, there have been two motions addressed to the Court which have been denied, namely a motion for nonsuit and a motion for direction of verdict, which, had they been complied with by the Court would have taken the case away
10 from you, you are not to be influenced; they are matters of absolutely no consequence to you at all; because they were made and because they were denied is entirely immaterial to you and those matters are not under any circumstances to be considered by you or taken notice of in your passing upon those matters which come before you. They were matters which by the proper procedure in a Court of this character were matters which were addressed to the Court, and the Court
20 in passing upon them has not—and if you have any such idea at this time let me disabuse your minds of it—has not passed upon the facts in this case at all.

Now, counsel in summing up or in addressing you at the conclusion of any cause have a right to refer to and reasonably argue from and draw all reasonable proper deductions from the evidence in the case. Beyond that, further than that and other than that they have no right to legally
30 go. Summing up on the part of attorneys is supposed in law to be for your benefit, to aid and assist you, if possible, in the unravelling of the facts and assisting you in arriving at what all the truth of the situation is. So that you can see, gentlemen, how perfectly proper that rule is that I have just stated to you. If counsel go aside from that rule how can it be of any assistance to you? But how certain it is, on the contrary,
40 to go to your confounding, unless you will strike

out of your minds, as it were, anything that may have been said, any suggestions that may have been made, any inference that may have been attempted to be drawn that was not proper and could not reasonably be adduced from the testimony in the case to which proper logic has been applied. I ask of you, gentlemen, that if you find at this time your minds in that condition where you would have been led astray by anything that may have been said, that you will use your best endeavors to follow that rule which I have just given you and the suggestion I have just made to you, and disabuse your minds of it, unless it is based upon the evidence in the case as you find it.

Again, the mere happening of an occurrence such as this one which you have before you raises no presumption of negligence. Negligence must not only be alleged; that is, asserted, but it must be established; and in cases of this character the entire foundation, the entire basis of a right to maintain the action is the establishment of negligence; that is, the failure upon the part of the defendant or its agents or servants to do something which legally they were required to do, or the doing of something which legally they had no right to do.

Now, in all cases of this character, as I have already indicated to you, there must be on the part of the plaintiff an allegation of negligence; that is, he must set forth that thing or those things wherein he says the defendant was negligent; and that is not sufficient. He must go further and in the trial of the issue he must establish that negligence and establish it by a fair preponderance of the evidence. Again, gentlemen, before

I go into the issues proper, let me explain to you what fair preponderance of the evidence means in a rather homely way, but I think in such a way as you will best understand it.

Where one side alleges a thing to be a fact, as,
10 for instance, with the question of negligence, the plaintiff alleges negligence chargeable to the defendant in a certain direction; evidence is given which may tend to both sides of that question. Some of it you may find goes to the establishing or making out as a fact that negligence as alleged; and others you may find goes to the contrary, goes to the disestablishing, to the tearing down of such an allegation. When you have that situation you must take the evidence that you find on both sides
20 of the proposition and weigh it up, or, as I have often, repeatedly said, much as you would take the heft of any commodity, take a portion of it in either hand, as you often have, probably, and weigh it up and determine which weighs the heavier, or whether the two lots weigh equally. If you find that in favor of the allegation and that against the allegation weigh the same or equal then there is no preponderance of evidence; and you only have preponderance when you find
30 that which is in favor of the allegation outweighs, weighs heavier, is entitled to more credence, more belief, than that which appears against it. Then and then only, gentlemen, you have what we call fair preponderance of evidence.

Now, in starting out, gentlemen, not by way of excuse at all, but for the purpose of making my purpose absolutely clear to you, I have brought these things to your attention in advance of go-
40 ing into the main issues, as I call them in this

case, because I thought it important that you should have them before you as I go along with the rest of what I have to say to you; because you will find nearly all through your deliberations you shall have to deal with those very matters of which I have already spoken to you; and, therefore, how important it is that you should know just what they mean and how you should deal with them. 10

As I have said to you, negligence is a thing which is fundamental in a case of this character. It must be alleged and it must be established, and the burden of establishing it is upon the plaintiff, and he must do so by a fair preponderance of the evidence.

There is a rule, which is a very simple one, which applies to a situation of this character; that is, where persons are using a public highway, whether they be doing so as foot passengers or whether they be doing it by vehicle and by and through several classes of vehicles which we know and know of being used continuously upon the public highways. It is a rule which bears down or refers with equal force to all classes of users of the highways who are making lawful use thereof, and that rule is this, that each must exercise that care which a reasonably prudent person would or should exercise considering the time, place, circumstances and conditions so that he will not bring harm to himself or others, Now, of course, gentlemen, in this case this child was but three years and six months of age or thereabouts, and therefore, in our state was not chargeable with contributory negligence. 20 30

So let me turn to that rule, for the present, at 40

least, as it would apply in law to the servant of this defendant company, namely, the chauffeur who was driving or who was in control of its car. The obligation in law resting upon him was to use reasonable care, such care as a reasonably
10 prudent person would or should have used when you take into consideration the time, place, circumstances and conditions surrounding the particular ocurrence.

You see, gentlemen, that you are to take the facts as you find them in this case. First, you are to determine what of them is the truth; therefore what the facts are which are believable by you; and then you are to apply to them that rule which I have just given you. And then there is
20 another thing which has been given, and which you are required to give proper consideration to, and that is the statute in this state which is known variously as the Traffic Act or the Vehicular Traffic Act, which has amongst its provisions this one:

> "Before backing ample warning should be given, and while backing unceasing vigilance shall be exercised not to injure those behind."

30 Now, as to that statute, it is one which we call a penal statute, because for the violation thereof or of any of its provisions or requirements there is a penalty attached; therefore it is called a penal statute. Statutes of that character, our Courts have said, are given by the legislature to the people of this state and to those who come within this state and make use of its public highways as a guide to the reasonably prudent man,
40 assuming that as far as they are applicable to

any particular situation and would come within the rule of reasonable care, that reasonably prudent men would not pass them by or not make use of them; but that the reasonably prudent man as the occasion presented itself and required would take notice of them and make use of them as a reasonably prudent man would or should. 10

Again, because and if it should be shown that this particular provision of this statute had been trangressed by this chauffeur, the mere fact of such a showing does not *prima facie,* of itself and in itself, by the mere showing, charge him with negligence. But you are to take what the law says—you are to consider the time, the place, circumstances and conditions. It is very comprehensive, gentlemen. It means that you are to take, so far as the evidence gives it to you, every- 20 thing into consideration surrounding this particular happening, and when you have done that keep in mind, if you will, and as you should, this provision of the statute; and apply to those facts, those circumstances, those conditions this question: What under all of that would or should a reasonably prudent man have done? Did he do so something which he should not have done, or did he fail to do something which he should have done? Those will be the inquiries presented to you 30 for your deliberation, and on top of it all, has the plaintiff satisfied you from the evidence that this chauffeur did something which as a reasonably prudent man he should not have done? Or did he fail to do something which a reasonably prudent man should have done? If your answer to those questions is no, then you stop right there, because then the plaintiff is not entitled to have 40

a recovery, because then the plaintiff has not made good that primarily important allegation wnich the law says ne must.

