New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY, Defendant-in-Error, *v.* WALTER SCHUTTE, Plaintiff-in-Error.	In Error to Supreme Court.

BRIEF FOR PLAINTIFF-IN-ERROR.

The writ of error in this case brings up for review the judgment of the Supreme Court affirming the judgment of the Court of Special Sessions of the County of Hudson, finding the defendant guilty of atrocious assault and battery. The facts in the case are set out in detail in the brief of the Supreme Court hereunto annexed, to which counsel for plaintiff-in-error refers and also the law upon the subject. No criminal intent or malice on the part of the defendant was proven. The Supreme Court, however, held that the driving of an automobile at an excessive rate of speed is a wilful act likely to inflict injury, from which malice and intention to inflict injury may be implied. Plaintiff-in-error contends that this is error.

The main case the Supreme Court relies upon to sustain its judgment, is Queen *v.* Martin, 8 Q. B. D., 54. The facts in this case briefly stated were these: Shortly before the conclusion of the performance one night at the Theatre Royal, at Leeds, when the gallery of the theatre was three-quarters

filled, the defendant who was familiar with the theatre, ran quickly down the stairs and put out the gas light at the middle landing, and also at the bottom, and placed the iron bar across the doors leaving the lower part of the stairway in total darkness. When the lights were put out, a panic seized the audience who rushed down the stairs and endeavored to reach the street, but because of the closed doors several persons were severely injured. It appears that the gallery of this theatre was reached from the street by a stone staircase lighted by three gas lights, one at the top, one on a landing about the middle, and the third at the bottom. Between the street and the bottom of the staircase were a pair of folding doors opening outward to the street and kept closed by iron bars let down into sockets in stone work of stairs. The indictment in this case was under a statute charging that the defendant unlawfully and maliciously inflicted grievous bodily harm upon certain persons.

In summing up to the jury, the Recorder said that malice was an essential ingredient in the offense charged, and if they were of the opinion that the defendant's conduct in extinguishing the lights and closing the doors amounted to nothing more than a mere piece of foolish mischief, they might acquit him, but if they believed the acts were done with a deliberate and malicious intention they ought to convict.

The jury found that defendant extinguished the lamps and placed the bar across the doorway in such a manner as to make the exit more difficult, and that he did it with the intention of causing terror and alarm in the minds of the audience and with the intention of wilfully obstructing the exit from the gallery.

Coleridge, C. J., said he had no doubt as to the

propriety of the conviction. The prisoner must be taken to have intended the natural consequences of his acts. He acted "unlawfully and maliciously" not that he had any personal malice but in the sense of doing an unlawful act calculated to injure and by which in fact others were injured. Just as in the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed.

No one would claim that the mere fact of turning out the lights on the staircase, locking the door and putting on the bar would imply criminal intent, but from the fact that he knew that there was a large crowd of people at the theatre at that time who would use this stairway, he could forsee the natural and probable consequences of his actions. If nobody had been at the theatre at that time, or if some people had been present of whose presence he had no knowledge, it certainly could not be claimed that the fact of turning out the lights, locking the door and putting on the bar standing alone would imply intent and malice necessary for the conviction of the defendant. As in this case, if the boy had been in the public street and the defendant had seen him, then the rule of implied intent and malice might apply, but how can there be a criminal intent or malice when the defendant never had any notice or knowledge of the presence of this boy in the public street through which he was passing in his automobile.

The difference between the facts in that case and the one under review is this: That in the former case there could not be any question but that the defendant knew that injuries to persons would result from his conduct. He was in the theatre, saw and knew that a large number of people were there. He knew they would use said stairway, and

he knew when the lights were turned out and the bars put on that injuries were likely to result. In the case under review the defendant did not see the boy who was injured, did not know he was there, the lights were burning on his machine, the horn was blown, and the street as far as he could see was entirely clear, so that it was impossible for him to have foreseen any accident or injuries of any kind.

In this case it does not appear clearly just how the accident happened. The boy says that the moment he stepped from the curb to the street he was hit (p. 15, lines 20 to 40). Does not know what part of the automobile struck him, nor does he know it struck him at all (p. 17, lines 1 to 10). On page 13, line 22, he says "I saw the automobile and when I went to go across I was knocked down." This he afterwards denies to have said (p. 16, lines 8, 9 and 10). The injury was not caused by the rate of speed at which the automobile was travelling, but either by the boy trying to cross in front of the machine or stepping off the curb without looking whether a machine was coming or not.

The Court further holds that "the running of a car at a high rate of speed is an act in which the will of the driver concurs, and hence is clearly a wilful act as distinguished from merely negligent conduct when considered with respect to the state of mind of the offender, which is what the criminal law considers." In determining whether the act of the defendant was wilful I contend the state of mind of the offender in relation to the injury should be considered and not in relation to the running of the car. The rate of speed might be considered an element in determining whether or not, from the facts in a case, the defendant intended to cause the injuries, but standing alone cannot supply the

absence of proof of intent and malice, especially when, as in this case, the defendant had no knowledge of the presence of the injured boy in the street at and before the time he received the injuries.

Whelpley, J., in the case of State *v.* Clark, 5 Dutch, 96, 98, says: "In common parlance, 'wilful' is used in the sense of 'intentional' as distinguished from accidental or involuntary." Whatever one does "intentionally" he does "wilfully."

In this case there is no evidence of any kind that the injuries were inflicted intentionally or knowingly. The best that can be said for the State is, that it was an accident.

Plaintiff-in-error therefore prays that the judgment below be reversed.

Respectfully,

WILLIAM S. STUHR,
Attorney and of Counsel
with Plaintiff-in-Error.

New Jersey Supreme Court.

THE STATE Defendant-in-Error, *v.* WALTER SCHUTTE, Plaintiff-in-Error.	In Error to Hudson Special Sessions.

BRIEF FOR PLAINTIFF-IN-ERROR.

The writ of error in the above entitled cause brings up the bill of exceptions as assigned and sealed in the cause and the entire record of the proceedings had upon the trial in the above entitle cause, at the Court of Special Sessions of Hudson County.

The indictment found in said cause contains two counts; one for atrocious assault and battery, alleging that the said defendant and one Richard Schutte "an assault did make upon one Thomas Mitchell with a certain automobile then and there operated and controlled by them, the said Walter and Richard, in and upon the head, face and body of him, the said Thomas, did then and there wilfully, unlawfully and atrociously strike, beat, cut, lacerate, wound and maim and other wrongs and injuries to him, the said Thomas, then and there did;" and the other for simple assault and battery, in that the said Walter Schutte and one Richard

Schutte, in and upon one Thomas Mitchell, an assault did make and him, the said Thomas, then and there did beat, wound and ill treat and other wrongs to the said Thomas then and there did.

The case was tried before Hon. Mark A. Sullivan, Judge of the Special Sessions Court of the County of Hudson, and the defendant found guilty by said Judge of atrocious assault and battery.

The assignment of errors will be found on page 75, and the specification of causes for reversal will be found on page 77.

Facts.

The following are the facts as they appear from the record of the proceedings had upon the trial.

Thomas Mitchell, twelve years of age, testifies that he received the injuries set forth in the indictment, on the tenth day of December, nineteen hundred and twelve, by coming into a collision with an automobile owned and operated by the defendant Walter Schutte. Mitchell claims that in the middel of the block on Cole Street between Fifth and Sixth Streets, in the City of Jersey City (*vide,* State of Case, p. 13, line 25; p. 17, line 30), at about eight o'clock in the evening, he attempted to cross from the east side of Cole Street to the west side of Cole Street (p. 13, lines 35-40; p. 14, lines 1 to 10); that he heard no horn or trumpet blown; nor did he see the automobile coming; nor did he hear it. He looked both ways and that the moment he stepped from the curb to the street he was hit (p. 15, lines 20 to 40). Does not know what part of the automobile struck him; nor does he know it struck him at all (p. 17, lines 1 to 10). Although on page 13, line 22, he says, "I saw the automobile and when I went to go across I was knocked down," which he afterwards on cross ex-

amination denies to have said (p. 16, lines 8, 9 and 10).

John Reed, a witness on behalf of the State swears that he was standing under the bridge on Cole Street near Sixth Street and saw three boys about sixteen or seventeen yards away; that he heard the noise of the machine, turned around and saw the machine was on the boy; that he hollered "Stop" and "Murder," but that the machine proceeded rapidly on towards Eighth Street (p. 18, lines 4 to 30). The machine made a noise like a kind of cyclone (p. 19, line 1); he heard the noise about a second before the boy was truck (p. 21, lines 1 to 3); that he is not a judge of speed, but thinks the machine would go about two hundred yards in eight seconds (p. 19, lines 20 to 25).

Fred. Etzel, a witness on behalf of the State swears that he helped pick the boy up (p. 25, lines 1 to 3); that he could not tell the speed of the automobile (p. 26, lines 35-40); did not see how the accident occurred; all he saw was a boy lying in the street about six feet from the curb when he helped to pick him up (p. 24, lines 30 to 40; p. 25, lines 1 to 18).

John Caldwell, a witness on behalf of the State testifies that he did not see the accident (p. 27, lines 14-17); that he was standing on the corner of Ninth and Erie Streets when he saw the automobile come along; that it stopped in front of Nielan's saloon; that there were five people in the car, four of them went in Nielan's saloon and the chauffeur left with the car (p. 27, lines 20-28).

Eugene Pohl, a witness on behalf of the State testifies that he did not see the accident (p. 29, line 30), but merely saw the car when it stopped at Ninth and Erie Streets (p. 28, lines 20-40); that all the passengers in the car with the exception of the driver went into the saloon on the corner; that

the driver was the defendant Walter Schutte (p. 29, lines 20-25).

Joseph Brady, a witness on behalf of the State testifies that on the night of the accident he was coming south on Cole Street; he saw the automobile coming north and a few boys between Fifth and Sixth Streets on Cole Street; he saw the automobile hit what looked like the form of a person and ran toward the person and found it was Thomas Mitchell and picked the boy up and carried him to the hospital (p. 30, lines 20-30). The automobile was going pretty lively. Couldn't tell the exact mileage it was making (p. 30, lines 30-32); that he is a trainman (line 38); never rode in an automobile (p. 31, line 25); nor timed an automobile going any distance (p. 32, lines 10-12); says he thinks the automobile was going about thirty miles an hour (p. 34, line 18); says he did not measure the time, but has an idea of the time it took to go a block (p. 33, lines 1-2); says the right front wheel of the automobile hit the boy (p. 35, lines 37 to 40; p. 36, lines 1-9).

William Hoffman, a witness on behalf of the State testifies that he is a member of the Jersey City Police Department and that he was present at the station house and heard Walter Schutte make a statement that he was running the automobile on Cole Street, but he did not know that he had struck anybody with the automobile (p. 40, lines 32-37; p. 41, lines 17-19).

Walter Schutte, says that he is twenty-three years of age and the owner of the automobile in question; that he passed through Cole Street between Fifth and Sixth Streets on the evening of December 10th, 1912 (p. 42, lines 30-40); at about half-past eight o'clock; that he was going north; that the automobile had a trumpet attached and lights; that he blew the trumpet just before he

came to every crossing; the lights were burning on the automobile; that he used the trumpet just before he came to Fifth Street; was driving about eight or nine miles an hour; that the paving of Cole Street is rough and has little holes (p. 43); that he saw nobody on Cole Street between Fifth and Sixth Streets; that he did not hear anybody holler "Stop" or "Murder" and did not know he had run over anybody until he was about a block and a half away from home returning from the garage (p. 44, lines 1 to 18; p. 51, lines 29-32) where he had left the machine; that he usually drives eight or nine miles and never exceeding that speed unless when going up hill, then fifteen miles an hour (p. 45, lines 11-30 to 40). He says he supposes if the car was driven twenty miles an hour it would turn upside down (p. 46, line 10); the car is a Reo Tourist, 38 horse power and was built in 1905 (p. 45, lines 2-10); it makes a noise like some of the rag wagons that are used with bells on (p. 46, ilnes 35-38); that Officer Duffer was the first one who told him about running over the boy (p. 50, lines 20-22); that he sold the machine in January, three or four weeks after the accident because he dreaded the machine after the accident and did not want to go near it (p. 53, lines 22-30).

Scott Lunger, a passenger in the automobile on the evening in question says they passed through Cole Street on their way home about eight or half-past eight o'clock (p. 54, lines 18-24); that the automobile had two lights in front and a trumpet; could not swear trumpet was used; that he has not much knowledge as to speed, but the automobile was not going fast because of the condition of Cole Street (p. 54, lines 30-40; p. 55, lines 1 to 8); that he saw no boy in the street on Cole Street between Fifth and Sixth Streets that night; nor did

he hear anybody shout "Stop" or "Murder" (p. 55, lines 23-28); that the defendant Walter Schutte drove the machine and was sober (p. 55, lines 37-40).

George A. Duffert, a witness on behalf of the defendant says that he is an officer of the Jersey City Police Department (p. 56, line 32); that he met Walter Schutte at about a quarter to ten o'clock on the evening in question and told him that Detective Hoffman was looking for him and asked what the trouble was; that he made no answer, but went across with him to Detective-Sergeant Hoffman. Walter Schutte was perfectly sober (p. 57, lines 10 to 21).

Edward J. Nielan, a witness on behalf of the defendant, says that he was a passenger in the automobile on the evening in question, the car was running at ordinary speed; that you couldn't go fast on Cole Street on account of the holes (p. 58, lines 30-35); that he did not see anybody getting hurt and saw nobody on the street alongside of the automobile, or in front of it; nor did he hear anybody holler "Stop" or "Murder," and did not know the boy had been run over until Sergeant Hoffman told them they hit somebody on Cole Street; said they were surprised and did not know anything about it (p. 59, lines 1 to 15; p. 59, lines 35-40); said it took them three or four minutes to go around from Cole to Erie Street; that he could run almost as fast as the car was going through Cole Street (p. 59, lines 20-28). He says that when Detective Hoffman came into the saloon they were all there, the machine was at the garage; that Walter Schutte was not with them when the detective came in; they were standing at the bar drinking, it was about ten minutes to nine, a few minutes after they arrived, and that they immediately went to the

Station House with the officer (p. 61, lines 20 to 40); that the defendant Walter Schutte entered the Station House shortly after their arrival (p. 62, lines 31 to 33). All I was asked at the Station House was whether I was in the car. I told them I had no statement to make as I did not witness anything that had happened; did not know anything had happened (p. 63, lines 19-21, lines 28-30). When we got to the Station House the Sergeant asked, "were you in the car," and I said "yes," and also whether I knew we had run over a boy and I said "no" (p. 64, lines 10-12, line 24).

Richard Schutte, the father of the defendant Walter Schutte, says that he was in the car on the evening in question; saw no particular boy in the street; saw children on the sidewalk (p. 65, lines 30-40), but saw none in the street outside of the sidewalk; did not know anybody had been run over by the automobile until Detective Hoffman told them (p. 66, lines 1 to 12); it took them four minutes to go from Cole Street to Eighth Street (line 21); has ridden probably ten thousand miles in automobiles and can tell the rate of speed of an automobile within a mile or two; that Cole Street at the time in question was full of holes and bad pavement (p. 66, lines 25 to 36); that the automobile was not going more than eight or ten miles an hour and through Cole Street he thinks less than that (p. 67, lines 20-30); that the block on Cole Street between Fifth and Sixth Street is about two hundred feet long, and it took from eight to ten seconds to go through it (lines 30-35); that he has ridden about one hundred miles in this car (p. 68, lines 17-19), and that the fastest he has travelled in the car is fifteen miles in the open country (p. 69, line 35). Did not know the accident had happened until he was taken to the station (p. 69, lines 38-40).