You may keep in mind, gentlemen, what I have said to you, too, and that is that this rule which
10 I have been urging upon you and trying to so plainly place before you that you cannot but understand it, applies to those persons who are in the lawful use of a highway. Of course, you are to take into consideration that testimony which is in the case, as and as far and to such an extent as you believe it, as to what this child was doing at that time or immediately before this happening; because it is said that this child was hooking on the back of this car. It is an important thing
20 for your consideration because you see, gentlemen, that this is not a rule of absolute care, but reasonable care. If it were otherwise then a person who is making use of the highway by such a vehicle as the kind in question would become an insurer of the safety of the life and property of every user of the highway. That is not the rule, because if it were, how unreasonable it would be. Then nothing that one could do in the management and control and operation of such a vehicle
30 would ever free him from any happening to anybody or any person's property. He would be an absolute insurer. You can see, gentlemen, how quite impossible it would be for any persons with any degree of safety to use, handle, or control a vehicle upon the public highways. I am placing it in that way before you, gentlemen, so that you will appreciate the degree of care which the law places upon a person, to demonstrate to you as
40 exactly as I can that the degree is just that de-

gree which is comprehended and covered by the word reasonable; and further explain such reasonable care as a reasonably prudent person would or should have exercised.

Now, if you find that the plaintiff has established negligence upon the part of the defendant or its servants then you have to go still another step forward, because the burden still rests upon the plaintiff to satisfy you, still by a fair preponderance of the evidence, that that negligence which may have been thus established, was the proximate cause of this happening; that it was the moving cause which brought about this happening to this child and its ultimate and final death; because, you see, one in the use of a public highway at a given time may be negligent, but that negligence may have nothing whatever to do with an occurrence of this character. He or she may be negligent in any number of ways and yet none of those acts of negligence may have produced or brought about the thing complained of, and it is only when the negligence has been established and, further, that that negligence so established and made out was the proximate cause of the happening, the thing which produced and caused the happening complained of, that a plaintiff has made out those parts of his case.

So that you see there are two things which the plaintiff must make out and must make out by a fair preponderance of the evidence: First, that the defendant's servant was negligent; second, that that negligence was the proximate cause of the happening complained of.

Now, if as to either one of those the plaintiff has failed to make out his case then your verdict

must be for the defendant, and only can the plaintiff have a verdict if he has by that degree and quality of evidence made out both of those points, If he has, then and then only will it be necessary for you to know for what a verdict in this case
10 may be. And again, gentlemen, I must beg of you your closest attention, because a case of this character can only be maintained because of a statute which the legislature has given us known commonly as the Death Act. Were it not for that statute in cases of death resulting from the act of another there could not be any civil remedy. Now, I am emphasizing that, gentlemen, intentionally, because this very act which gives the right of action and without which you could not have
20 it, also lays down specifically and defines with care what a verdict in such a case may be for, and you cannot legally go aside from those provisions. Whatever you and I might think about it, whether you think in a case of this character there should be some finding in the verdict for something more than the statute says, is getting away from the question and is absolutely immaterial. You and I are here simply to enforce the law and apply it as we find it. The duty and responsibility of en-
30 acting the law, of framing it, is in another body; it is in the legislature. Therefore, let me come back and say that whatever you and I may think of it, whatever our feelings may be in or towards the matter, it is of no consequence; it has nothing to do with our duty at all. Our plain duty lies simply in administering the law as we find it.

The statute says that in every such case the jury may give such damages as they shall deem
40 fair and just with reference to the pecuniary in-

jury resulting from such death to the next of kin of such deceased person. In this case the father is the next of kin, and you will notice, gentlemen, that the statute says pecuniary injury. That means money injury, money loss. Our Courts have construed that statute in many ways. These are some of them:

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What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss which falls upon the next of kin by the premature taking off of the intestate. That fund is ascertained by taking into consideration all the possibilities, of which there are a number, each case presenting some that others do not. For instance, in this case some of the possibilities are these, and others you may yourself think of and make use of: This child but for this happening might have lived, but still might have died shortly after this happening from natural causes, and then, of course, any expectation of pecuniary benefit or money benefit would have ceased. The child might have met with some other physical injury or defect or discease which would have prevented it from earning in the future or ever being able to earn for itself or others. Of course, if that happened, pecuniary loss would for that reason have happened to the father, and he would have been a loser by and through that means. Again, it might be that had this child reached the point where it could have earned it might for some reason or another have met with some financial reverse whereby its earning power would be cut off or lessened, and that would have worked an injury to the father, but not one attributable to this cause.

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Again, our Courts have said that nothing is to be added—meaning to such a verdict as might be given in a case of this character—for loss of society or wounded feelings or anything else which cannot be measured by money and satisfied by
10 pecuniary recompense. The damages are to be determined by reference to the pecuniary injury resulting to the next of kin of the deceased by her death. The injury to be thus recovered for has been further defined to be a deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is therefore the sole measure of damage.

Putting it in a little simpler language than that,
20 gentlemen, what a recovery may be had for in a case of this character—I say this character, referring to a death case—is that money loss which would come to the next of kin by and through the death of the party, thus cutting off a reasonable expectation to the next of kin of money contributions to be made to them by the one so taken off, had that one lived.

Applying it to this child it would be and it is the father's reasonable expectation of pecuniary
30 contributions, money contributions or money benefits that would have flown from this child, had she lived, that sum reduced to its present worth. In that direction, gentlemen, there is this serious thing which you must also consider besides those which I have already laid before you:

There is a duty resting in law upon a parent such as this father, for and toward a child, and that duty is to provide raiment, food, lodging, ed-
40 ucation and all of those other things which in

civilized society parents are naturally called upon to furnish for their children during the time that they are progressing from infancy to maturity. The father is in law obligated to expend so far as his station in life will permit just such sums of money as are properly necessary to properly nur- 10 ture, nourish, provide for and educate the child. Now, in the usual case, gentlemen, there would have been some years to elapse, at least, before this child (three years and six months of age) could be reasonably expected to have performed any service for itself, by and through which money compensation could have been obtained. When that time did arrive, if ever it did, the father until that child became twenty-one, unless he sooner emancipated her, left her free with her 20 own money, was entitled in law to have the benefit of her earnings; but still out of it he was called upon to expend such as was necessary of it, or more than he received if that were necessary, to educate, nurture, care for and clothe her. So you see he had an expense which he had to meet. His expectations, if he had one reasonably, was that as this child matured and was able to work for herself, she would do so and would earn, and those earnings she would bring in to him, and that 30 his cost of maintaining her would have been less than the money which she brought to him. If it were greater, if his cost were greater than that which she brought to him, why, then, of course, he would be assisted, it is true, by that which she brought in, but still, he would have a further item of expense, for bringing her to that point where she became twenty-one years of age.

Now, those things, and all those things, gentle- 40

men, you must take into consideration. There may be others which you may think of, and know and understand, as being applicable to a case of this character. If so, of course, use them. But I must say to you, gentlemen, that, as you see
10 from the statute, it is not a question of sympathy; it is not a question of what you would take for the life of a child if it were yours; it is not a question of what amount of money, if any, you would give for the wounded feelings of the parents. Those are matters which are absolutely outside of your consideration. It is a prettey hard and fast money proposition. What have you been satisfied and can you say is the sum of money, if any, which the father, in reasonable expectation
20 can be said to have had a right to expect to receive from this child had she lived and continued to live until she was twenty-one years of age?

If you have been satisfied that that is a sum beyond what the expenses would have been to him to care for and provide for her, as I say the law requires, then that is the sum which you would start to work upon in finding your verdict. I say it is the sum which you would start to work upon because that sum when so found must be reduced
30 to its present day value, and the reason for that, gentlemen, is very plain: That if the child had lived and if the child had been able to earn, and if the child had contributed when earning, you see that earning power would not commence until some years in the future, and when it did start, if ever it did, her earnings would come to her and her contributions undoubtedly go to the father as she earned the money, weekly or monthly or how-
40 ever her wages or compensation was paid, and

they would be operative further over that period when she commenced to earn until the end of the time when she became twenty-one years of age, unless earlier emancipated or left free to her own earnings by the father. So that is the reason, gentlemen, why the sum which I have first spoken to you of must be reduced to its present day value; that is, that sum which today would equal or be worth that sum which you find, if you find, the father will lose by reason of the death of this child. 10

Now, gentlemen of the jury, there is absolutely nothing more in the case. I have gone, so far as I am concerned, as far as I can to place it before you. I have gone to quite a length so that you might thoroughly understand each and every rule as I have attempted to place it before you. With that, therefore, you may take the case. 20

The jury retire.

Mr. Hauser: May I have a formal objection? I wish to except to the reference made in your Honor's charge to the act known as the Traffic Act, particularly with regard to the provisions as to the backing of a vehicle without giving warning, on the ground that it is not pleaded, nor was the statute offered in evidence. 30

The Court: Anything further?

Mr. Tumulty: Nothing further.

New Jersey Court of Errors and Appeals

Charles E. Smith, Administrator *ad prosequendum* of the Estate of Ethel Smith, deceased, Plaintiff-Respondent, vs. Brunswick Laundry Company, a corporation, Defendant-Appellant.	Action at Law. On Appeal.

BRIEF FOR PLAINTIFF-RESPONDENT

Statement of Facts

The jury might have found that the defendant's servants backed an automobile truck upon a child, three and a half years old, when she was crossing a public highway, which resulted in her death.

POINT I

If there was any evidence of this fact, that was sufficient to go to the jury on the question of negligence, for the driver of the vehicle was bound to

use reasonable care in backing, under the vehicular traffic act; and if the evidence of the plaintiff's witnesses was believed, he did not use this care.

The Traffic Act, Chapter 156 Laws of 1915, page 288, bottom of page, Section 3, provides:

> "Before backing, ample warning should be given and while backing, unceasing vigilance shall be exercised not to injure those behind."

Under this law, the conduct of the defendant, if correctly described by the plaintiff's witnesses as related in the brief of the defendant, was sufficient upon which to found an action of negligence, the age of the child made it *non juris,* being only three years and a half of age.

> David vs. West Jersey Railroad, 84 Law, 685.

There was ample evidence; the testimony of two witnesses, Schweitzer, an adult and Lillian Smith, a child, pages 20 to 41, that the decedent, three and a half years of age attempted to pass behind the standing automobile and that the driver backed down without giving her any warning. It was clearly for the jury to say whether or not, to control the vehicle in this manner was negligence; the age of the child being three and a half years made her *non sua juris.*

> David vs. West Jersey St. Rwy. Co., 84 Law 685.

If there was evidence of negligence, this was therefore a jury question and there was no error as claimed under Point 1 and 2 of the Appellant's brief, in refusing to order a nonsuit or direction of a verdict.

POINT II

There was evidence that the horn was not blown before the driver backed down. If this was so, no verdict could have been directed against the defendant, because verdicts are not directed on weight of evidence.

Uvalde Asphalt Co. vs. Central Stockyards, 84 Law 297.

POINT III

It is not ground of appeal that the verdict was contrary to the charge of the Court. That is a matter for rule to show cause on application for new trial, which was not taken in this case.

POINT IV

As to the comment of the Court, this was comment on the evidence. If the remarks of counsel were improper, the Court corrected them in the trial.

The trial Judge undoubtedly has the right to make such comment as was made in this case during the trial.

Markling vs. Lambert, 76 N. J. L. 160.

The comment was ambiguous and could not have affected the defendant because the Court might have been referring to counsel's questions and not to the testimony of the witness, but even if the Court was referring to the testimony of the witness the Court had a right to make his comment thereon if it seemed to him remarkable.