Law.

To constitute a wilful injury the act must have been intentional, or the act or omission which produced it must have been committed under such circumstances as evinced reckless disregard of the safety of others, as by failure after discovering the danger to exercise ordinary care to prevent impending injury. In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result. In order to establish wantonness it is not necessary to show an entire want of care. The violation of a statute does not constitute a wilful wrong. A wilful injury will not be inferred when the result may be reasonably attributed to negligence or inattention.

29 Cyc., pages 509 and 510.

Essential Elements of an Assault or Battery: Intent—How far Essential. To constitute an indictable assault or battery there must always be an intent, expressed or implied, to do injury to another; but one may be liable in a civil action for assault or battery, where there was an entire absence of intent to do any injury, the ground of liability being that the assault was committed in the pursuance of an unlawful act or was the result of negligence.

Accidental Injury. An accidental hurt, in which the actor is blameless, does not amount to a

battery, and the person inflicting such injury is not liable either criminally or civilly.

Intent and Injury Must Concur. To constitute a battery, the intent to injure must concur with the use of unlawful violence upon the person of the assaulted party, but the slightest degree of force suffices to constitute violence, and the intended injury may be to the feelings or mind of the latter, as well as to the corporeal person.

2 Am. & Eng. Ency., pages 953, 954, 955.

Injuries Inflicted Through Negligence. There are cases of violence inflicted which will sustain a civil action for damages, and yet will not be punishable criminally by indictment; as, for instance, an injury resulting from the recklessness or negligence of the defendant without any criminal intent.

2 Am. & Eng. Ency., page 989.

It is to be observed that although an intentional injury done with force to the person of another may support a civil action for trespass for damages, yet to constitute criminal offence of an assault, the intention to do injury is essential to be proved.

3 Greenleaf on Evidence (8th Edition), Section 61.

In the case of State *v.* Thomas, 36 Vroom, pages 598-600, in commenting on the distinction between manslaughter and criminal assault and battery Justice Dixon in delivering the opinion of the Court among other things says, "Thus, in State *v.* O'Brien, 3 Vroom, 169, the defendant was convicted of manslaughter for failing to perform his duty as switch-tender of a railroad, in consequence whereof a train ran off the track and a

passenger was killed; and the Supreme Court adjudged that his conviction was legal, even though his will had not concurred in his omission of duty. Certainly, if death had not ensued from his negligence, but only personal injury, a charge of criminal assault and battery could not have been sustained.

One who negligently drives over another is not guilty of a criminal assault and battery, although he does it while violating a city ordinance against fast driving."

Commonwealth *v.* Adams, 114 Mass., 323.

This was an indictment for assault and battery where the defendant while driving at a rate prohibited by law ran against and knocked down a boy who was crossing the street. No special interest on the part of the defendant to injure the defendant was shown. The defendant pleaded guilty to a complaint for fast driving, in violation of the ordinance and the commonwealth asked for a verdict on the assault and battery charge on the ground that the intent to violate the city ordinance supplied the intent necessary to sustain the charge of assault and battery, and the Court so ruled. Upon the appeal the Court said, "we are of the opinion that the ruling in this case can not be sustained. It is true that one in the pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done wilfully. But, the act, to be unlawful in this sense, must be an act bad in itself, and done with all evil intent, and the law has always made this distinction that if the act the party was doing was merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or mistake; but if *malum*

in se, it is otherwise (1 Hall, P. C., 39; Foster C. L., 259). Acts *mala in se* include, in addition to felonies, all breaches of public order, injuries to person or property, outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly. Acts *mala prohibita* include any matters forbidden or commanded by statute, but not otherwise wrong. It is obvious, therefore, that the violation of the ordinance does not in itself supply the intent to do another act which requires a criminal intent to be proved. The learned Judge erred in ruling that the intent to violate the ordinance supplied the intent to sustain the charge of assault and battery."

Plaintiff-in-error insists that the Court erred in refusing to acquit the defendant and finding him guilty of atrocious assault and battery. That the facts testified to did not constitute a crime; that there was no proof of any intent on behalf of the plaintiff-in-error to do the injuries complained of, nor any proof that he saw the boy before the accident, to the contrary, the proof is that he had the lights burning on his machine and blew the trumpet before he came to the corner of Fifth Street, and did not see anyone, nor hear the witness Reed shouting after him after the accident. From the boy's own testimony it appears that the accident happened as soon as he stepped from the curb into Cole Street, to use his own words, "the moment I put my foot down to the street I was hit" (p. 15, line 37). The State claims that the plaintiff-in-error was guilty of criminal negligence because he exceeded the speed limit fixed by law while running through Cole Street. Its evidence on that question, however, is vague and uncertain, while that on behalf of the plaintiff-in-error that

he did not exceed the speed limit is clear and positive, and even if the State's evidence upon that point was clear the conviction of atrocious assault cannot be sustained under the authorities above referred to.

The judgment below should be reversed.

WILLIAM S. STUHR,
Attorney and of Counsel with
Plaintiff-in-Error.

[4178]

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *Defendant-in-Error,* *vs.* WALTER SCHUTTE, *Plaintiff-in-Error.*	In Error to Supreme Court.

BRIEF FOR THE STATE.

Facts.

The Plaintiff-in-error was convicted upon an indictment charging him with having, on the first day of December, 1912, in the County of Hudson, committed an assault upon one Thomas Mitchell with a certain automobile then and there operated and controlled by him, the said Walter Schutte, by then and there wilfully, unlawfully and atrociously striking, beating, cutting, lacerating, wounding and maiming him, the said Thomas Mitchell. The indictment also contains a charge of assault and battery.

The plaintiff-in-error assigns six specifications of causes for reversal which, for the purpose of this brief, are divided into two groups; first four comprising, in effect, a single objection and the last two also comprising a single objection.

As to the first four specifications, they bear upon the finding of the Court upon the facts, and contend that thereunder the judgment is without foundation in law as to the second group that the judgment was erroneous even if the facts proved a crime to have been committed. The assignment of errors raise no other objection.

POINT I.

The motion to acquit, at the close of the State's case, is addressed to the sound discretion of the Court, and if there is any evidence to support the finding, the judgment below will not be set aside. It must appear that the defendant suffered manifest wrong or injury in the denial of any matter by the Court which was a matter of discretion.

State v. Hatfield, 66 N. J. L., 443;
State v. Valentine, 71 N. J. L., 552;
State v. Brown, 72 N. J. L., 354.

If the evidence supports the contention that this plaintiff-in-error wantonly and recklessly drove his automobile through the city streets in disregard of the safety and the rights of travelers upon the highway, and thereby grievously wounded and maimed this child, there can be no doubt regarding the validity and justice of this conviction.

In support of this charge the following is quoted from the testimony of Thomas Mitchell, the complaining witness:

"Q. How old are you? A. Going on thirteen" (Case, p. 11, ll. 10-11).

"Q. And just as you stepped off the curb you were hit with an automobile? A. Yes" (Case, p. 14, ll. 7-8).

"Q. How far had you gone from the curb when you were struck? A. Two feet from the curb" (Case, p. 15, ll. 6-8).

"Q. How far had you gone from the curb.

"By the Court: How far from you is two feet?

"A. That far (fully outstretching his hands sideways).

"By the Court: He is outstretching his hands about four feet.

"Q. Did you hear a horn or trumpet blow? A. No, sir.

"Q. Did you see the automobile coming? A. No, sir.

"Q. Did you look around to see if there

were any lights? A. No, sir; I did not see any.

"Q. Did you hear it at all? A. No, sir.

"Q. Did you look to see if anything was coming? A. Yes.

"Q. Which way did you look? A. Both ways.

"Q. Did you see the automobile was coming? A. No, sir, the moment that I put my foot down I was hit" (Case, p. 15).

John Reed, a witness for the State testified that he was fifteen or seventeen yards from where the boy was hit and described it as follows:

"Q. What did you see? A. I heard the noise of the machine and I turned around and the machine was on the boy. I just turned as the body was going down, and then as soon as I saw the body was going down I put my hand up and hollered 'Stop! stop!' and the machine went over his body and it settled there, and then I hollered for them to stop and they did not stop, and I hollered murder, to stop them.

"Q. Who was in the machine? A. I don't know.

"Q. Did the machine stop at all? A. No, sir, they went right on there under the bridge.

"Q. How far away did the machine stop? A. At 8th Street.

"Q. Did you go to where the boy was hit? A. Yes, I lifted the boy up.

"Q. Was he conscious or unconscious? A. He was unconscious.

"Q. That is all you know about what took place? A. Yes.

"Q. When you say you heard the noise of the machine can you describe what kind of noise that was? A. It was a buzzing like a kind of cyclone" (Case, p. 18, l. 14; p. 19, l. 1).

"Q. At that moment was it going fast or slow? A. It was going fast.

"Q. Have you any knowledge of the speed of automobiles? Any experience to determine the speed of automobiles? A. I am a poor judge of speed unless you take me at a comparison or to the best of my opinion.

"Q. Compared with a trolley car? A. A trolley car would not be in it. I have seen

a minute and three-quarter seconds man running 100 yards and I think the machine would go 200 yards in eight seconds" (Case, p. 19, ll. 13-24).

Fred Ezell, a witness for the State, testified that he was standing with John Reed, with his back to the street:

"and all of a sudden while we were talking there comes an automobile and it makes a noise, and it was right under the bridge, and all of a sudden the car went by, and Reed called out 'murder,' without saying anything to me, and went away, and I turned around to see what happened and there was a boy on the street, and I went there and helped to pick him up, and some boys were there and said 'hurry up and carry him to St. Francis Hospital' (Case, p. 24, l. 34; p. 25, l. 7).

"Q. How near the curb were you standing? A. On the corner, southeast; it was about six feet from the curb where the boy lays. I looked up to see what was the matter when the car was coming at a good speed and Mr. Reed hollered 'Stop! Murder!' and I turned around to see what was the matter.

"Q. What do you mean by good speed? A. Fast. He got away as quick as he could and I turned around to see what was happening.

"Q. And when you turned around and first noticed the car, how far was it from where the boy afterward lay? A. In about a second it was about twenty feet. It ran right ahead and Mr. Reed run after it as far as he could and hollered, and I guess the whole neighborhood heard him, and I looked and saw the boy laying on the ground about five or six feet from the curb, and he was motionless, as though he was killed" (Case, p. 25).

Joseph Brady, a witness for the State, is a trainman and was thoroughly examined and cross-examined as to his competency to testify regarding the speed of automobiles. The following is quoted from the testimony of this witness:

"Q. Can you tell from your experience how fast this automobile was going? A. About thirty miles an hour." (Case, p. 34, ll. 16-18).

POINT II.

As to whether the crime is that of atrocious assault and battery.

The only definition of atrocious assault and battery is that found in the statute itself: "Or any person who shall commit an atrocious assault and battery by maiming or wounding another * * * " (Sec. 113, Crimes Act, Comp. Stat., page 1782).

As to the injuries sustained by this child, he was an exhibit before the Court, and the injuries were manifest and gruesome, the record showing that they were pointed out to the Court, and must necessarily have been the determining factor on the question of wounding and maiming. (Case, page 16, ll. 14-38).

The Plaintiff-in-error will seek to rely on the doctrine laid down in the case of *State v. Thomas,* 65, N. J. L., 598, but it is contended that the two cases are not analogous, because in the *Thomas* Case, following the doctrine of *State v. O'Brien,* 3 Vr., 169, it is held that

> "If death had not ensued from this negligence, but only personal injuries, a charge of criminal assault and battery could not have been sustained."

The principle thus enunciated in the O'Brien and Thomas Cases, however, proceeds upon the theory that the negligence complained of was an act of omission, while in the present case, not only does the indictment charge it, but the proof supports the charge of willful recklessness and utter disregard for life and safety in the propelling and controlling of an instrument capable of dangerous velocity, and that the same was propelled and controlled in a dangerous manner, thereby causing the assault which is the subject of this indictment.

The evidence in the case at bar must justify the conclusion by the trial court that the element of

intent, that is malice, malice either express or implied, was established beyond a reasonable doubt.

In *People v. Lilley,* 43 Mich., 521, Chief Justice Marston, at (p. 525), speaking of an assault, says:

> "What then constitutes an assault in law? It might be somewhat difficult to produce all the authority upon this subject, and we shall not attempt it. Some of the tests, as putting the persons, assaulted in fear, cannot be relied on as evidence, and assaults may be made upon a person, even though he had no knowledge of the fact at the time."

An assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect. Manslaughter has been defined to be unlawful killing of another, without malice, either express or implied, 4 Black, Com. 191; 3 Greenl. Ev. Para. 119.

The offence is one that is committed without premeditation; the "result of temporary excitement, by which the control of the reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition."

It has been held that where a prisoner fired a gun in the direction of a crowd, he was guilty of an assault upon each. *People v. Raher,* 92, Mich., 165, citing *State v. Nash,* 86 U. S., 650; *State v. Myers,* 19 Ia., 517; *Smith v. Commonwealth,* 100 Pa. State, 324; *People v. Morehouse,* New York Supreme Court, 6 N. Y. Supp. 763.

In this case the defendant contended that his conviction was not justified by the evidence; that the evidence failed to show that the gun was loaded when he pointed it at Walsh. "If a person presents a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life if the pistol had gone off, semble that this is an assault, even though the pistol were in fact not loaded" *Reg. v. St. Geo.* 9 Car. & page 483.

In *Commwl. v. White,* 110 Mass., 407, the same doctrine is laid down.

In *State v. Shepherd,* 10 Ia., 126, it was held that the pointing of a gun which is not loaded, in a threatening manner at another constitutes an assault, when the party at whom it is pointed does not know that it is not loaded, or has reason to believe that it is not.

In *Queen v. Martin,* 8 Q. B. D. 54, Martin was tried upon an indictment charging that he did unlawfully and maliciously inflict grievous bodily harm upon George Pybus, against the form of the statute, etc. A very brief statement of the facts in that case is as follows: The gallery to a theatre was reached by a stone staircase, which was lighted by three gas lights. There was a pair of folding doors between the street and the bottom of the staircase.

These doors were divided for the purpose of opening conveniently. By the application of strong iron bars, let into sockets in the stone work, and connected with the doors by iron bolts these doors could be kept closed. The defendent was in the gallery of the theatre; at the conclusion of the performance he ran quickly down the gallery staircase, and as he did so, he reached up with his hands and put out the gas light at the middle landing and also that at the entrance. By placing one of the iron bars across the door he closed it, after leaving the theatre. As a result there was a jam on the stairway inside, and George Pybus and a number of persons were injured. Quoting from the case as follows:

> "It was clearly proved that the defendant was on the stage of the theatre after the accident, assisting the injured persons who had been brought there."

Lord Coleridge, Chief Justice, in his opinion says,

"I am unable to entertain any doubt as to the propriety of this conviction. The prisoner was indicted under 24-25 Victoria, Chapter 100, Section 20, which enacts that 'whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor,' etc. The prisoner must be taken to have intended the natural consequences of that which he did. He acted 'unlawfully and maliciously,' not that he had any personal malice against the particular individual injured, but in the sense of doing an unlawful act calculated to injure, and by which others were, in fact injured. Just as in the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed. The prisoner was most properly convicted."

Field and Hawkins, JJ. concurred.

STEPHEN, J.

"I am entirely of the same opinion, but I wish to add that the recorder seems to have put the case too favorably for the prisoner, for he put it to the jury to consider whether the prisoner did the act as a mere piece of foolish mischief. Now, it seems to me that if the prisoner did that which he did as a mere piece of foolish mischief, unlawfully and without excuse, he did it 'wilfully,' that is 'maliciously,' within the meaning of the statute. I think it is important to notice this, as the word 'malicious' is capable of being misunderstood. Lord Blackburn (then Mr. Justice Blackburn) in the case of *Reg. v. Ward* (1) and *Reg. v. Pembleton* (2) lays it down that a man acts 'maliciously' when he wilfully and without lawful excuse does that which he knows will injure another."

Smith v. Commonwealth, 100 Pa. 324. A, while a passenger in a railway car, which was filled with passengers, in a spirit of frolic, not with intent to injure anyone, discharged a pistol, intending to shoot down into the floor of the car. It

was specifically found by the jury which convicted A "that the pistol was fired in the spirit of frolic "and not with the expectation or intention on the "part of the defendant to injure any person what-"ever." The indictments submitted to the jury were one for assault and battery, two for aggravated assault and battery. One of the requests to charge which was refused, and upon which refusal error was sought to be established, was,

> "If the jury believe from the evidence that the defendant had no design or intention to strike or wound the prosecutor at the time the pistol was discharged, the defendant should be acquitted."

This request to charge was properly refused as to the counts for assault and battery and aggravated assault and battery. The court charged inter alia:

> "I instruct you, as a matter of law, that firing any pistol in a car, inhabited at the time by passengers, is a flagrant violation of the law, admitting of no justification, not to be encouraged or approved, or excused in any respect that has or can be presented. I instruct you, moreover, as a matter of law, that the act itself implies malice. I use the words 'implies malice' because malice is either expressed or implied. Expressed malice is where the evidence justifies the jury in believing that the party, with a guilty, deliberate and studied purpose intended to injure his victim. Implied malice is where there is no specific intent, but where, under the circumstances of the infliction of the injury, the surroundings were such as to indicate a disregard of the social duty to his fellows, a disposition that was so reckless as to declare, in action 'I'll have my sport and take the risk of injury, whether it injures or not', and when the surroundings are such as to raise the probability of danger on thus acting, the law legally and rightfully implies malice, not of that specific, deliberate and studied character that

characterizes express malice, but malice is implied in view of the action as it stands in relation to the surroundings."

Later in the charge the learned court seems to have hit upon the essence of that offence, which would appear to be on all fours with the facts in the case at bar in this court. The court said,

> "If such were not the law every criminally-disposed man in the Commonwealth would receive a premium for taking his place in crowded places and indulging in criminal sport."

For the plaintiff-in-error, in the case last above cited, it was contended:

> "Under the casts as found by the special verdict, the defendant could not be convicted of an assault because to constitute an assault, there must be an attempt with intent to do violence to another. The intent to injure is the gist of an assault."
>
> *Hayes v. People,* 1 Hill, N. Y., 352; Hob. 134;
> *U. S. v. Hand,* 2 Wash., 435;
> *Richels v. State,* 1 Snead (Tenn.) 606.
> *Johnson v. State,* 43 Tex., 567.

Mr. Justice Sterrett, delivering the opinion of the Court, says, (p. 329):

> "We think, in view of the testimony before the jury, there was no error * * * in charging on the subject of implied malice *
>
> * The facts established by the special verdict clearly justified the judgment that was pronounced thereon. This is conclusively shown in the opinion of the learned Judge before whom the case was tried that nothing more need be said on that subject."

Speaking of the defendant's act, the reviewing court says:

> "It was recklessly and wilfully done, with-

out slightest justification or excuse. From such facts as these the law will imply malice."

In this opinion the court likewise cites and upholds the doctrine laid down in *Queen v. Martin*, 8 Q. B. D., 54. *Commonwealth v. Hawkins*, 157 Mass., 551.

The opinion in this case of *Commonwealth v. Hawkins* is here quoted in full:

"Indictment, charging the defendant with an assault with a dangerous weapon, in Fall River, in and upon one Mary A. Powers. At trial in the Supreme Court, before Bond, J., there was evidence tending to show that the defendant, having been annoyed on the night of July 21, 1891, by different persons ringing his door-bell and insulting him when he came to the door, went out of the house into the street and fired a pistol, the bullet from which struck one Mary A. Powers, who was standing on the corner of two streets about two hundred and sixteen feet distant; that it was quite dark at the time; that both streets were in a thickly settled portion of the city, and that there were liable to be people on both streets and passing the corner at the time when the shooting took place. The defendant, who was under the influence of liquor at the time of the shooting, admitted that he fired the revolver, and stated that when he did so he looked up and down the street to see if there were any persons on the street; that he did not see any, and that he fired the revolver, pointing it toward the ground to let the persons who had been annoying and insulting him know that he had a pistol, in the belief that they would keep away from his house and not further molest him, and that he did not see Mary A. Powers, and that he did not intend to shoot her, or any other person; and the Commonwealth admitted that he did not intend to shoot her.

"The defendant requested the judge to instruct the jury that 'the fact that the firing of the pistol by the defendant was an unlaw-

ful act, or that it was in violation of the city ordinances, did not make it an act wrong in itself and done with evil intent, and did not render the defendant criminally liable for the result of the shooting.' The judge gave this instruction, adding that it was a circumstance which the jury had a right to consider on the question of the conduct of the defendant. The judge also instructed the jury, that it was not necessary for the government to prove that the defendant intended to shoot Mary A. Powers, or any person, but that if they found that the defendant discharged the revolver in a grossly careless and negligent manner, or in a wanton and reckless manner, and by so doing wounded Mary A. Powers, he was guilty of the charge in the indictment.

"The jury returned a verdict of guilty; and the defendant alleged exceptions.

"J. W. Cummings for the defendant.

"C. N. Harris, Second Assistant Attorney General, for the Commonwealth, did not care to be heard.

"Knowlton, J. The only exception argued was to the instruction which the court gave, that the jury might consider, as a circumstance bearing on the question of the defendant's conduct the fact that the firing of the pistol was an unlawful act, done in violation of a city ordinance.

"The principal question of fact submitted to the jury was whether the defendant discharged the revolver in a grossly negligent or wanton and reckless manner. The jury were instructed, in substance, that, if he did, he was criminally liable for the consequences of his act.

"It is a general rule in criminal proceedings at common law that the defendant cannot be convicted unless a criminal intent is shown, but it is not necessary that he should have intended the particular wrong which resulted from his act. If he intends to do an unlawful and wrongful act, which is punishable because it is wrong in itself, and in doing it he inflicts an unforseen injury, he is crim-

inally liable for that injury. It is a familiar rule that one who shoots intending to hit A, and accidentally hits and injures B, is liable for an assault and battery on B. So, in cases of homicide, the rule is well established, that one who wantonly, or in a reckless or grossly negligent manner, does that which results in the death of a human being, is guilty of manslaughter, although he did not contemplate such a result. His gross negligence in exposing another to a personal injury by intentionally doing the act makes his intention criminal, and supplies all the intent which the law requires to make him responsible for the consequences. *Commonwealth v. Pierce,* 138 Mass., 165 and cases cited. This principle is equally applicable to other cases where a personal injury results from a wanton or reckless act, which is likely to do bodily harm, or from any gross negligence which causes the danger. In the case at bar, if Mary A. Powers had died from the pistol shot, the defendant, on the facts found by the jury, would have been guilty of manslaughter. As she survived the injury, the same principle now requires a conviction of assault and battery. There has been much discussion in the cases in regard to the nature of the intent necessary to constitute this crime, but the better opinion is that nothing more is required than the intentional doing of an act which, by reason of its wanton or grossly negligent character, exposes another to personal injury, and causes such an injury.

"See *Meader v. Stone,* 7 Met., 147, 151; *Commonwealth v. White,* 110 Mass., 407; *Commonwealth v. Stratton,* 114 Mass., 303; *Commonwealth v. Adams,* 114 Mass., 323; *Commonwealth v. Mann,* 116 Mass., 58, 61; *Commonwealth v. Pierce, ubi supra; Rex v. Burton,* 1 Strange 481; *Rigmaidon's* case, 1 Lewin, 180; *Regina v. Fretwell,* 9 Cox C. C., 471; *Gibbons v. Pepper,* 4 Mod., 405; *Weaver v. Ward,* Hob. 134; *Peterseon v. Haffner,* 59 Ind., 130; *State v. Myers,* 19 Iowa, 517.

"Inasmuch as recklessness or gross carelessness lies at the foundation of the charge

against the defendant, the fact that the act was done in violation of a city ordinance was proper evidence for the consideration of the jury on the question of negligence. *Lane v. Atlantic Works,* 111 Mass., 136; *Damon v. Scituate,* 119 Mass., 66, and cases cited.

"Exceptions overruled."

Following is the text of *State v. Wolfe,* completely quoted as that case is reported in Vol. V., N. J. L. J., at p. 84:

"This was the trial of an indictment against John H. Wolfe, of Jersey City, for the shooting of Melinda Jacobus, his sweetheart, at her residence, in Peru, Passaic County, on the 23rd day of October last. The indictment contained two counts. The first count charged defendant with shooting Miss Jacobus with a loaded gun, with intent to kill. The second count charged defendant with atrocious assault and battery. The jury brought in a verdict of simple assault and battery. The evidence disclosed the facts that Wolfe, while on a visit, at the time and place above mentioned, carelessly took up a gun, which was standing in a corner of the room, not knowing it was loaded but not seeking to know it, and pointing the gun at Miss Jacobus, discharged its contents into her body. The shot, at the time was thought fatal, but she miraculously recovered. The tender relations of the parties showed that the gun was picked up in mere thoughtlessness, there being no intent to do injury. The prosecutor, therefore, in summing up, virtually abandoned the first count and devoted his attention to the second count. He cited many cases where the mere negligent handling of dangerous weapons, there being no intent to do injury, had resulted in the death of the victim. In all these cases the defendant was held guilty of manslaughter, but the prosecutor stated after a careful examination had failed to discover any adjudged case of this class of cases, when negligence only existed, where the injury was not fatal, with one exception, to wit: *The Commonwealth v. McLoughlin,* 5 Allen Mass., page 507. In this

case the charge of the court below was sustained. The part of the charge quoted being as follows: 'If the defendant fired the pistol at Blodgett, not knowing or caring whether it was loaded, the jury in applying the principle, that every person may be presumed to intend the natural and ordinary consequences of his acts, would not be authorized to find an intent to kill from that fact alone; but if the pistol being loaded and capped, was fired by the defendant, he not knowing, but not seeking to know, whether the pistol was loaded, he might be convicted of assault and battery.' Besides this case, the prosecutor cited from Stephen's Digest of Criminal Law, that author's opinion, in the absence of any adjudged case, as the author states in a note, to the effect of the instance above recited.

"The defense seems to be confined to showing the absence of any intent to do injury.

"Mr. Eugene Stevenson for the State.

"Mr. W. F. Daly for defense.

"Woodruff, J., laid down the following principles: 'No one can tell what passes in the mind of another absolutely. The intent can't only be inferred from the acts and words of the party. The general rule of law is: If the natural consequence of his act would be the death of another, a jury may fairly infer, from the act, that it was done with intent to kill such other person. The law presumes that a man intended the result which naturally followed the means voluntarily used by him. Homicide by accident is where a man doing a lawful act, without intention to do bodily harm to anyone, and using proper caution to prevent danger, unfortunately happens to kill another. In such case it is excusable. For example where in sports, as in fencing, one is killed by accident. But if dangerous weapons are used in such sports, and there is negligence in their use, it may amount to manslaughter. In this latter case, if death does not ensue, it is simply assault and battery.

"To reduce killing from murder to excusable homicide, the act must not only be lawful or innocent, but it must be done in a prop-

er manner, and with due caution to prevent mischief. As in case of correction of a child, with a proper instrument of punishment by a parent, it is justifiable; but if with a cudgel or other thing not likely to kill, it will be manslaughter; if with a dangerous weapon likely to kill or maim, regard being had to the age and strength of the party, it will be murder. Before a man deals with a gun or pistol, as if it were not loaded, it is incumbent on him to ascertain whether it is so or not; and if he does not use a reasonable caution in this respect and afterwards, upon pulling the trigger, it unexpectedly explodes and kills a person, it will be manslaughter. A party whose negligence causes the death of another is responsible, whether the business he was engaged in be legal or illegal. If it was illegal as shooting at a chicken or duck, for the purpose of stealing it, and he kills a human being it is murder. If the business was legal, as in the case of a physician, or apothecary, or manufacturers having charge of children, it is manslaughter. Homicide by misadventure, or excusable killing of a man, requires three things: (1) There must have been no intention to do harm; (2) Proper precaution must have been taken to avoid mischief; (3) The act must have been lawful.

"If a person point a loaded gun at another, at a distance within reach, and while so pointed he deliberately pulls the trigger and sends the contents, shotballs or other material naturally tending to destroy life, into the body of another and wounds him or her, he is guilty of an atrocious assault and battery, if the party do not die from the effects of it.

"If without using such precaution, as a reasonable person would use, to ascertain whether a gun is loaded or not, before he handles it, by his carelessness, when he has it pointed towards a person, he causes the same to go off, and it wounds him or her, he is, in law, guilty of an atrocious assault and battery."

Judgment should be affirmed.

ROBERT S. HUDSPETH,
Prosecutor of the Pleas,
Hudson County.

GEORGE T. VICKERS,
First Assistant Prosecutor,
Of Counsel.

Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y.

INDEX.

Writ of Error.

NEW JERSEY, *ss.*:

(L. S.) The State of New Jersey, to our Chief Justice and other Justices of our Supreme Court of Judicature, GREETING:

Because in the record and proceedings and also in the giving of judgment upon a certain indictment against WALTER SCHUTTE and one RICHARD SCHUTTE, late of the City of Jersey City, in the County of Hudson, for and in the said City of Jersey City and County of Hudson, on the tenth day of December, in the year of our Lord one thousand nine hundred and twelve, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of the Court of Oyer and Terminer, of the aforesaid County, in and upon Thomas Mitchell, in the peace of God, and of this State, then and there being, an assault did make, and him, the said Thomas, with a certain automobile then and there operated and controlled by them, the said WALTER and RICHARD, in and upon the head, face and body of him, the said Thomas, did then and there wilfully, unlawfully and atrociously strike, beat, cut, lacerate, wound and maim and other wrongs and injuries to him, the said Thomas, then and there did to the great damage of the said Thomas, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

And further, that the said Walter Schutte and Richard Schutte, on the tenth day of December, in the year of our Lord one thousand nine hundred and twelve, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this court, in and upon

Thomas Mitchell, in the peace of God, and of this State, then and there being, an assault did make, and him, the said Thomas, then and there did beat, wound and ill treat and other wrongs to the said Thomas, then and there did, to the great damage of the said Thomas, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same (Pro ut the said indictment and the several counts therein), which was in our said Supreme Court of Judicature, before you, between Walter Schutte, plaintiff-in-error, and State of New Jersey, defendant-in-error, manifest error hath intervened to the great damage of the said Walter Schutte as is said; we being willing that the error, if any there be, should, in due manner be corrected, and full and speedy justice done in this behalf, do command you that if judgment be thereupon given and affirmed, that you distinctly and openly send under your seal, the record and proceedings aforesaid with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the fifth Tuesday of March inst., together with this writ, that the record and proceedings aforesaid being inspected we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the twelfth day of March, A. D. nineteen hundred and fifteen.