Where counsel makes improper remarks, it is not ground of error unless the Court upon

request, refuses to interfere and instruct the jury to disregard improper remarks. The case of *See vs. Public Service,* 84 Atl., 745; 82 N. J. Law 147, states the law. The language of the Court in the charge will be found as to comment of counsel on page 84, beginning at line 40, where the Court said:

> "Unless you will strike out of your minds, as it were, anything that may have been said, any suggestions that may have been made, any inference that may have been attempted to be drawn that was not proper and could not reasonably be adduced from the testimony in the case, to which proper logic has been applied. I ask of you, gentlemen, that if you find at this time your minds in that condition where you would have been led astray by anything that may have been said, that you will use your best endeavors to follow that rule which I have just given you and the suggestion I have just made to you, and disabuse your minds of it, unless it is based upon the evidence in the case as you find it."

In this language the Court adequately instructed the jury to disregard anything said by counsel not founded on the evidence, and this being done, it will not be presumed that the jury disregarded the Court's admonition.

But, the remarks of counsel were not improper. The defendant had possession of the automobile and if the defendant refused to put in evidence as to the condition of the automobile it certainly would have been proper for the jury to have drawn an inference as to the condition of the auto against the defendant through any failure on their part to produce proof within their posses-

sion. In the case of *Newark Electric Co. vs. Ruddy,* 62 N. J. L. 507, the language of Baron Channel in *Bridges vs. North London Rwy.,* Law Reports 6 Queens Bench, 377, where he said: "If the defendant does not choose to give the explanation," the jury may find "the real cause was negligence on the part of the defendant." So that it was legitimate matter of comment if the defendant did suppress or declined to produce any evidence that might have been relevant to clearing up the issue. But, assuming that the remarks of counsel were improper, because not founded upon any evidence, in the case, then the Court in his charge clearly corrected that error if any there was. *Wigmore,* Section 278.

POINT V

The defendant appellant under Point V argues that the negligence of the parent can be imputed to the child. This has been settled adversely to this contention in the case of *Consolidated Traction Co. vs. Hone,* 59 N. J. L., 30 Vr., 275 and *Newman vs. Phillipsburg Horse Rwy. Co.,* 52 N. J. L., 23 Vr. 446.

Markey vs. Consolidatad Traction Co.,
65 N. J. L., 36 Vr. 682.

RESUME

This was an automobile accident. A child 3 1/2 years old, was crossing a public highway and the driver of the automobile backed down upon her and killed her, without giving her any warning and without using any care, that a jury might say was reasonable, because if he had looked he would have seen the child crossing behind him, and on the testimony it was a legitimate inference that

he did not look and did not give any warning. It was therefore, purely a fact case, because if the driver didn't give any warning and didn't look, he was guilty of negligence, or at least the jury would have a right to say so, and the contributory negligence of the child was excluded because of her age, 3 1/2 years. Therefore, it was solely a question of facts for the jury to say whether the defendant was guilty of negligence and they said he was.

This Court in *Fox vs. Great Atl. Co.*, 87 *Atl.*, 340, 84 Law, 726 said:

> "The rule is well stated in *1 Thompson on Negligence*, Section 1322. The learned author says: 'Cases of collision on highways almost invariably involve questions of concurrent negligence on the part of both the actors. As the circumstances attending such injuries are within the range of every day observation and experience, the question of contributory negligence in these cases is in a peculiar sense a question for a jury, though, of course, within the limits of the principle that there must be evidence reasonably tending to that conclusion, and subject also to the rule that, in cases where the evidence tends only to that conclusion, the judge can decide it as a matter of law."

So that under this view of the law, almost invariably questions of negligence in collisions on the highways are for the jury and it was particularly true of this case.

It is respectfully submitted the judgment below should be affirmed.

ALEX. SIMPSON,
Attorney for Plaintiff.

New Jersey Court of Errors and Appeals

CHARLES E. SMITH, Administrator, etc., of Ethel Smith, deceased, Plaintiff-Respondent, against BRUNSWICK LAUNDRY COMPANY, Defendant-Appellant.	

APPELLANT'S BRIEF

Statement of Facts

This appeal is taken from a judgment entered upon a verdict in favor of the plaintiff and against the defendant, in the amount of $2055.48, on the 20th day of December, 1918, in the Hudson County Circuit Court, in an action tried before Judge Luther A. Campbell and a jury.

The Plaintiff's intestate, Ethel Smith, on September 23d, 1918, being then three and a half years old, met her death by being run over by an electrically driven delivery wagon owned by the defendant, and at the time operated by its employee. The auto had been standing at the curb in front of the decedent's residence, the driver being in the house on business. Upon

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coming out, he observed three children sitting on the front stoop, one of whom was the intestate, the others being her sister and brother. The driver, having first taken pains to see that no one was at or about the car, either front or rear, boarded it and put it in motion, heading west, across the street, preparatory to backing up so as to go in the opposite direction. He crossed the street to the curb on the opposite side, where he stopped, and then reversed his motive power. He had scarcely moved five feet, before he heard a scream, stopped his car and jumped out, finding the child under the car, between the front and rear left wheels. The car was moving very slowly at the time of the occurrence, and was stopped immediately. These facts are not in any particular contradicted nor rebutted.

It is alleged in the complaint that the defendant

> "did not use reasonable care to propel said truck at a safe rate of speed; did not use reasonable care to guide and govern the motion thereof to avoid injury to persons in the vicinity thereof; did not use reasonable care to keep a lookout for persons in the vicinity of said truck; did not use reasonable care to give any warning of its intentions to move the said truck, but on the contrary suddenly and without warning and without keeping any lookout, backed the said truck against and upon the said Ethel Smith," etc.

The complaint also alleges that the decedent was at all times in the exercise of due care for her safety.

The answer was practically a general denial

and by way of defenses set forth (1) the negligence of the parents of the intestate in failing to place and keep her in charge of some person of suitable age and discretion while upon the public highways; (2) that the decedent met her death through an unforeseen and unavoidable accident, for which the defendant was not responsible and which it could neither anticipate nor avoid.

The defendant, at the close of the plaintiff's case moved for a non-suit, which was denied, and an exception allowed. At the close of the entire case, defendant moved for the direction of a verdict in its favor, which was also denied, and an exception allowed. In the course of the cross-examination of a witness for defendant, exception was taken by defendant's counsel to remarks of the Court and in the course of the summing up by counsel, exception was also taken to remarks of plaintiff's counsel, and the withdrawal of a juror asked for, which was refused. To these matters detailed reference will be made hereafter.

POINT I

It was error for the Court to refuse to non-suit upon the close of Plaintiff's case.