DAVID S. CRATER,
Clerk.

WILLIAM S. STUHR,
Attorney.

Return.

The answer of the Justices of the Supreme Court of the State of New Jersey within named, the record and proceedings whereof mention is within made with all things touching and concerning the same, we do hereby certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed as within we are commanded.

WILLIAM S. GUMMERE,
C. J.

(Seal)

Writ of Error.

NEW JERSEY, ss.:

THE STATE OF NEW JERSEY TO MARK A. SULLIVAN, President Judge of the Court of Common Pleas of the County of Hudson constituting the Court of Special Sessions in and for the County of Hudson and State of New Jersey, of the Term of September, in the year of our Lord One Thousand Nine Hundred and Thirteen;

(L.S.)

Because in the record and process, and also in giving of judgment upon a certain indictment against Walter Schutte and one Richard Schutte, late of the City of Jersey City, in the said County of Hudson, for and in the said City of Jersey City and County of Hudson, on the tenth day of December, in the year of our Lord One Thousand Nine Hundred and Twelve, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of the Court of Oyer and Terminer, of the aforesaid County, in and upon Thomas Mitchell, in the peace of God, and of this State, then and there being, an assault did make, and him, the said Thomas, with a certain automobile then and there operated and controlled by them, the said Walter and Richard, in and upon the head, face and body of him, the said Thomas, did then and there wilfully, unlawfully and atrociously strike, beat, cut, lacerate, wound and maim and other wrongs and injuries to him, the said Thomas, then and there did to the great damage of the said Thomas, contrary to the form of the statute in such case made

and provided and against the peace of this State, the government and dignity of the same.

And further, that the said Walter Schutte and Richard Schutte, on the tenth day of December, in the year of our Lord One Thousand Nine Hundred and Twelve, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this court, in and upon Thomas Mitchell, in the peace of God, and of this State, then and there being, an assault did make, and him, the said Thomas, then and there did beat, wound and ill treat and other wrongs to the said Thomas, then and there did, to the great damage of the said Thomas, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same. (*Pro ut* the said indictment and the several counts therein.)

Whereof, before the said Court of Oyer and Terminer of the aforesaid County, the said Walter Schutte hath been indicted and was tried and is thereof convicted by you, Judge of the said Court of Special Sessions in and for the County of Hudson, taken between the State of New Jersey and the said Walter Schutte as it is said, manifest error hath intervened to the great damage of the said Walter Schutte, as from his complaint we have received information, we being willing, in his behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Walter Schutte, command you that if judgment be thereon given, then that you distinctly and openly send under your seal the entire record and proceedings had

upon the trial aforesaid, with all things touching the same, to our Justices of our Supreme Court of Judicature, at Trenton, on the third day of December next, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, WILLIAM S. GUMMERE, ESQ., our Chief Justice, at Trenton aforesaid, the thirteenth day of November, A. D. Nineteen Hundred and Thirteen.

WM. C. GEBHARDT,
Clerk.

WILLIAM S. STUHR,
Attorney.

Return to Writ of Error.

The answer of Mark A. Sullivan, Esquire, Judge of the Court of Special Sessions holden in and for the County of Hudson and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, I send to the Justices of our Supreme Court of Judicature at Trenton, at the day and year within contained, in a certain schedule to this writ annexed as within I am commanded.

MARK A. SULLIVAN,
Judge.

Indictment.

STATE OF NEW JERSEY, HUDSON COUNTY, to wit: Be it remembered, that a Court of Oyer and Terminer, holden at Jersey City, in and for the said County of Hudson, on the first Tuesday of April, in the year of our Lord One Thousand Nine Hundred and Thirteen, before Honorable Francis J. Swayze, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Honorable Mark A. Sullivan, and Honorable George G. Tennant, Judges of the Court of Common Pleas in and for the said County of Hudson, according to the form of the statute in such case made and provided, by the oaths of

1 Frank Cordts, Foreman, a nd
2 Peter G. Abbott.
3 Joseph L. Boland.
4 James M. Devlin.
5 Frederick Engelbrecht.
6 John T. Fitzgerald.
7 Richard C. Greten.
8 Charles W. Guilbert.
9 Joseph E. Hall.
10 Joseph T. Houghton.
11 Dr. J. Morgan Jones.
12 James Kiernan.
13 Dr. F. K. MacMurrough.
14 J. Harry Miller.
15 John J. Mooney.
16 Joseph A. Riordan.
17 William Rubel.
18 John C. Ruby.
19 Edward J. Sullivan.
20 George P. Toffey.
21 Nicholas A. Toppin.
22 Harry Trost.
23 Edward V. Walsh.

good and lawful men of said County, duly empanelled, sworn and charged to inquire for the State in and for the body of the said County of Hudson, it is presented in manner and form following, that is to say, that the Bills following are true Bills.

FRANK CORDTS,
Foreman.

And the foregoing having been presented to the said Court on the twenty-seventh day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen, with bills of indictments Nos.

218 to 235 inclusive, it is ordered by said Court that the said bill of indictment so as aforesaid included as bill number 232 for Atrocious Assault and Battery as charged upon Walter Schutte should be handed to the Court of Quarter Sessions for trial and disposal according to law is in words as follows:

HUDSON OYER AND TERMINER.

APRIL TERM, A. D. 1913.

HUDSON COUNTY, to wit: The Grand Inquest of the State of New Jersey, in and for the body of the County of Hudson, upon their respective oath PRESENT, That Walter Schutte and Richard Schutte, late of the City of Jersey City in the said County of Hudson, on the tenth day of December in the year of our Lord One Thousand Nine Hundred and Twelve, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court in and upon Thomas Mitchell in the peace of God and of this State, then and there being an assault did make, and him, the said Thomas, with a certain automobile then and there operated and controlled by them, the said Walter and Richard, in and upon the head, face and body of him, the said Thomas, did then and there wilfully, unlawfully and atrociously strike, beat, cut, lacerate, wound and maim and other wrongs and injuries to him, the said Thomas, then and there did, to the great damage of the said Thomas, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further PRESENT, That the said Walter Schutte and Richard Schutte on the tenth day of December, in the year of our Lord One Thousand Nine Hundred and Twelve, at the City of Jersey City aforesaid, in the County of Hudson aforesaid, and within the jurisdiction of this Court, in and upon one Thomas Mitchell in the peace of God and of this State, then and there being, an assault did make, and him the said Thomas then and there did beat, wound and ill treat and other wrongs to the said Thomas then and there did, to the great damage of the said Thomas contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

ROBERT S. HUDSPETH,
Prosecutor of the Pleas.

A TRUE BILL.
FRANK CORDTS, Foreman.

PRESENTED
JUNE 27th, 1913, AND HANDED DOWN TO THE COURT OF QUARTER SESSIONS.

JOHN F. CROSBY,
Clerk.

ENDORSED: Bill No. 232, Hudson Oyer and Terminer, April Term, 1913, the State vs. Walter Schutte and Richard Schutte, indictment for Atrocious Assault and Battery. Robert S. Hudspeth, Prosecutor of the Pleas.

Judgment Record.

HUDSON COUNTY SPECIAL SESSIONS.

THE STATE,

vs.

WALTER SCHUTTE.

And afterwards, to wit, on the fourteenth day of October, in the year of our Lord One Thousand Nine Hundred and Thirteen, at a session of the Court of Quarter Sessions, of the County of Hudson, aforesaid, being now of the term of September, 1913, before the Honorable Mark A. Sullivan, Judge of the said Court of Quarter Sessions in and for the County of Hudson, here cometh the said Walter Schutte, under the custody of Thomas McDonough, Esquire, his bail, in whose custody he had been before committed for the cause aforesaid, who being brought to the bar here in his proper person and by his said bondsman aforesaid, to whom he is also here committed and having heard the indictment read and forthwith being demanded of and concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith he is not guilty thereof and therefore for good and evil he puts himself upon the country, and Robert S. Hudspeth, Esquire, Prosecutor of the Pleas in and for said County, who prosecutes for the State of New Jersey, in this behalf doth the like.

Thereupon cometh the said Walter Schutte, charged by bill of indictment as aforesaid, and by his writing doth request of Robert S. Hudspeth, Esquire, Prosecutor of the Pleas as aforesaid, who prosecutes as aforesaid, that he the said Walter Schutte, should be tried before the Court of Special Sessions holden in and for the County of Hudson, in which County said indictment has been found, in the manner and form by the statute in such case made and provided, and that the said Walter Schutte, defendant, doth waive his right of trial by jury, and the said request and waiver being submitted to the Honorable Mark A. Sullivan, Judge of the Court of Quarter Sessions, holden in and for said County of Hudson, the said Mark A. Sullivan, Esquire, Judge as last aforesaid, does not think the public interest will be benefited by denying the foregoing request and grants the same, and orders that a session of the Court of Special Sessions, in and for the County of Hudson, be held at the Court House, in the City of Jersey City, in said County, on the fourteenth day of October, Nineteen Hundred and Thirteen, for the trial and for the disposition of said cause, and that a jury be waived and that said cause be tried by the Court without a jury, and that the said cause be thereto continued.

At which day last aforesaid, the Court having heard the evidence submitted by the said Walter Schutte, defendant as aforesaid, and by Robert S. Hudspeth, Esquire, Prosecutor of the Pleas, who prosecutes for the State of New Jersey, in the County of Hudson, and the Attorneys being heard and the evidence submitted, the Court finds

the defendant, Walter Schutte, guilty as charged in said indictment.

Whereupon all and singular the premises being seen and by the Court now here fully understood, it is by the Court considered and adjudged that the said Walter Schutte be and is sentenced to be confined in the jail at the County farm at hard labor for the term of six months, and thence until the costs of this prosecution are paid.

Judgment entered and signed this fourteenth day of October, Nineteen Hundred and Thirteen.

MARK A. SULLIVAN,
Judge.

Attest:

JOHN F. CROSBY,
Clerk.

HUDSON COUNTY SPECIAL SESSIONS—PART I.

STATE, vs. WALTER SCHUTTE and RICHARD SCHUTTE,	Indictment 232. April Term, 1913. Atrocious Assault and Battery.

TUESDAY, OCTOBER 14, 1913.

This cause came on to be tried before Honorable Mark A. Sullivan, Judge, in the Hudson County Quarter Sessions holden in the Hudson County Court House in Jersey City on this fourteenth day of October, Nineteen Hundred and Thirteen.

Mr. George T. Vickers, Assistant Prosecutor of the Pleas, appeared for the State, and moved the trial of the indictment.

Mr. W. S. Stuhr, Counsellor at Law, appeared for the defendants.

The defendants waived trial by jury and agreed to be tried by the Court without a jury.

Mr. Vickers opened the case for the State and stated that the State expected to prove that the defendants recklessly and with criminal disregard of the rights of others and of their comfort and safety drove an automobile so as to cause serious injury to a boy in Jersey City, and that their acts constituted atrocious assault and battery.

THOMAS MITCHEL, called by the State and sworn, testified as follows:

Direct Examination by Mr. Vickers:

Q. How old are you?
A. Going on thirteen.
Q. Where do you live?
A. Third Street.
Q. In Jersey City?
A. Yes, sir.
Q. On the tenth of last December were you hurt?
A. Yes.
Q. Will you tell the Judge all that you know that happened to you, where you were and how you came to be hurt?
A. I was going to the store for my mother and father I was there (witness cries).

By the Court:

Q. Do you go to school?
A. Yes.
Q. What school?
A. Saint Mary's.
Q. Were you going to school on this day?
A. Yes.
Q. Going to school or to the store?
A. To the store.
Q. What time of the day was it?
A. In the night.
Q. What time?
A. About eight o'clock.
Q. Were you leaving your own house to go to the store?
A. I was coming back.
Q. You had something in your arms?

A. Yes, things.
Q. What store did you go to?
A. On the avenue, for eggs.
Q. Did you have eggs coming back?
A. Yes, sir.
Q. In your arms?
A. Yes.
Q. What happened?
A. I met a boy.
Q. What was his name?
A. Thomas Cleary.
Q. Where did you meet him?
A. Going home from school.
Q. On what street did you meet him?
A. On Sixth Street.
Q. Where did you walk with him after meeting him?
A. Stepping off the curb corner of Sixth street and Cole and I was going across from this side of Cole street and wanted to go across on the other side.
Q. Which side of Cole Street were you?
A. I was on this side of Cole Street.
Q. You were on the side nearest to Jersey Avenue, or on the sidewalk toward Monmouth Street?
(No answer.)
Q. Which one of the sidewalks of Cole Street were you on?
A. On this side.
Q. Is that nearer Jersey Avenue?
(No answer.)
Q. Do you know where the east and west points are?
A. Yes.

Q. Do you know whether it was the east sidewalk or the west sidewalk? Do you know that?

A. East side I think.

Q. Tell us where this store was on Newark avenue?

A. It was on Jersey Avenue. I was coming home.

Q. Between which streets?

A. Newark Avenue.

Q. On the corner of Newark Avenue and Jersey?

A. Yes.

Q. How did you go after you left the store?

A. Through Jersey Avenue to Fifth Street, and then we went to Cole Street and Fifth, and then—(interrupted).

Q. Did you go across Cole?

A. No I saw the automobile and when I went to go across I was knocked down.

Q. Was that at the corner of Cole and Fifth?

A. No. In the middle of the block.

Q. You crossed Fifth and went up towards Sixth?

A. No; I went up this way.

Q. You walked up Fifth Street to Cole?

A. Yes.

Q. When you got to Cole which way did you go? Did you walk towards Sixth?

A. Yes.

Q. Then you crossed Fifth?

A. No, sir.

Q. You got to the middle of the block between Fifth and Sixth?

A. Yes.

Q. Then what did you do?

A. I put my foot down to cross over to the other side of Cole Street and I was hit.

Q. And just as you stepped off the curb you were hit with an automobile?

A. Yes.

Q. Which way was it going?

A. I couldn't tell you.

Q. Was it going towards Newark Avenue, or from Newark Avenue?

A. I don't know.

By Mr. Vickers:

Q. Did you know you were struck, remember anything after you were struck?

A. No, sir.

Q. When did you wake up?

A. I don't know, sir. Not then; afterwards.

Q. Where were you then?

A. In Saint Francis Hospital. (Witness cries again.)

Cross-Examination by Mr. Stuhr:

Q. Were you in the middle of the block between Fifth and Sixth Street on Cole?

A. Yes.

Q. There is a trestle there, is there not?

A. Yes.

Q. Were you near the trestle?

A. No. A little bit from it.

Q. When you went across the street did you slip as you went?

A. No, sir.

Q. Had you gotten on the street pavement from the curb when you were struck by the automobile?

A. Yes.

Q. How far had you gone from the curb when you were struck?

A. Two feet from the curb.

Q. Can you show the Judge how far two feet is?

No answer. (Witness cries.)

By the Court:

Q. How far from you is two feet?

A. That far. (Fully outstretching his hands sideways.)

THE COURT: He is outstretching his hands about four feet.

By Mr. Stuhr:

Q. Did you hear a horn or trumpet blow?

A. No, sir.

Q. Did you see the automobile coming?

A. No, sir.

Q. Did you look around to see if there were any lights?

A. No, sir; I did not see any.

Q. Did you hear it at all?

A. No, sir.

Q. Did you look to see if anything was coming?

A. Yes

Q. Which way did you look?

A. Both ways.

Q. Did you see the automobile was coming?

A. No, sir; the moment I put my foot down I was hit.

Q. Did you see the lights before you were hit?

A. No, sir.

Q. You did not see anything coming?

A. No, sir.
Q. And did not hear any noise?
A. No, sir.
Q. Now don't you remember telling the Judge here you did see the automobile?
A. No, sir.

Re-Direct Examination by Mr. Vickers:

Q. Did you get this mark on your face from being hit by the automobile?
A. Yes.
Q. And this mark on your head?
A. Yes.
Q. Did you have those marks before?
A. Yes.
Q. You did not have them before?
A. When I was hit by the automobile.
Q. Before you were hit by the automobile did you have them?
A. When I was struck by the automobile I had them.

By the Court:

Q. Did you have them before you were struck by the automobile?
A. No, sir.

By Mr. Vickers:

Q. And you have some marks on your legs also?
A. Yes, sir.
Q. And you got those also from the automobile?
A. Yes, sir.
Q. How old are you?
A. Twelve.

Re-Cross Examination by Mr. Stuhr:

Q. Do you know what part of the automobile struck you?

A. No, sir.

Q. You don't know it struck you at all?

A. No, sir.

By the Court:

Q. When was this?

A. First of December.

Q. Was it from the trestle you tried to go across the street?

A. I was a little bit away from the trestle?

Q. Had you reached the trestle or gone under it?

A. No, sir; I had not reached it.

Q. There is an alley there, is there not?

A. Yes.

Q. Had you reached the alley yet?

A. No, sir.

Q. The alley runs along the trestle?

A. Yes.

Q. And had you reached the alley?

A. No, sir. I crossed the street about the middle of the block.

JOHN REED, called by the State and sworn, testified as follows:

Direct Examination by Mr. Vickers:

Q. Where do you live?

A. 274 Sixth Street, Jersey City.

Q. On the tenth of December last did you see what happened this little boy that was on the stand?

A. Yes.

Q. Tell what you saw?

A. I was standing under the bridge talking to Mr. Ezel, the shoeman there, and we noticed three boys down the street about 16 or 17 yards. I said in the police court it might be about ten yards, but I corrected it by going over the same place, and they agreed to that in the lower court. I was talking to him about a house—

Q. What did you see?

A. I heard the noise of the machine and I turned around and the machine was on the boy, I just turned as the body was going down, and then as soon as I saw the body was going down I put my hand up and hollered Stop, Stop, and the machine went over his body and it settled there, and then I hollered for them to stop and they did not stop, and I hollered murder, to stop them.

Q. Who was in the machine?

A. I don't know.

Q. Did the machine stop at all?

A. No, sir; they went right on there under the bridge.

Q. How far away did the machine stop?

A. At 8th Street.

Q. Did you go to where the boy was hit?

A. Yes. I lifted the boy up.

Q. Was he conscious or unconscious?

A. He was unconscious.

Q. That is all that you know about what took place?

A. Yes.

Q. When you say you heard the noise of the machine can you describe what kind of noise that was?

A. It was a buzzing like a kind of cyclone.

Q. What is your business?

A. When I worked I used to work in the shoe business; I am retired; I don't work at all.

Q. When you first saw the machine can you tell whether it was going slowly or rapidly?

A. It went on the boy rapidly; I did not see the machine until it was onto the boy.

Q. At that moment was it going fast or slow?

A. It was going fast.

Q. Have you any knowledge of the speed of automobiles? Any experience to determine the speed of automobiles?

A. I am a poor judge of speed unless you take me at a comparison or to the best of my opinion.

Q. Compared with a trolley car?

A. A trolley car would not be in it. I have seen a minute and three-quarter seconds man running 100 yards, and I think the machine would go 200 yards in eight seconds.

Cross-Examination by Mr. Stuhr:

Q. What point did you see this man?

A. In the centre of the bridge.

Q. Where is that bridge?

A. It runs from Sixth to the Alleyway.

Q. Where were you?

A. About five yards inside of the bridge from Sixth Street.

Q. How far could you see on Cole Street from where you were standing?

A. I could see as far down as the plumber's or the barber shop.

Q. Where are they?

A. The plumber is between Fifth and Sixth Stret near Fifth Street.

Q. From where you were standing you could not see anything down Cole Street?

A. Certainly I could.

By the Court:

Q. What was the nearest to the bridge that you could see towards Fifth Street?

A. Do you mean when I am looking south to Jersey Avenue, how far could I see?

Q. No. But how near to the bridge could you see?

A. What do you mean?

Q. What particular house or place could you see near the bridge?

A. I could see the house the other side of the alley, or the end of the house beside the alley.

Q. Could you see the sidewalk in front of this house where you were standing?

A. Yes.

By Mr. Stuhr:

Q. Did you see the entire sidewalk between Fifth and Cole?

A. Yes.

Q. In which direction were you looking while talking to the other gentleman?

A. I was looking to the centre of Cole Street; I was looking west.

Q. When did you first look south?

A. When I heard the noise of the machine.

Q. How soon before this machine was on the boy did you hear that noise?

A. Just about a second, coming right along and it struck the boy as it came to him and took him down.

Q. Then you saw the machine going away?

A. Yes.

Q. And go up to Eighth Street?

A. Yes.

Q. And then where did it go?

A. Turned into Eighth Street.

Q. You say it was going fast?

A. Yes.

Q. Do you know how far a mile is?

A. The racers of course I have seen them summer in and out, measured a mile, I have seen them running every summer for the last 25 or 30 years; I know pretty well how long a mile is.

Q. How many feet is there in a mile?

A. Something about seventeen hundred feet.

Q. You think 1700 feet make a mile?

A. Something about that.

Q. How many average blocks would make a mile?

A. Twenty blocks. Well, there is no average blocks; I have seen blocks as big as a block and a half.

Q. What is the smallest one?

A. In Providence, Rhode Island, there was a block as big as three blocks here.

Q. What is the length of the block between Fifth and Sixth Street?

A. I should judge close on to a hundred yards.

Q. One hundred yards?

A. Yes, about ninety to 100 yards.

Q. How big is a yard?

A. Three feet.

Q. Then twenty blocks would be how many?

A. I don't know. I have been on the race track for many years and seen a mile run and I have a pretty good idea of what a mile is.

Q. Whereabouts did you see this automobile when it was on the boy?

A. About 15 to 17 yards from me, and I was about five yards where I was with this man, and that would be 22 yards; I was on the sidewalk at the trestle.

By the Court:

Q. I thought you said you were under the bridge?

A. I did not. I was on the sidewalk.

By Mr. Stuhr:

Q. How far were you on the sidewalk?

A. Between three and four feet from the curb.

Q. Show us here about how far that is?

A. From here to about here I was from the curb.

MR. VICKERS: Indicating about twenty-four inches.

MR. STUHR: Indicating about twenty-four inches.

Q. Did you see the boy before the accident took place?

A. I seen two or three boys right close there.

Re-Direct by Mr. Vickers:

Q. I misunderstood that situation. Was this machine going north up the Hudson or towards Newark Avenue?

A. It was going right clean over to the Long Dock.

By the Court:

Q. Going north?

A. Yes, going north.

By Mr. Vickers:

Q. I don't know where the Long Dock is?

A. It was going north, and I looked south to see him struck, 15 yards to my left.

Q. Was the machine on the east side or the west side of the street?

A. On the east side as you go up north.

Q. Did you see the two defendants in this case that night later after you had seen the automobile disappear around 8th Street?

A. Did I see the two defendants?

Q. Yes?

A. Yes; but I couldn't recognize them in the machine.

Q. The two men who were arrested?

A. Yes.

Q. Where did you see them then?

A. In the station house.

Q. Can you tell the Court what was their condition as to sobriety?

A. That would be pretty hard for me to swear, because there is some men going along that are perfectly sober and you would imagine them to be drunk. If you were used to a man you might be able to give a different opinion. The only thing I do know is that the young man was very excitable when he was brought in.

Q. Do you mean excited or excitable?

A. Excitable, or excited, whichever way you call it.

FREDERICK EZELL, called by the State and sworn, testified as follows:

Direct Examination by Mr. Vickers:

Q. Where do you live?
A. 109 Cole, Jersey City.
Q. What is your business?
A. Shoe clerk.
Q. How long have you been in this country?
A. 44 years.
Q. You are the gentleman who was with Mr. Reed, the last witness, on the night of this accident?
A. Yes.
Q. Will you tell the Judge in your own way what you saw and heard take place there?
A. Well, it was that evening I was out on business towards Grove Street, and on the corner of Sixth and Cole Mr. Reed was standing against the wall, and I crossed over and said good evening; and we talked about business; and I was standing facing him towards the wall, and he was standing on the corner, and all of a sudden while we were talking there comes an automobile and it makes a noise, it was right under the bridge, and all of a sudden the car went by, and Reed called out Murder, without saying anything to me, and went away, and I turned around to see what happened, and there was a boy on the street, and I

went there and helped to pick him up and some boys were there and said hurry up and carry him to Saint Francis Hospital.

Q. Where was this curb; towards the Hudson River?

A. Yes.

Q. How near the curb were you standing?

A. On the corner, southeast; it was about six feet from the curb where the boy lays. I looked up to see what was the matter when the car was coming at a good speed and Mr. Reed hollered Stop, Murder, and I turned around to see what was the matter.

Q. What do you mean by good speed?

A. Fast. He got away as quick as he could and I turned around to see what was happening.

Q. And when you turned around and first noticed the car how far was it from where the boy afterwards lay?

A. In about a second it was about twenty feet, it rang right ahead and Mr. Reed run after it as fast as he could and hollered and I guess the whole neighborhood heard him, and I looked and saw the boy laying on the ground about five or six feet from the curb and he was motionless as though he was killed.

Q. Did you see the defendants in the police station that night afterwards?

A. No, sir. I went home and washed my hands from the blood and went out.

Q. Was it this little boy who was on the stand that was hurt?

A. Yes.

Cross-Examination by Mr. Stuhr:

Q. How far is your business place from the corner of Fifth and Cole Streets?

A. About half a block.

Q. And Mr. Reed came along as you were standing there?

A. Yes.

Q. And you talked?

A. Yes.

Q. Which way were you looking?

A. East, and Mr. Reed was facing the street; he was talking there standing on the side and I was facing him in front of him.

Q. How long did you stay there before the boy was struck?

A. Ten or fifteen minutes.

Q. When you saw the automobile on the boy did you go to the boy?

A. Yes; I picked him up; he was cut and bleeding; I ran right over and picked the boy up.

Q. You did not bother about the automobile at all?

A. No, sir; I only wanted to see where the automobile went, that is all.

Q. Did you holler?

A. No; Mr. Reed hollered, nobody else.

Q. This automobile went just as automobiles generally go?

A. It went quick out of sight when I looked.

Q. They all go very quick?

A. Some times they go too quick. I couldn't tell the speed.

Q. You can't tell what the speed of this one was?

A. No, sir.

JOHN CALDWELL, called by the State and sworn, testified as follows:

Direct Examination by Mr. Vickers:

Q. Where do you live?

A. 109 Eighth Street, Jersey City.

Q. How old are you?

A. Eighteen.

Q. Did you see anything of this accident on the night of the tenth of December?

A. No, sir.

Q. Did you see the auto which was said afterwards to have hit this boy?

A. Yes.

Q. Where?

A. I was standing corner of Ninth and Erie and an automobile came along containing five men; four of them went in Mr. Nielan's saloon, and then the chauffeur left with the car, and shortly after a gentleman came and asked me if an auto had stopped at that place, and I told him yes.

Q. Did you know any one in the automobile?

A. The only one I know was Mr. Nielan.

Q. That was the proprietor of the saloon where the auto stopped?

A. Yes.

Q. Did you know the other occupants of the car?

A. No, sir.

Q. Did not see them so as to recognize them?

A. No, sir.

Q. Were you afterwards at the police station?

A. Yes.

Q. Did you see the men there that were arrested?

A. Yes.

Q. Did you recognize them as the men who had been in that automobile?

A. No, sir; I did not know them at all.

EUGENE PHOL, called by the State and sworn, testified as follows:

Direct Examination by Mr. Vickers:

Q. Were you with the last witness, Caldwell, on the night this boy was struck?

A. Yes.

Q. Do you know who were the men in the automobile?

A. Yes; Mr. Nielan, Mr. Schutte, Mr. Schutte's son, a gentleman named Eddie Bowers and another man.

Q. Mr. Schutte and Mr. Schutte's son are the two defendants here?

A. Yes.

Q. And the son is the younger man of the two?

A. Yes.

Q. Did you see them stop at Nealan's saloon?

A. Yes.

Q. What time was that?

A. Between around half past eight and nine o'clock.

Q. Where is Nealan's corner?

A. Northeast corner of Ninth and Erie Street.

Q. Are you acquainted in that neighborhood?

A. Yes. I live there.

Q. At Cole Street the trestle, or bridge as it is called, is how far away from Ninth Street?

A. Two blocks one way and three blocks another.

THE COURT: It is two four hundred foot blocks and three two hundred foot blocks.

By the Court:

Q. Pavonia Avenue comes in there also?
A. Yes.
Q. That makes it six blocks?
A. Yes.

By Mr. Vickers:

Q. After the car got to Nealan's did they go in that saloon?
A. Every one went in the saloon except the driver, and he drove away west with the car.
Q. By the driver do you mean this young man here, this younger defendant?
A. Yes. He stayed in the car.

Cross-Examination by Mr. Stuhr:

Q. You did not see the accident?
A. No, sir.
Q. The first you saw was what?
A. I seen a gentleman named Brady come up and ask had we seen a touring car with five men in it stop there, and we told him yes, and that the driver had gone away and that the others were in the saloon.
Q. Where did you see this car first?
A. Ninth and Erie Street when it stopped at the saloon.

JOSEPH BRADY, called by the State and sworn, testified as follows:

Direct Examination by Mr. Vickers:

Q. Where do you live?
A. 262 Mercer Street, Jersey City.
Q. How old are you?
A. Going on thirty years.
Q. What is your occupation?
A. Trainman.
Q. Did you see this young Thomas Mitchell that night of December 10th?
A. Yes.
Q. Tell the Court what you know about it?
A. I was coming south on Cole Street and I saw an automobile coming north and a few boys between 5th and 6th on Cole, and I saw the automobile hit what looked like the form of a person; I ran toward the person and I found it was this young boy, and there was another man around, I don't know his name, he was with the boy at the time too, he and I picked the boy up and carried him to St. Francis Hospital.
Q. How fast was the automobile going, if you can tell?
A. It was going pretty lively, but on my oath I couldn't tell just the exact mileage it was making.
Q. About how fast?

Objected. Objection sustained.

Q. Your occupation is that of trainman?
A. Yes.
Q. You are accustomed in your business of observing speed?
A. I have rode in fast trains.