The only actual eye witness of the occurrence was an eight-year-old girl, the sister of the deceased, who says:

> "they were going home from the lots, *had crossed the street*, and when in back of the auto, he backed up, tripping the decedent as she went to go on the side-

> walk, running over and killing her" (Case p. 32).

She heard no horn blow, nor any noise at all. On cross-examination she says:

> "We first saw the auto as we came across the lots. It was standing still in front of the door at our house" (Case p. 34).

She could not or would not say why they passed at the rear of the auto (Case p. 35).

Before her sister got hurt, they ran on the sidewalk, but when the deceased went to run on the sidewalk, she got her foot caught in the automobile tire, (p. 37), contradicting her previous statement, but later says she does not know how the child got her foot caught in the wheels (case, p. 39). Then she admitted that the auto was headed across the street and stopped against the gutter on the opposite side, that the deceased was not hurt until afterwards, (case, p. 40), and then (case, p. 41) *admitted that the three of them ran after the car, across the street, and that she and her brother got out of the way and the deceased could not.*

The other witnesses for plaintiff admit the auto was directly across the roadway, that they heard no horn or warning, but did not see the accident as it occurred (case, pp. 12, 21, 22, 20, 28, 29).

From the testimony offered by the plaintiff there was absolutely no proof of any of the allegations of the Complaint, save possibly that no warning was given before backing up, but that fact, standing alone, does not justify the verdict. The driver had otherwise used the care

with which he was chargeable. He had no reason to suspect that any child or children were behind his car, having first looked around when he started off, (case, p. 72) and certainly could not anticipate or guard against their hanging on behind. No evidence of unsafe rate of speed; of lack of care in guiding the car or governing its motion, and in fact no proof was offered of any negligence whatsoever on the part of the defendant. These points are all covered in counsel's motion for non-suit. The Court, however, although the Traffic Act was neither pleaded nor proven, made reference to it in denying the motion, and which later, in his charge, was repeated at length, and to which exception was taken.

The Court in denying the motion made no reference to the points raised by defendant that no negligence had been established, plainly ignoring the application on that specific ground, and denying it on two points, *viz:* failure to give ample warning before backing, although "that of itself was not *prima facie* negligence;" and on the decision of this Court in the *Hone* case, as to negligence of parents.

Therefore the issue is narrowed down to this: Was the failure of the driver to give "ample warning before backing" the proximate cause of the accident? The question practically answers itself. Clearly it was not the proximate cause.

Then if no negligence was established on the part of the driver, and the child met its death by reason of some cause other than the act or omission of the defendant, on what theory can the defendant be held accountable? Merely because of the inability of the child to appreciate the danger of running after an auto, imitating its elders in stealing a ride? Surely the law

does not penalize the owner of an auto for an occurrence against which he can not guard, nor even reasonably anticipate.

POINT II

It was reversible error to refuse Defendant's motion for a verdict in its favor at the close of the entire case.

When the case was closed, there was absolutely no more proof of the alleged negligence on the part of defendant, than at the close of the plaintiff's case. The plaintiff did not make out his case by a preponderance of the evidence; there was no question for decision save whether a horn was sounded or not, and even then, any such failure was not the proximate cause of the accident. The only eye witness of the occurrence, the sister of the decedent, having been re-called in rebuttal, and being the only witness called by plaintiff for such purpose, corroborated her previous statement that the three children were running after the automobile. Defendant's witness, Mrs. Walsh, testified (case, pp. 48-52) that the three children were hanging on the back of the wagon. That they had been on the sidewalk prior to the car being started across the street. The Baylor boy testified to similar effect (case, p. 57) and neither witness was contradicted. To the like effect is the testimony of Bertha Miller (case, pp. 61, 62, 65). Where the plaintiff's evidence as a whole failed to prove defendant's liability, the burden being on plaintiff, defendant's motion to direct a verdict in its favor should have been granted.

Hayden vs. Maine C. R. R., 103 Atlantic, 1047.

Defendant on all the testimony was entitled to the direction of a verdict in its favor. The strongest view to take of the accident was that it arose out of an unavoidable and unpreventable condition, for which the defendant was in no wise to blame.

The rule seems to be, that the Court, in passing upon a motion for non-suit, cannot weigh the evidence, but is bound to concede to be true, all evidence which supports the view of the plaintiff, and to give him the benefit of all the legitimate inferences which are to be drawn in his favor *Hoff vs. Public Service Co.*, 101 Atlantic, 404, *Safler vs. Vanderbeck*, 96 Atlantic, 1019. But where the entire case is devoid of any proof save, for the sake of the argument, the omission to sound the horn prior to backing the car, can it be said that conceding that part to be true, it warrants any inference that such omission was negligent under the circumstances, and the proximate cause of the child's death.

Unless this Court can ascertain from the evidence in the case that there was sufficient to authorize a recovery, the denial of the motion to non-suit cannot be upheld.

Loveland v. McKeevar, 101 Atl., 377, Citing Larned v. McCarthy, 90 Atl., 272, Everling v. Mubillod, Ct. of E. & A. March Term, 1917, No. 137.

See also

Closter Dairy vs. N. Y. C. R. R., 97 Atl., 305.

Ward vs. Erie R. R. Co., 100 Atl., 1029.

Carton vs. Trenton, Etc., Corp. 100 Atl., 174.

"The trial judge is only justified in granting a non-suit or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case, and the weight of conflicting testimony should always be submitted to a jury for their consideration and determination."

Klitch vs. Betts 98 Atl., 427 at p. 431, citing numerous cases.

In the present instance it was admitted and not controverted that the decedent with her sister and brother ran after the auto as it started across the street, surely an act over which the defendant had no control and which it could neither foresee nor guard against.

There is no testimony in this case to support the judgment, and without such, it cannot be upheld.

Schopper vs. Kretschmar, 95 Atl., 572.

That the Court may review the facts, where there is no dispute upon the material facts, has been determined in *Higgins vs. Georke-Krich Co.*, 103 Atl., 37.

POINT III

The verdict rendered by the jury was contrary to the evidence, contrary to the charge of the Court, and contrary to law.

The Court charged (case p. 85).

"The mere happening of an occurrence such as this one raises no presumption of

negligence. Negligence must not only be alleged; that is asserted, but it must be established; and in cases of this character the entire foundation, the entire basis of a right to maintain the action is the establishment of negligence, that is the failure upon the part of the defendant, or its agents or servants to do something which legally they were required to do, or the doing of something when legally they had no right to do.''