Q. And from your experience do you know whether a train is going five or ten, or fifteen or thirty miles an hour?

A. I could give an idea.

Q. From your knowledge of schedules between stations and distances?

A. Yes.

Q. What kind of trains have you worked on?

A. Freight trains.

Q. Both slow and fast freight trains?

A. Slow and fast.

Q. Are you capable of judging the difference in speed between slow freight trains and fast speed trains?

A. Yes; I have an idea of course.

Q. Is your idea based on your knowledge of actual runs made and taking notice of the time it took to go from one point to another?

A. Yes.

Q. Have you observed the speed of automobiles?

A. I don't know much about riding in automobiles; I never rode in one.

Q. Have you seen them go?

A. Yes.

Q. Have you observed the rate of speed, some going slow and some going fast?

A. Yes.

Q. Now, judging from your experience as a railroad man and your occupation and your observation of this particular automobile, can you say whether it was going slow or fast?

Objected to. Excluded as indefinite.

Q. Can you tell from your experience how fast the automobile was going?

Objected to. Objection overruled.

THE COURT: You may cross-examine him now on that.

Cross-Examination by Mr. Stuhr:

Q. Did you ever time an automobile when passing by you?

A. No, sir.

Q. Would it be possible for you to tell whether an automobile was going five miles an hour or ten miles an hour?

A. Possible? Yes, I should say.

Q. Suppose two were going past you how would you be able to judge?

A. By judging and seeing them go a block.

Q. Did you ever time an automobile going the distance of a block?

A. No, sir.

Q. Did you ever time an automobile going any distance?

A. No, sir.

Q. Did you ever test this automobile in question?

A. No, sir.

Q. You just guess at it, is that the idea?

A. I am on my oath and I have only my word.

Q. What would that word be, a guess?

A. A whole lot to me.

Q. If you talked about speed in this case it would be a guess, would it not?

A. I don't think it would be a guess.

Q. You did not measure the time in this case of the automobile?

A. No; I did not measure the time. I have an idea what time he took to travel a block.

Q. Based on what?

Objected to as not intelligent, whether the speed or the time it is based on. Question allowed.

THE COURT: If you understand the question answer.

WITNESS: What is the question?

Q. What do you base your idea of speed on?

THE COURT: The question was on what do you base your judgment of the time he took to go a block.

A. From my experience as a railroad man.

Q. Was it your duty to take time of trains or runs between the stations?

A. I have done it whether it was my duty or not.

Q. Was it your duty?

A. It was every trainman's duty.

Q. Did you have a watch for that purpose?

A. Yes.

Q. And did you always use it to test the speed of the trains or whether they were on time?

A. Yes.

Q. How often have you done it?

A. I don't know; it was too often to count.

Q. How long have you been a trainman?

A. Eight or nine years.

Q. As what?

A. Switch tender and trainman.

Q. How long as a trainman?

A. About eight years.

Q. Who has charge of the freight trains you are on?

A. The conductor.

Q. He is the one whose duty it is to keep the train on schedule time?

A. It is not exactly up to him.

Q. Who else has something to do with it?

A. The engineer too.

By Mr. Vickers:

Q. Can you tell from your experience how fast this automobile was going?

A. About thirty miles an hour.

Cross-Examination by Mr. Stuhr:

Q. Where did you first see that automobile that evening?

A. It was in the block between Fifth and Sixth Streets when I first saw it.

Q. Where were you standing?

A. I was walking on Cole Street.

Q. At what other street?

A. Sixth.

Q. When did you first see the automobile when you got to Sixth Street?

A. It was between Fifth and Sixth Street when I saw it.

Q. Had the accident taken place then?

A. No, sir.

Q. How far from the accident did you see it when you first saw it?

A. Not very far away. I couldn't say the exact—

Q. How long did this machine take to go a block?

A. Six or seven minutes.

Q Six or seven minutes to go a block?

A. No, I mean six or seven seconds; I withdraw the other answer.

Q. Do you know how long a mile is?

A. I have an idea.

Q. How many feet is your idea?

A. About five thousand, something like that.

Q. How many blocks would that be?

A. Supposed to be 20 city blocks.

Q. An automobile going six seconds to a block would take how long to go a mile?

Objected to as a matter of arithmetic.

Objection sustained. Exception.

Q. Were you the one who took the boy to the hospital?

A. Yes.

Q. In what part of the street did the accident take place?

A. It took place a little from the water table on the east side of Cole Street.

Q. How many feet from the curb?

A. I did not measure. It may be three or four feet.

Q. And it might be five or six?

A. Probably it might be five.

Q. Did you see the boy before the automobile struck him?

A. I seen a couple of boys.

Q. Did you see this boy particularly?

A. I did not see him to recognize him particularly from the others.

Q. Did you see how it happened?

A. Yes.

Q. How did it happen?

A. The front of the automobile hit him.

Q. What, the wheel, or what?

A. Around at the front of the wheel.

Q. Which wheel?

A. Why, the one on the east side the way the automobile was heading.

Q. Anybody else there when you picked up the child?

A. Yes, a couple more.

Q. Who?

A. This gentleman who was a witness here, and there was a couple of boys there, Mr. Reed.

Q. Anybody else outside of him?

A. That is all I knew of. Mr. Reed, I just saw him.

Re-Direct Examination by Mr. Vickers:

Q. You don't know this boy?

A. No, sir; I did not know him.

Q. You have no interest in the case?

A. No, sir.

Q. In fact you refused to make a statement to the Prosecutor's detective and said you did not want to bother with it?

Objected to.

A. Yes.

Objection sustained.

WILLIAM HOFFMAN, called by the State and sworn, testified as follows:

Direct Examination by Mr. Vickers:

Q. You are a member of the Jersey City Police Department?

A. Yes.

Q. On this tenth day of December, when this little boy was hit by an automobile, did you make an arrest or were you present at the arrest of these defendants?

A. I made the arrest.

Q. Do you know from either of them or from both of them who was driving the car?

A. Well, after I got the information—

Q. Tell me yes or no; do you know?

A. Yes. The father Richard Schutte informed me that the son Walter Schutte was running the car.

Q. Where was Walter then?

A. He was on the street then and had not been arrested at that time.

Q. Did you arrest Walter afterwards?

A. Yes.

Q. When you did, did he say anything to you, that he was running the car?

A. Not to me at that time. He made a statement in the station.

Q. Did he make the statement to you?

A. No.

Q. Did you ascertain from either of these defendants whether this car about eight o'clock that evening and before it reached Nealan's saloon, ran along Cole Street?

A. Not me.

Q. Did you take Mr. Schutte, the father, and Mr. Nealan to the police station?

A. Yes, I did.

Q. Did you then have any talk with them as to whether they in that automobile had passed over Cole Street before stopping at Nealan's saloon?

A. No, I did not.

Q. Is this your handwriting to this paper?

A. Yes.

Q. Is this your report of what took place? Will you look at it?

MR. STUHR: Is that in your handwriting? I object to it.

WITNESS: This is my report.

Q. Your report of what took place?

A. Yes.

MR. VICKERS: I ask the witness to read the report there to refresh his recollection.

Objected to. Objection sustained.

Q. When was that report made?

A. This is the statement made to the Prosecutor's Office September 27th of this year.

Q. It is your statement?

A. Yes.

Q. At the time you made it, do you know whether it was correct or not?

Objected to as incompetent.

THE COURT: I won't allow him to read it now to refresh his recollection, because his memory is presumptively as good now as it was on the 27th of September, last

month. You may ask him whether there is anything in that statement that is contradictory of what he says now.

Q. I call your attention to this part of the statement where it says here "who admitted that they were in the automobile," (referring by that to the prisoners Richard Schutte and Walter Schutte) "that passed through Cole Street at that time and Richard Schutte the father of Walter Schutte informed me they were in the automobile at that time." Is that what took place between you and the defendant Richard Schutte when you took him to the police station?

A. Yes.

Cross-Examination by Mr. Stuhr:

Q. Which was true, the statement you made here this morning on the stand, or this written statement?

A. This written statement is true.

Q. What made you say you had no conversation?

A. I did not want to get it down so fine because Captain Richards really did the talking, and I was standing there.

Q. Is this report in your handwriting?

A. Yes.

Q. The entire report?

A. Yes.

Q. When did you make it?

A. On the 27th day of September.

Q. Why did you make it then?

A. Because the Prosecutor's office wanted a statement.

Q. And do you mean you forgot between now and Sepetember 28th?

A. I wanted to get it clear.

By the Court:

Q. You say this statement is not true?

A. No. I made that statement to the Prosecutor's detective to verify and save time, as is our duty.

Re-Direct by Mr. Vickers:

Q. Were you present at any time when the son Walter said anything with respect to running the automobile?

A. Yes.

Q. Where was that?

A. At the station house.

Q. Who was present?

A. Other men which I don't just remember.

Q. What did Walter say as to whether he did or did not that night run an automobile on Cole Street?

A. Yes. He admits that he run the automobile that night.

(Answer stricken out.)

Q. Tell us what he said about running an automobile on Cole Street?

A. As near as I can remember he made the statement that he was running the automobile along there but he did not know that he had struck anybody with the automobile.

Q. In what you now say in regard to this statement, it was not made to you personally but in your presence by the father and Mr. Nealan?

A. Yes, that is the situation.

Re-Cross Examination by Mr. Stuhr:

Q. Did Walter Schutte make any statement to you at all?

A. I did not take any statements at all. I was standing in the reserves room when the statements were taken from them in reference to the running of the automobile. That is all I know about the statement.

Q. You don't know what the statement was?

A. Yes, I do.

Q. What?

A. I remember he said he was running the automobile but did not strike anybody or run over anybody.

Q. To whom did he make that statement?

A. I don't remember.

Q. Was that statement made in your presence?

A. At that time?

Q. Yes.

A. Yes, I think it was.

Q. Do you know whether it was made in your presence?

A. I know I was standing there and there was three or four statements being taken at the same time.

Q. Who was taking the statements?

A. I think Patrolman McNamara.

Q. And you heard the statement while he was taking it?

A. I won't be sure; I don't know.

Q. Do you know when that statement was made?

A. Yes, December 10, in the evening, 9:30.

State rests.

MR. STUHR: I ask an acquittal as to the father on the ground that he is not connected with the affair at all. He may only have sat in the automobile like Mr. Nielan so far as the evidence goes.

MR. Vickers opposes the motion.

THE COURT: I will acquit the father.

MR. STUHR: Now I ask an acquittal of the son.

THE COURT: I will put you to your defense as to him and grant you an exception.

To which refusal to acquit Walter Schutte the counsel for the defendant Walter then and there prayed an exception, and the same is allowed and signed and sealed accordingly.

MARK A. SULLIVAN, Judge. (L. S.)

WALTER SCHUTTE, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Stuhr:

Q. How old are you?

A. Twenty-three.

Q. On the tenth of December, 1912, did you own an automobile?

A. I did.

Q. And were you out riding with it on the evening of that day?

A. I was.

Q. And did you pass through Cole Street between Fifth and Sixth Street on the evening of that day?

A. I did.
Q. About what time did you pass by?
A. I should judge about half past eight.
Q. Where were you coming from?
A. I was coming from Mercer Street.
Q. Going north?
A. Going north.
Q. Had this automobile a trumpet attached?
A. It had.
Q. Had you lights burning?
A. Yes.
Q. How often would you use this trumpet?
A. Just before I came to every crossing.
Q. Did you do that that evening?
A. I did.
Q. Did you use it just before you came to Fifth Street?
A. I did.
Q. At what rate of speed were you going that evening?
A. About eight or nine miles an hour.
Q. How long had you been driving an automobile?
A. About a year and a half up to that time.
Q. What kind of street is Cole Street so far as pavement is concerned?
A. Pretty rough street.
Q. Do you mean the pavement is rough?
A. Yes.
Q. What do you mean by rough?
A. It has all little holes.
Q. What time did you pass Cole Street between Fifth and Sixth Street in the evening when you came by there on the night this accident is alleged to have happened?

A. Between eight and half past, I should judge.

Q. Did you see this little boy?

A. I did not see anybody.

Q. After you passed through Cole Street between Fifth and Sixth Street, did you hear anybody holler Stop, Murder?

A. No, sir.

Q. Did you know you had run over anybody?

A. No, sir.

Q. When did you hear about that?

A. When I was about a block and a half away from home.

Q. After passing Sixth and Cole Street where did you go?

A. In the direction of Eighth Street, and then to East Hamilton Place, and from there to Ninth and Erie Streets, to Mr. Nielan's place.

By the Court:

Q. Just describe that again.

A. Over Cole Street and to 8th, and through 8th to East Hamilton Place, and through East Hamilton Place to Ninth Street, and through Ninth Street to Erie.

By Mr. Stuhr:

Q. Who was in the car?

A. My father, Mr. Nielan, Mr. Scott Lunger, and a man named Powell.

Q. When you got to Ninth and Erie Street what did you do there?

A. They got out and I went down to the garage.

Q. Where was the garage?

A. On First Street near Jersey Avenue.

Cross-Examination by Mr. Vickers:

Q. What kind of car was this?

A. Reo tourist, 38 horsepower, three speeds.

Q. This was an asphalt street you were traveling on, Cole Street?

A. Yes.

Q. Do you think you were going eight or nine miles an hour?

A. Not over eight or nine.

Q. Do you know what the speed limit in the city is?

A. Ten mile, I guess, ten or twelve mile.

Q. Why were you not going as fast as the law would allow you?

A. For the simple reason I did not want to have broken springs.

Q. The road was so bad that there was danger of breaking springs?

A. Yes.

Q. How long did you run at the rate of 8 or 9 miles an hour?

A. From the time we went out in the morning.

Q. You ran at that rate all the morning because you did not want to have broken springs?

A. Not that at all.

Q. Did you usually drive that speed?

A. Yes.

Q. On the Boulevard?

A. Yes. You can drive faster on the Boulevard.

Q. How fast were you driving on the Boulevard that day?

A. Eight or nine miles an hour.

Q. Never exceeding that; not fifteen miles?

A. Except when coming up-hill.

Q. You travel faster up-hill than on the Boulevard when you travel within the law?

A. No, sir.

Q. Do you know the limit of your car as to speed?

A. I suppose if she were driven twenty miles an hour she would turn upside down.

Q. You regard thirty miles an hour as very dangerous speed in that car?

A. Yes.

Q. Or even twenty miles an hour a dangerous speed?

A. That is pretty fast.

Q. Would it be dangerous in that car?

A. It would in a way.

Q. With you driving it?

A. Yes, and with anybody.

Q. And at that particular place in Cole Street, bumping over everything, you would regard ten miles an hour dangerous?

A. Yes.

Q. When you drive eight or ten miles an hour you do it with the throttle open, the exhaust open?

A. There is no exhaust on it.

Q. There was no exhaust on it?

A. No cut out.

Q. Is this a modern car or antiquated?

A. It was built in 1905.

Q. Does it make a lot of noise?

A. Well, like some of these rag wagons that use bells on.

Q. Then you knew it was difficult for you to hear any warning on the car from the sidewalk if it were given while driving in that car, did you not?

A. I did not know it.

Q. Have you ever had a person call to you from the sidewalk and you hear it, a person saluting you, for instance?

A. Often.

Q. You could hear it?

A. Yes.

Q. And do you remember going under the railroad bridge on Cole Street?

A. I do.

Q. Was there any train going over or special noise?

A. I couldn't say.

Q. You did not notice anything unusual?

A. No, sir.

Q. Did not notice anything at all?

A. No.

Q. Who arrested you?

A. Detective Hoffman.

Q. And you were asked whether you wanted to make a statement when you went to the station house, were you not?

A. I was.

Q. And you refused?

A. I did.

Q. And when you were asked what you had to say about running over a child and breaking its jaw and smashing its legs up and splitting its head open, was there any reason why you should not then say that you knew nothing about it, and that you were driving slowly; was there any reason why you should not explain the situation?