And at page 87,

''Negligence is a thing which is fundamental in a case of this character. It must be alleged and it must be established, and the burden of establishing it is upon the plaintiff, and he must do so by a fair preponderance of the evidence.''

At page 88,

''The obligation in law resting upon him (defendant's chauffeur) was to use reasonable care, such care as a reasonably prudent person would or should have used when you take into consideration the time, place, circumstances, and conditions surrounding the particular occurrence.''

At page 90,

''It is an important thing for your consideration, because you see, gentlemen, that this is not a rule of absolute care, but reasonable care. If it were otherwise then a person who is making use of the highway by such a vehicle as the kind in question would become an insurer of the safety

of the life and property of every user of the highway. That is not the rule, because if it were, how unreasonable it would be, * * * He would be an absolute insurer."

At page 91.

"The burden still rests upon the plaintiff to satisfy you by a fair preponderance of the evidence, that that negligence which may have been thus established, was the proximate cause of this happening; that it was the moving cause which brought about this happening to the child and its ultimate and final death."

"It is only when the negligence has been established and further, that that negligence so established and made out was the *proximate* cause of the happening, *the thing which produced and caused the happening complained of;* that a plaintiff has made out those parts of his case."

"The plaintiff must make out by a fair preponderance of the evidence: First, *that the defendant's servant was negligent; second, that that negligence was the proximate cause of the happening complained of.*"

That the verdict rendered was contrary to the evidence and to the law is self evident, as is apparent from the most casual reading of the record. *No proof of any negligence on the part of the driver was established;* neither of omission or commission, save possibly the failure to give warning of his intention to back his car. To any observer it was apparent, from the fact that the front of the auto was against the westerly curb,

that the driver was obliged to back up before going in either direction. The position of the auto itself was a warning to everyone who was or was about crossing the street at that point. If a person therefore deliberately ignores the plain, unmistakable fact of danger, and is injured, who is to blame for the occurrence? It cannot be contended that the act of the driver in crossing the street, preparatory to turning his car was either negligent or the proximate cause of the accident, nor any producing cause, since up to the time of backing the car nothing had happened to the decedent.

There remains then nothing to be considered save the failure to give a warning of his intention to back up his car. If it be assumed that this was negligence, was such failure to give warning the proximate cause of the child's death? If such warning had been given, and the child had still met its death, would this verdict have been justified? Yet the result no doubt would have been no different; the jury would have in such case, as they did in this one, totally ignored the law as charged and mulcted the defendant notwithstanding.

The proof is uncontradicted that the auto was moving very slowly; that it was stopped immediately upon the outcry made; that the driver was competent and careful and that he had, before starting out, used precautions to see that no one was in front or behind him, and *that the children ran after the car as it travelled across the street.* The admissions of the plaintiff's witnesses establish the lack of negligence on the part of the driver. Where a verdict is without evidence to support it, and is against the instructions of the Court, the judgment will be reversed.

French vs. Whelden, 99 Atl., 232.

What then explains the verdict of the jury? Prejudice and passion against the defendant, to which reference will be made hereafter, and sympathy for the plaintiff, in total disregard of the law, and of the rights at law of the defendant. Surely there is no justification for allowing the sympathy and prejudice of a jury to overcome and displace the law, and such a result should not be upheld.

POINT IV

It was reversible error for both the trial Judge and the Counsel for the Plaintiff to make remarks and statements in the presence of and hearing of the Jury, which were unwarranted and clearly prejudicial to the Defendant.

The Court in the course of the cross-examination of one of defendant's witnesses (Case p. 50) commented on her testimony, saying that "it was a remarkable characterization"—to which defendant's counsel objected. The remark of the Court was neither withdrawn nor explained at any time, and doubtless had its effect in antagonizing the jury against the defendant.

Counsel for plaintiff, in his summing up (case pp. 81, 82) said, after defendant's counsel has entered his objection to certain remarks and had said objections noted:

> "Evidently the lawyer is very much afraid of that. I don't blame him, because it is something that a normal lawyer would try to do in an important case like this."

To which remarks defendant's counsel again objected, upon the ground that such comments were uncalled for and unjustified and uttered for the purpose of influencing the jury, which objections were also noted.

Notwithstanding these objections, counsel proceeded further to condemn the defendant and its attorney for the failure to produce a photo of the auto, to which counsel duly objected and requested the withdrawal of a juror, upon the ground that counsel's statement was inflammatory and not based upon any facts produced, was unjustified, and made solely for the purpose of influencing the jury, which request was denied, the Court stating that it would not spend the time, and counsel had put his objection upon the record. The Court also cautioned plaintiff's counsel as to his methods (case p. 82). Taking the uncalled for remark by the Court relative to the statement of the witness together with the objectionable comments of counsel in summing up, is it at all likely that the jury heeded the remarks of the Court in the charge? (Case p. 83):

> "You are to be guided in your deliberations, and your findings are to be based, upon the testimony and such rules and principles of law which the Court shall give you. By that I mean, gentlemen, that you are not to turn aside from your plain duty as shown you by your oath, and attempt in any manner because of prejudice or sympathy, or for any other reason to put into the case something that is not there and which does not grow out of the trial of the issue by and through the testimony as it has been given to you by the several witnesses."

How, in the face of the uncontradicted testimony and this part of the charge, can the verdict of the jury be accounted for, unless by the effect of the prejudice caused by defendant's counsel in protecting the interest of his client, and sympathy for the plaintiff?

Neither the remarks of the Court nor of plaintiff's counsel were at any time withdrawn or the jury told to disregard them, so that the decision in *Saper vs. Baker*, decided by this Court July 2d, 1918, and reported in 104 Atl., 26, is not decisive of the propriety of those remarks nor of the lack of their effect upon the jury.

In the case of *Christensen vs. Lambert,* 66 Law 531, affirmed in 67 Law 341, it was held that improper remarks by counsel in addressing the jury may be cause for setting aside a verdict.

Unjustified comment by counsel should be restrained by the Court, and may be, in the discretion of the Court, required to be retracted. *Minard vs. West, J. & Co.,* 64 Atl., 1054, 74 Law 39.

In the case of *Benoit vs. Perkins,* 104 Atl. 254 at page 258, a New Hampshire case, the Court said:

> "A statement by counsel in argument of material facts of which there is no evidence, direct or inferential, is ordinarily reversible error, unless there is a finding that it did not render the trial unfair."
>
> Citing Gosselin vs. Company, 97 Atl., 744.
>
> "When exception was taken to the improper statement it was incumbent upon the defendant to withdraw it, obtain an instruction to the jury not to consider it, and a finding of fact from the presiding

justice that the trial was not rendered unfair thereby."