A. There was no reason at all.

Q. Why did you not?

A. I could not be looking on the side of me and front of my car and back of me at the same time.

Q. Why did you not make some explanation of injuring this child?

A. I did not think it was necessary.

Q. Were you under the influence of liquor?

A. I was not.

Q. Had you been drinking anything that day?

A. Yes.

Q. What had you been doing, driving from morning until half past 8 or 9 o'clock at night?

A. I don't get that.

Q. What were you doing all that day, driving?

A. Driving in the morning a couple of hours on business.

Q. When did you start out in the morning?

A. About ten o'clock.

Q. And the rest of the day until 8 or 9 o'clock in the evening was pleasure?

A. Yes.

Q. And you were in this county during all that time?

A. No.

Q. Where had you been outside of the county?

A. Staten Island.

Q. You drove to Bergen Point from Nielan's saloon?

A. That was in the afternoon.

Q. Where did you drive that night?

A. As far as Nungesser's.

Q. Had your father been with you all the day that you had been in that car?

A. Yes.

Q. You say you had only been driving about a year and a half at this time?

A. Yes.
Q. Did you buy this car?
A. Yes.
Q. When?
A. Either June or July, 1911.
Q. From whom?
A. From a man I knew in Maiden Lane.
Q. Who?
A. Henry J. Washburn.
Q. Did you buy it at that time for yourself or your father?
A. Myself.
Q. For business or pleasure?
A. Pleasure.
Q. Are you in business for yourself?
A. No, sir.
Q. What do you do?
A. Salesman.
Q. For whom?
A. My father.
Q. When you bought this car was it originally registered in your name?
A. It was.
Q. And has been from that time on?
A. Yes.
Q. When I say registered you know what I mean?
A. Yes.
Q. With the State Department?
A. Yes.
Q. Do you remember your license number for that year?

Objected to as immaterial. Objection sustained.

Q. This car made such a noise that a man shouting to you from the sidewalk could not be heard by you at the wheel?

A. No, not unless he was in front of me.

Q. He would have to be in front of you?

A. Ahead of me on the sidewalk.

Q. Otherwise you could not hear him in that car?

A. No.

Q. Is that right?

A. Yes, that is right.

Re-Direct Examination by Mr. Stuhr:

Q. The one who first told you about running over this boy was who?

A. Officer Duffert.

Q. Did you go with him to the police court at that time?

A. No, sir; I went across the street to Hoffman.

Q. Why?

A. He told me Hoffman was sent up there.

Q. And Hoffman took you to the station house?

A. Yes.

Q. Did anybody tell you what these injuries were when you were at the station house?

A. They said the boy was pretty well hurt.

Re-Cross-Examination by Mr. Vickers:

Q. Did they say he was pretty well hurt, or did they tell you what was the matter with him?

A. They did not tell me what was the matter with him at all.

Q. Were you told the boy's name?

A. Well, I understood it was not Mitchell, it was some other name they had there.

Q. Were you not told you were charged with atrocious assault and battery in that you did, about 8:20 P. M. of this day, while operating an automobile on Cole Street between Fifth and Sixth Street, knock down and run over one Thomas Mitchell, breaking his jaw and injuring his left arm and left leg, and who was removed to Saint Francis' Hospital by friends? Were you told that?

A. I don't remember.

Q. And when you were asked that did you say I decline to answer any questions?

A. That is what I said.

Q. You said that?

A. I said I would not make a statement.

Q. You said what I read to you?

A. Yes.

By the Court:

Q. What time in 1911 did you buy that machine?

A. I am not sure whether June or July.

Q. When did you first hear about the accident?

A. Corner 8th and Cole Street.

Q. What were you doing there?

A. Going home from the garage.

Q. What did you do when they told you about the accident?

A. I couldn't believe it at all.

Q. What did you do? Did you go home?

A. No. I had to go to the detective, Mr. Hoffman.

Q. The first you heard of it was at the corner of 8th Street and Cole?

A. Yes. Officer Duffert told me; he said You better go down the street to Detective Hoffman; and I went down there and he came over and took me to the station.

Q. How is it Hoffman did not come to you when you were talking to Duffert?

A. I don't know; perhaps he did not know me.

Q. After that what did you do?

A. Went home to bed.

Q. When did you next see the machine?

A. About a week before I sold it.

Q. When did you sell it?

A. In January.

Q. Thirty-first or the first?

A. Some time in January; I don't know what day.

Q. Then it was almost a month after the accident before you saw the machine?

A. Yes.

Q. You never went near to it to see whether there was blood on it or any marks to show whether you had run over anybody or not?

A. No.

Q. Was it washed after the accident?

A. The car was not washed from the time it came into New Jersey until it was sold.

Q. Do you mean for a year and a half it was not washed?

A. It was not in Jersey a year and a half.

Q. Then you did not live in Jersey?

A. I am in the country in the summer time.

Q. You bought this car in 1911, June or July?

A. Yes.

Q. And you sold it January, 1913?

A. Yes.

Q. And you lived in Jersey all that time?

A. Yes.

Q. And you say the car was not washed since it came into Jersey?

A. The car was not washed at all.

Q. When you next saw the car after this accident three or four weeks after it, did you examine it to see if there was any stain on it or anything to show there was an accident?

A. I looked the car over and did not see anything out of the way with it.

Q. Do you want me to understand that while you were told of the night of this accident that you had run over a boy and broken his jaw and smashed him all up, it never occurred to you to look and examine the car to see if there was anything in and about the car that showed you had run over a boy?

A. I dreaded the car; I did not want to go near it.

Q. But you said then and say now that you did not know that you ran over the boy?

A. Yes.

Q. Then why did you not want to go near the car?

A. I did not want to have anything to do with any machine after that.

Re-Cross-Examination by Mr. Vickers:

Q. You were immediately released on bail?

A. I was.

Q. So that you had the same day or the next day opportunity to go right over to the car and examine it for yourself?

A. I did.

Q. Did you ever go to the hospital to see the boy?

A. No, I did not.

SCOTT LUNGER, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Stuhr:

Q. Where do you live?

A. 256-A Ninth Street, Jersey City.

Q. How long have you lived in Jersey City?

A. Pretty near twenty years.

Q. Do you know Richard and Walter Schutte?

A. Yes.

Q. Were you out in Walter Schutte's automobile the evening of December 10th, 1912?

A. Yes.

Q. Did you pass through Cole Street that evening?

A. Yes, on the way home.

Q. What time of the evening was it?

A. I should judge around eight or half-past eight.

Q. From what direction were you coming?

A. From Mercer Street, coming down Mercer Street viaduct, that is going from south north.

Q. Do you remember passing the block on Cole Street between Fifth and Sixth Street?

A. Yes.

Q. Had this automobile two lights on it in front?

A. To the best of my knowledge, yes.

Q. Had it a trumpet?

A. Yes.

Q. Was that trumpet used?

A. I couldn't swear to that.

Q. What rate of speed was this automobile going at?

A. I have not much knowledge of speed; I could hardly say; it was not going fast, though,

because the condition of Cole Street is very bad; I am acquainted in that neighborhood; to go fast there would be detrimental to the machine and also to the building crossing; there is quite a number of children on that street and a machine must go slow.

Q. Well, how long, for instance, would it take to go a block with the machine?

A. Probably three minutes.

By the Court:

Q. You don't mean that?

A. Probably a minute.

Q. Three minutes to go two hundred feet.

A. If I have no idea of the distance I can't answer that.

By Mr. Stuhr:

Q. Did you see any boy in the street betweer Fifth and Sixth Street on Cole that night?

A. No.

Q. Did you hear anybody shouting while you were passing through that street, Stop, Murder?

A. No, sir.

Q. How long did it take you to go from Cole Street between Fifth and Sixth Street to Erie and Ninth?

A. Maybe six minutes.

Q. Which way did you go?

A. Went to the north to 8th St., Erie to East Hamilton Place, north to 9th Street, and then east to 9th and Erie to Mr. Nielan's saloon.

Q. Who was driving the machine that evening?

A. Walter Schutte.

Q. What was his condition as to sobriety?

A. He was as sober as a judge.

By Mr. Vickers:

Q. Which judge?

A. That is a common expression.

By Mr. Stuhr:

Q. Did that machine go through that block between 5th and 6th Street in six seconds?

A. Hardly.

Q. Did it?

A. No.

Q. How long do you think it took to go through that block?

MR. VICKERS: He has said three minutes.

MR. STUHR: He corrected that. Never mind. That is all.

GEORGE A. DUFFERT, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Stuhr:

Q. You are an officer of the Jersey City police department?

A. Yes.

Q. Do you know Mr. Schutte and his son?

A. Yes.

Q. They live in Cole Street?

A. Yes, between 8th and Pavonia Avenue.

Q. Do you remember the night in question that has been spoken about here?

A. Yes.

Q. Did you meet Mr. Walter Schutte that evening?

A. I did.

Q. What time was it?

A. About a quarter to ten.

Q. What did you say to him?

A. I said to him, Walter, what trouble are you in now?

Q. What did he say?

A. He did not make me any answer at all at the time. I said, Now Mr. Hoffman wants to see you across the street. He came across the street with me and I turned him over to Detective-Sergeant Hoffman.

Q. What was the defendant's condition as to sobriety?

A. Perfectly sober.

Cross-Examination by Mr. Vickers:

Q. He had not been drinking at all?

A. Not to my knowledge.

Q. You won't say a man was not sober unless he had to your knowledge been drinking?

A. I couldn't say.

By the Court:

Q. Where do you say they live?

A. Between 8th and Pavonia Avenue on Cole Street, 148 Cole Street.

EDWARD J. NIELAN, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Stuhr:

Q. Where do you live?

A. 293-A Pavonia Avenue, Jersey City.

Q. How long do you live in Jersey City?

A. Nineteen years.

Q. Do you know the defendants here?

A. Yes.

Q. Do you remember the tenth day of December, 1912?

A. Yes.

Q. Were you out with these gentlemen and Mr. Scott Lunger in an automobile that evening?

A. Yes.

Q. Did the automobile go through Cole Street that evening?

A. Yes.

Q. Where was the automobile coming from?

A. From Mercer up to Cole.

Q. From the south going north?

A. Yes.

Q. What was the rate of speed that the automobile was going at at that time?

A. Ordinary speed, just the same as they are going to-day every day during the whole week, I mean as they go on that street, you can't go fast on that street on account of the holes.

Q. Between Fifth and Sixth Streets in Cole Street did you see any boy there?

A. I did not see anybody getting hurt. There are children around there day and night.

Q. Did you see anybody on the street alongside of the automobile or in front of it?

A. No, sir, not that I saw.

Q. Or anybody alongside of the machine?

A. Not that I saw.

Q. Did you hear anybody hollering Stop, or Murder?

A. Not a word.

Q. Did you know at all that you had run over a boy?

A. Not until Sergeant Hoffman came and told us we hit somebody in Cole Street. We were surprised and did not know anything about it.

Q. What time in the evening did you pass through there?

A. About 8:30.

Q. What time did you arrive at Erie Street?

A. Around that time.

Q. How long did it take you to get there?

A. Three or four minutes.

Q. How long did it take you to pass that block between 5th and 6th Street?

A. I could almost run as fast as we were going through there; in fact, I could any time.

Cross-Examination by Mr. Vickers:

Q. Did you see Sergeant Hoffman come in and tell you you hit somebody?

A. Yes. He came in and asked if we were in the machine, and I said yes, and he said, Well, you hit somebody, and we said, no, we did not know it.

Q. Did Sergeant Hoffman ask you where the car was?

A. I ain't sure, but we told him it was gone back to the garage; I don't remember him asking me where the car was; if he had I could have told him.

Q. Where had you last stopped before you stopped at your place of business?

A. Nungesser's, upon the Boulevard.

Q. When did you leave there?

A. Stayed there possibly about five minutes.

Q. When did you leave there?

A. I couldn't tell you the exact time.

Q. When did you get to your place?

A. About half-past eight.

Q. Do you know when you got to the station house?

A. Yes; between half-past eight and nine; we were only in our place five minutes when Hoffman came in.

Q. How far is your place from the station house?

A. Three or four blocks.

Q. And you don't know when you left Nungesser's?

A. No, sir; we left our place about a quarter after six that night and we went up the Boulevard to Nungesser's.

Q. That is all you did; went up there and came back?

A. Yes.

Q. You left about half-past six?

A. Yes.

Q. And it took you to go from your place to Nungesser's and back again all but five minutes of two hours?

A. We were about two hours, I guess.

Q. Going that distance?

A. Yes.

By the Court:

Q. Where were you sitting in the machine?

A. In the rear seat.

Q. Who was in the front seat?

A. Eddie Bowers and Walter Schutte.

Q. When Detective Hoffman came into your saloon, who was there?

A. There was the whole bunch.

Q. Who was there that was in the car with you?

A. Mr. Lunger and Mr. Bowers, Walter Schutte and Richard Schutte, and myself, the five of us were there; there were other people at the bar?

Q. Where was the machine?

A. At the garage; after we got out Walter took it there and he went back again.

Q. He was in your saloon?

A. No; he had gone out.

Q. Did you not say when Detective Hoffman was there the whole five of you were in your saloon?

A. I believe I did say that.

Q. Was that true or not?

A. It was not true.

Q. Who had been in your saloon when Detective Hoffman came there?

A. Mr. Lunger, Mr. Bowers, Richard Schutte, and myself.

Q. What were you doing when the detective came in?

A. Standing up at the bar drinking.

Q. What time of the night was that?

A. About ten minutes to nine.

Q. That was just a few minutes after you got there?

A. We were in there only a few minutes.

Q. Did you immediately go with the officer to the station house?

A. Right away.

Q. What did you do at the station house when you got there?

A. They asked us to make a statement about the accident.

Q. Did everybody make statements there?

A. So far as I know. Detective Hoffman told us the Captain wanted to see us.

Q. Where did you go?

A. Back again afterwards.

Q. Did anybody go from the station house for Walter?

A. I don't know.

Q. Did you go, or Mr. Schutte?

A. No.

Q. Did the Captain ask you where Walter was?

A. Yes. We told him he was at the garage with the car.

Q. When you came out of the station house you all separated?

A. Not right away, not until about an hour afterwards.

Q. Did you all go back to your saloon after you came from the station house?

A. Yes, sir.

Q. Did you telephone to Walter?

A. No. Walter was in the station house I guess a little while after we got there.

Q. Officer Duffert says it was about half-past nine o'clock?

A. Well, it was.

Q. You said it was about twenty minutes to nine you were in your saloon and Detective Hoffman came in and you all went to the station house except Walter; and it was an hour after that that Walter came there.

A. I couldn't tell the exact time.

Q. Was Walter in the station house when you came there?

A. He was there.

Q. He was there?

A. Yes; we were about to leave.

Re-Cross-Examination by Mr. Vickers:

Q. Were you asked to make a statement as to what occurred?

A. I was just asked if I was in the car.

Q. Did not Sergeant McNamara or Sergeant Gillooly take a written statement from you and you signed it?

A. I did not sign any that I know. I told him I did not have any statement to make as I did not witness anything that happened.