Citing Leway vs. Demers, 94 Atl., 262.

"Under this rule a verdict is set aside, not as a punishment for the misconduct of counsel, but to assure the opposite party a fair trial."

Bullard vs. Railroad, 5 Atl., 838.

See also:

Kelsea v. Phoenix Ins., Co., 101 Atl., 362, at 364,—
Morrison v. Noone, 100 Atl., 45, —
Fuller vs. Maine Cent. R. R., 100 Atl., 546,—
Green vs. Laclair, 99 Atl., 244
Dannals vs. Sylvania Tp., 99 Atl., 475,—
Seeherman vs. W. B. Co., 99 Atl., 174.
Kaighn v. Fox—95 Atl., 994.

POINT V

The negligence of the parents in allowing a child of tender years to go upon a highway known to be frequently used by vehicles, without the supervision and care of another of sufficient age and understanding to guard it against danger is chargeable to the child and bars a recovery.

It is recognized that this statement may seem radical and is opposed to the decisions in this State, but changed conditions warrant new laws.

The Howe vs. Consolidated Tr. Co. case (60 N. J. Law, 444) decided by an evenly divided

Court, was practically on all fours with the case at bar. At that time the use of the automobile had not been so general as at the present time, certainly not in the commercial way, and the theory of absolving the child from the result of the contributory negligence of its parents, may at that time have been based upon very good reasoning. But today the use of the auto, both pleasure and commercial, is as common as the horse and wagon once were, and the public generally recognizes the change in conditions and governs itself accordingly. The parents of the decedent here knew of the constant use of the street by automobiles; of the practice of the children to play upon or close to the roadway; of the lack of sufficient mental capacity in the decedent to appreciate or avoid danger, and still permitted it to go upon the street in the company of another child, only eight years old, and with her run after and try to hang on behind an auto, an act naturally attended with danger. No operator or owner of an automobile can be deemed to be an absolute insurer of the safety of every pedestrian upon the public highway, and particularly when his presence, in what turns out to be a place of danger, can neither be reasonably anticipated nor provided against.

We think it will be admitted that, assuming any recovery could be had other than that provided by the Death Act, or if the child had only been injured, the parents could not maintain any action for loss of services, etc., because of their contributory negligence.

In the case of *Hartfield vs. Roper,* 21 Wendell, 614, decided in New York, in 1839, and recognized as an authority on the point, it was held, in an action brought by the next friend of the infant

plaintiff to recover damages for an injury sustained by being run over by defendant's sleigh, that,

> "Where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public highway without any one to guard him, and is there run over by a traveller and injured, neither trespass nor case lies against the traveller, if there be no pretence that the injury was voluntary or arose from culpable negligence on his part."
>
> "In an action for such injury, if there be negligence on the part of the plaintiff, there cannot be a recovery; and although the child, by reason of his tender age, be incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents and guardians of the child, furnishes the same answer to an action by the child, as would its omission on the part of the plaintiff in an action by an adult."

Cowen, J., writing the opinion, said, at page 618:

> "The custody of a child is confided by law to its parents, or to others standing in their place; and it is absurd to imagine that it could be exposed in the road, as this child was, without gross carelessness. * * * To allow small children to resort there alone (on the common highway) is a criminal neglect. It is true that this confers no right upon travellers to commit a voluntary injury upon either; nor does it warrant gross neglect; but it seems to me that, to

make them liable for anything short of that, would be contrary to law. The child has a right to the road for the purposes of travel, attended by a proper escort. But at the tender age of two or three years, and even more, the infant cannot personally exercise that degree of discretion, which becomes instinctive at an advanced age, and for which the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case. It is perfectly well settled, that if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action, even though he be lawfully in the highway pursuing his travels, (citing cases) which can scarcely be said of a toppling infant, suffered by his guardians to be there, either as a traveller or for the purpose of pursuing his sports. The application may be harsh when made to small children, as they are known to have no personal discretion, common humanity is alive to their protection; but they are not, therefore, exempt from the legal rule, when they bring an action for redress; and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the care has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his

> act must be deemed that of the infant; his neglect, the infant's neglect,"

In the case at bar, plaintiff, in effect contends, as in the *Hartfield* case (page 620), that

> "drivers are bound to suppose that small children may be in the road, and as all care lies on the side of the former, damages follow of course for every injury to the latter."

This is going too far entirely. Suppose, as in the case at bar, the infant deliberately places itself in the way of a vehicle, by which an injury is sustained, it may be said, with equal force, the infant is incapable of neglect. But that does not justify placing the responsibility upon the defendant, since the responsibility is upon those chargeable with the care of the infant.

In the case of *O'Shea vs. Lehigh V. R. R. Co.*, 79 App. Div. (N. Y.), 254, 258, 259, the father, suing as administrator, was denied a recovery for the death of his son, on account of his, the father's, negligence, and cases from various states were cited, among which are the following:

Bamberger vs. Citizens St. R. Co., 95 Tenn., 18, where the Court said:

> "The underlying principle in the whole matter is, that no one shall profit by his own negligence, and to allow the father, who has been guilty of negligence, to recover, notwithstanding that negligence, when he brings suit as administrator, although he could not do it in his own right, would be to defeat this underlying principle by a mere change of form, when the entire recovery in either event goes to him

> alone. Upon principle we think that no matter how the suit is brought whether as administrator or as father, it can be defeated by the father's contributory negligence."

To the same effect is the case of *Atlanta, etc., Ry. Co. vs. Gravitt*, 93 Ga., 369, where the Court in denying the right of a parent to recover for the death of an infant because of the concurrent negligence of such parent and the defendant said:

> "In such case negligence on the part of the child's parent or custodian may utterly defeat a recovery. The reason for this is apparent, and has been uniformly recognized and sanctioned. It rests upon the broad ground of common justice that one whose negligence has brought about a calamity to a little one whom he is legally bound to watch over and protect from injury cannot be allowed to profit by the results of his own inexcusable if not criminal neglect and misconduct."

In *City of Pekin vs. McMahon*, 154 Ill., 141, where the suit was brought by the father as administrator of a deceased child, it was held that the contributory negligence of the parent, if it exist, may be shown in bar of the action.

See also, *Wolf, Admr. vs. Railway Co.*, 55 Ohio St., 517, where it was said,

> "To award damages to a parent guilty of contributory negligence in such case would permit him to profit by his own wrong, and besides it would be in direct conflict with the universal rule as to contributory negligence."

To the same effect:

> Koons vs. St. L. & I. M. R. R. Co., 65 Mo., 595.
> B. & O. R. R. Co. vs. Fryer, 30 Md., 47.
> T. M. Ry. Co., etc. vs. Herbeck, 60 Tex., 602.
> Chicago etc., R. R. Co. vs. Logue, 158 Ill., 621.
> Westerfield vs. Levi Bros., 43 La. Ann., 63.
> Tucker vs. Draper, 62 Neb., 66.

POINT VI

The amount awarded by the Jury cannot be considered to have been ascertained pursuant to the direction of the Court as the amount of the pecuniary injury sustained by the next of kin, and being excessive in amount, must be deemed as having been awarded as punitive damages.

The Court in its charge (case p. 94) defined the damages recoverable if any, as

> "compensation for the deprivation of reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased."

The Court apparently realized the possible difficulty of having the jury understand this definition, for he then explained that the damage intended by the definition was "that money loss which would come to the next of kin by and through the death of the party." The Court then defined the obligation upon the parent to provide necessaries to the infant during its infancy, and the length of time that would necessarily elapse

before the child could earn anything by which the father might be compensated, if ever. The Court also stated that such cost might be greater than the amount which the child might earn, and that the jury should also keep in mind the possibility of its dying before reaching majority, from any number of different causes other than the accident or that it might for some reason or other meet with some reverses whereby its earning power would be cut off or lessened (case p. 93). The jury were also warned that in deciding the case it was not a question of sympathy; not a question of what one would take for the life of his own child; not a question of what should be given for the wounded feelings of the parents, but only what the jury were satisfied and could say is the sum of money, if any, which the father, in reasonable expectation could be said to have had a right to expect to receive from the child, had she lived until she was twenty-one years of age (case p. 96).

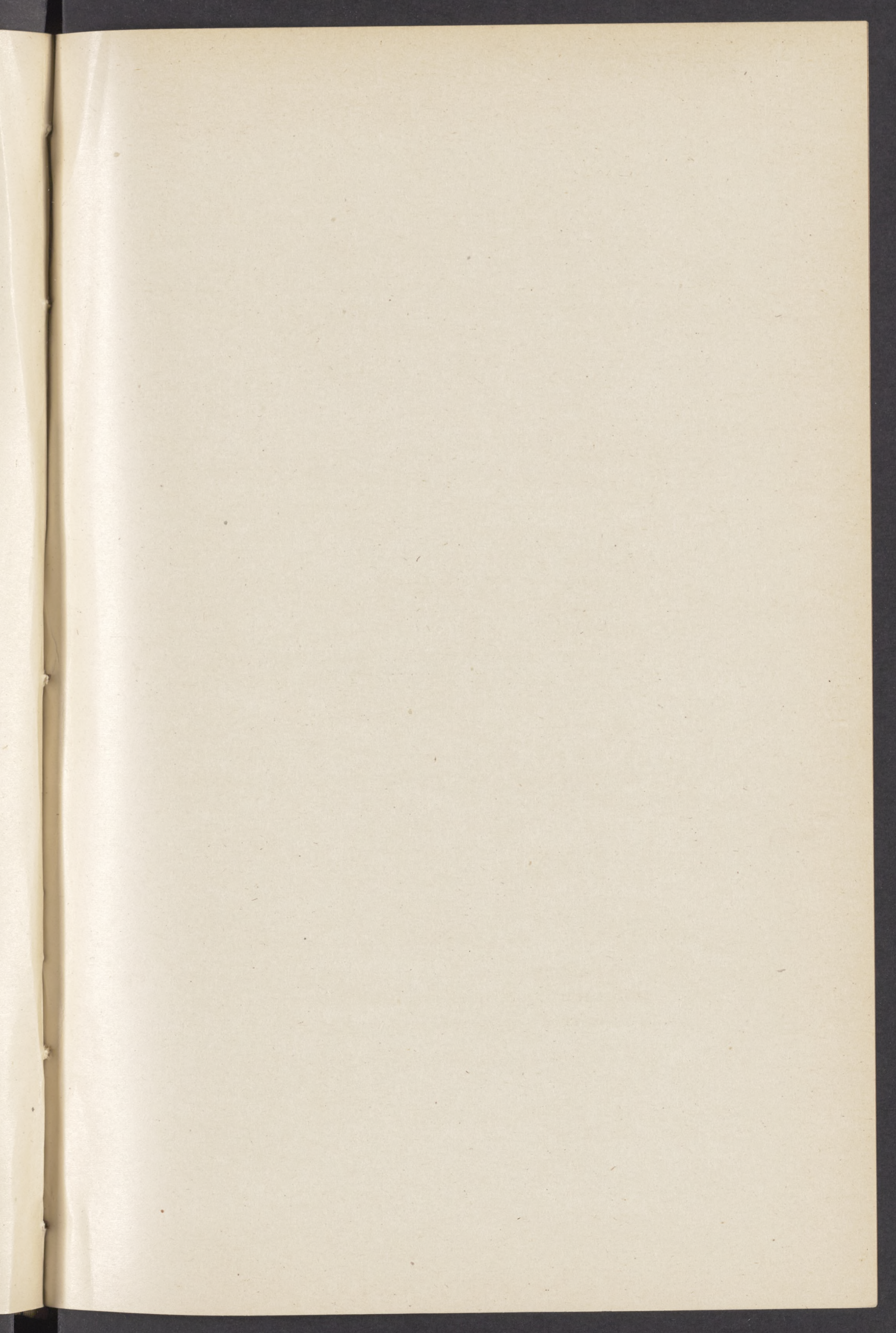
It is obvious that the jury either totally ignored the law as laid down by the Court, or were misled in some wise in arriving at their conclusion, since the amount awarded for the death of a three and a half year old child, arising out of the circumstances existing in this case, is clearly the result of sympathy, if not passion and prejudice, and is not based upon any method of computation whatsoever.

POINT VII

For all the reasons heretofore set forth the judgment in this case should be reversed and a new trial ordered.

Respectfully submitted,

WILLIAM HAUSER,
Attorney and Counsel for Defendant-Appellant.



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