Q. You did not make any statement?

A. No, sir.

Q. And you were asked to state the facts?

A. Yes.

Q. Not one of the five when informed of the facts had any statement to make?

A. No. I did not know anything that happened.

Q. You all and each of you refused to make a statement?

A. I don't know. I guess that may be so.

Q. You were there?

A. Yes; when they asked me any questions I did not know anything about it.

Q. Were you there with all the other defendants?

A. Yes.

Q. And all of you refused to make a statement?

A. I did for one; I don't know about the others; I can't answer for anybody else.

Re-Direct Examination by Mr. Stuhr:

Q. When you got to the station house did anybody ask you anything?

A. Hoffman asked me if I went in the car, and I said yes, and the Sergeant asked me, Were you in the car, too? and I said yes, and he put my name down.

Q. And they did not ask you anything else?

A. No, sir.

By the Court:

Q. Do you mean to say that they did not ask you whether you were in that automobile and whether you knew you had run over a boy?

A. Yes, they asked me that.

Q. But just now you said that they only asked you if you were in that car?

A. Yes; and they asked me if I knew we hit a boy, and I said No.

Re-Direct Examination by Mr. Stuhr:

Q. Did they ask any other questions?

A. No.

Q. Are you sure of that?

A. Yes.

Re-Cross-Examination by Mr. Vickers:

Q. Did you ask any questions?

A. No.

Q. Made no inquiry at all?

A. No.

Q. Not after they told you the car had hit a boy?

A. No.

RICHARD SCHUTTE, called by the defense and sworn, testified as follows:

Direct Examination by Mr. Stuhr:

Q. You are the father of Walter Schutte?
A. Yes.
Q. What is your business?
A. Silk business.
Q. Do you live in Jersey City?
A. Yes, 148 Cole Street.
Q. How long have you lived in Jersey City?
A. Forty-eight years.
Q. Do you remember the tenth of December last year?
A. Yes.
Q. You were in the automobile with your son and Mr. Nielan and some others?
A. Yes.
Q. Do you remember passing through Cole Street on the evening of that day?
A. Yes.
Q. Where were you coming from?
A. From Mercer Street and the Boulevard.
Q. Going north from the south?
A. Yes.
Q. Do you remember passing through Cole Street between 5th and 6th Streets?
A. I do.
Q. Do you remember seeing any boy in the street there, either in front or alongside of the automobile?
A. No particular boy; I seen children on the sidewalk.
Q. Did you see any in the street outside of the sidewalk?

A. No, sir.

Q. Did you know whether anybody had been run over by the automobile that night?

A. No, sir.

Q. When did you learn of it?

A. When Detective Hoffman came and asked us if we had been in the automobile, and we all acknowledged we were.

Q. When was that?

A. About a quarter to nine.

Q. What time had you been on Cole Street between Fifth and Sixth Street?

A. About 8:30.

Q. How long did it take you to go from Cole Street to 8th Street?

A. Three or four minutes.

Q. What rate of speed was the automobile going through Cole Street that day?

Objected to. Objection sustained.

Q. Have you ridden in automobiles frequently?

A. I have.

Q. How often?

A. Probably ten thousand miles.

Q. Could you tell what rate of speed an automobile goes by seeing it pass by?

A. Yes, within a mile or two.

Q. What was the condition of Cole Street in December last between 5th and 6th Streets?

A. Bad pavement, full of holes.

Q. How fast did the automobile go through there?

Objected to as not cross-examination.

Q. How fast did it go, can you illustrate that?

Objected to on the ground that he is not qualified to answer. Objection sustained.

Q. On these roads that you took ten thousand miles ride, were they one ride or several?

A. Many.

Q. How far was the distance about that you would go?

A. Sometimes 100 miles and sometimes more.

Q. Would you take the time from the time you started until you came back?

A. I watched the speedometer all the time.

Q. And from that you are able to form an opinion?

A. Yes.

Q. How fast did this automobile go, in your opinion?

A. Not more than eight or ten miles an hour.

Q. And through Cole Street how fast, between 5th and 6th Street?

A. I don't think it went as fast as that. I don't like to ride fast and my son knows that.

Q. Did you go through that block on Cole Street between 5th and Sixth Street in six seconds?

A. I don't think so.

Q. How fast did it go?

A. It took near 8 to 10 seconds.

Q. How long is that block?

A. About two hundred feet.

Q. When you came to 9th and Erie Street to Nielan's place what became of the machine?

A. Walter took it to the garage.

Q. And the rest of you went into Nielan's?

A. Yes, to have a drink.

Cross-Examination by Mr. Vickers:

Q. What part of the machine were you sitting in?

A. The rear.

Q. Who was in the front seat?

A. Walter.

Q. Alone?

A. No. Also a man named Bowers.

Q. Have you ridden ten thousand miles in that car?

A. No.

Q. How many miles have you ridden in that car?

A. Perhaps a hundred.

Q. Was the car strange to you at that time?

A. No.

Q. Do you think you can familiarize yourself with the speed of a car from riding 100 miles in it?

A. Yes.

Q. When had you ridden 100 miles in it?

A. Different times he took us down to Port Washington and Staten Island going around the country.

Q. How many miles had you ridden in that car that day?

A. Up and down the Boulevard, about 28 miles, I should judge.

Q. You were in Staten Island that day?

A. Yes, across the river.

Q. Do you know the distance from Staten Island ferry to Nungesser's?

A. About fifteen miles.

Q. What is the distance from Nungesser's to Ninth and Erie?

A. About a mile.

Q. What had you been doing about this number of miles you had ridden? You rode over half of them on this night in question on this car, in this particular car?

A. Yes.

Q. So that you were out in the car from 10 o'clock in the morning until a little after six at night?

A. Yes, sir.

Q. And you rode about 12 to 15 miles an hour?

A. More than that; 28 miles.

Q. The whole day

A. Yes.

Q. But that did not include the Nungesser trip?

A. No.

Q. I asked you how far you had gone in that car that day and you say 28 miles; how many miles you had gone that day of the hundred and you said 28 miles. Did you include the miles you rode to Nungesser's?

A. Yes.

Q. Did Walter drive that car as you wanted him to?

Objected to as immaterial and incompetent.

A. Yes.

Q. What is the fastest you ever travelled in that car?

A. Fifteen miles in the open country.

By the Court:

Q. When did you find out this accident had happened?

A. I did not know it had happened until I was taken to the station.

Q. After that when you found it had happened what did you do?

A. Not anything.

Q. Did you not try to get your boy there?

A. He got to the station house before we left. I told Detective Hoffman he was at the garage and he would be around to the house in a few minutes, and he went down after him.

Q. How long had you been in the saloon before Hoffman came there?

A. About three minutes, we did not have a chance to get our drink.

Q. How long did you remain in the saloon after Detective Hoffman told you?

A. We went away right away.

Q. And you say your boy was brought to the station house before you left?

Q. You were at the station house about an hour?

A. Not quite so long.

Q. What were you doing during that time?

A. Standing there, they were making out a bail bond for Walter.

Q. He had not been arrested?

A. He came in later.

Q. While you were waiting for him what did you do?

A. They asked me some questions and told me we had hit a boy.

Q. Did you refuse to make a statement?

A. No. They did not ask me for any.

Q. When did you next see the car?

A. I couldn't state that positively; it was a long time afterwards.

Re-Cross-Examination by Mr. Vickers:

Q. Have you a telephone in your garage where you kept the car?

A. I think they have.

Q. Did you make any effort to get your son when Lieutenant Hoffman told you what was alleged to have happened?

A. I told Hoffman or Captain Richardson that Walter could be got in a few minutes if he came back from the garage and they stood on the corner there and got him.

Q. What efforts did you make?

A. I could not go down there.

Q. You were in a saloon and there was a telephone there?

A. Yes.

Q. And you could have telephoned him to go to the police station?

A. I could I suppose.

Re-Direct by Mr. Stahr:

Q. There was no complaint made by the complaining witness Thomas Mitchell until the 25th of April, 1913?

A. No.

Re-Cross Examination by Mr. Vickers:

Q. You know that is due to the fact that this boy was nearly seven months in the hospital because of his hurts?

A. I suppose so.

DEFENSE RESTS.

MR. STUHR: I move for an acquittal on the ground that there is no evidence here of assault and battery and that the evidence shows it was an unavoidable accident and that the boy was negligent and careless.

THE COURT: I cannot understand why the driver of this machine did not go and see the boy and the machine and see if there was evidence of the accident, even when the other witnesses testified they got their hands full of blood, and that he got rid of the machine soon after, and he refused to make any statement to the police, and it seems as if that was only consistent with his knowledge that he had hit the boy with the machine. It is in the testimony that Cole Street is an asphalt street, that it was full of holes and that it would be a dangerous place to drive that machine even ten miles an hour by reason of the children who are always playing there; and one of the witnesses says the speed of the machine was 20 miles an hour, and the trainman places it at 30 miles an hour; and another witness seen it going away and could not place an estimate on the speed; and those in the car who were witnesses here say it went 8 to 10 miles an hour, and the younger defendant says it would be dangerous to go 10 miles an hour there. I don't believe he kept a machine a year or 18 months which it would be dangerous to go at ten miles an hour. So not only the speed must be considered, but all the other circumstances surrounding the case.

MR. VICKERS: Does the Court desire to hear the State in this matter?

THE COURT: The Court is in some doubt about the matter. I think I will now adjourn the matter until two o'clock.

Justice Swayze will be here quarter to two o'clock.

RECESS.

After recess Mr. Vickers summed up for the State.

THE COURT: It seems to me that the determining facts in this case must be that if this car was going 8 or 10 miles an hour it could have been easily overtaken by any one who was at the accident. The first witness testified that he shouted and ran after it and that it went so fast that he could not get near it, and that it went down 8th Street; and that and other testimony leads the Court to believe that, to say the least, these men who say it was going only 8 or 9 miles an hour are mistaken; and if it was going as another says, 30 miles an hour, it was a reckless speed, because as the defendant Walter Schutte says there were many children on that street.

I find the defendant Walter Schutte guilty of atrocious assault and battery.

The defendant Richard Schutte I found not guilty on the resting of the State's case.

I will fix the bail of the defendant Walter Schutte at two thousand dollars for sentence. I will sentence him a week from next Thursday.

MR. STUHR: I ask for an exception to the refusal of the Court to acquit the defendant Walter Schutte.

Exception allowed and signed and sealed accordingly.

MARK A. SULLIVAN, Judge. (L. S.)

Also to the Court's finding of facts.

The foregoing constitutes the true and entire record of the testimony and proceedings had upon the trial of the said cause in the Hudson Court of Special Sessions.

MARK A. SULLIVAN,
Judge of Hudson Court of Special Sessions.

Assignment of Errors.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Defendant in Error,* vs. WALTER SCHUTTE, *Defendant Below,* Plaintiff in Error.	On Error to Hudson Special Sessions. Assignment of Errors.

NEW JERSEY, SS.:

Afterwards, to wit, before the Justices of the said New Jersey Supreme Court, at Trenton, comes the said Walter Schutte, by William S. Stuhr, his attorney, and says that by the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error.

First. In this, that the judgment and sentence of the said Court of Special Sessions was given and passed against the said plaintiff in error; whereas, upon the evidence adduced upon the trial, judgment should have been given in favor of the said plaintiff in error.

Second. Because the Court refused to acquit the defendant as requested by the plaintiff in error; whereas from all the evidence in the case he should have granted such request and rendered a judgment of not guilty accordingly.

Third. Because the Court found the said plaintiff in error guilty of atrocious assault and battery; whereas from all of the evidence in the case he should not have so found, there being no evidence that plaintiff in error intentionally, know-

ingly or wilfully committed the grievances and injuries complained of in the indictment.

There are divers other errors in the record and proceedings aforesaid, and in the giving of judgment and passing of sentence aforesaid, by reason of which the said judgment and sentence should be reversed and set aside.

Wherefore, the said Walter Schutte prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

WILLIAM S. STUHR,
Attorney of Plaintiff in Error.

(COMMON JOINDER IN ERROR.)

Specification of Causes for Reversal.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *Defendant-in-Error,* vs. WALTER SCHUTTE. Defendant Below, *Plaintiff-in-Error.*	On Error.

The following are the causes relied upon for a reversal of the judgment in the above-entitled cause.

1. Because the Court after the close of the State's case erred in refusing to acquit the defendant Walter Schutte as requested.

2. Because there was no evidence that the defendant, Walter Schutte, knowingly, maliciously, wilfully or intentionally committed the injuries complained of.

3. Because the facts testified to in behalf of the State do not constitute a crime.

4. Because from the evidence it appears that the injuries complained of were the result of an accident.

5. Because if the facts testified to did constitute a crime, which plaintiff-in-error denies, they did not constitute the crime of atrocious assault and battery.

6. Because the Court erred in finding and adjudging the defendant, Walter Schutte, guilty of atrocious assault and battery.

WILLIAM S. STUHR,
Attorney of Plaintiff-in-Error.

Opinion.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, *Defendant-in-Error,* vs. WALTER SCHUTTE, *Plaintiff-in-Error.*	Error to Hudson County Special Sessions. Opinion.

Argued before GUMMERE, *C. J.,* and GARRISON and MINTURN, *JJ.*

Mr. William S. Stuhr, for Plaintiff-in-Error.
Mr. Robert S. Hudspeth, for the State.

GARRISON, *J.*:

The plaintiff-in-error was convicted of assault and battery by "wilfully and unlawfully" striking and wounding one Thomas Mitchell with an automobile, as charged in the indictment.

Upon the trial before the Judge of the Quarter Sessions, a jury having been waived, the allegations of the indictment were sustained by proof that the plaintiff-in-error ran his automobile through a city street at a rate of speed in excess of the rate permitted by section 23 of the Motor Vehicle Act (3 Comp. Stat., 1910, p. 3436), and that endangered public safety, and that actually resulted in the injury of a pedestrian.

The controversy of fact was over the rate of speed which was resolved by the trial Court adversely to the plaintiff-in-error, a matter that we do not review. *State* vs. *Jaggers,* 71 N. J. Law, page 281, 58 Atl. 1014, 108 Am. St. Rep. 746; *State* vs. *Herron,* 77 N. J. Law, page 523, 71 Atl. 274.

The legal controversy is whether or not, upon the facts so found, the conviction can be sustained, which was raised in the trial court by the denial of a motion to direct an acquittal.

Counsel for the plaintiff-in-error correctly contends that both the wilful wrongdoing that constitutes malice in the law and also an intention to inflict injury are of the essence of a criminal assault; and that, as a necessary corollary, mere negligence will not sustain a conviction for such crime. With these abstract propositions no fault is to be found, provided it is borne in mind that the necessary malice may be implied from the doing of an unlawful thing from which injury is reasonably to be apprehended, and also that an intention to injure need not be specifically directed to the particular individual that was injured, but may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional. "The prisoner," said Lord Coleridge, Chief Justice, in *Queen* vs. *Martin,* 8 Q. B. D. 54, "must be taken to have intended the natural consequences of that which he did. He acted unlawfully and maliciously, not that he had any personal malice against the particular individual injured, but in the sense of doing an act calculated to injure, and by which others were, in fact, injured."

The facts of the case from which this language is quoted were that the defendant was in the gallery of a theatre which was reached by a staircase lighted by gas lights, at the bottom of which was a pair of folding doors. At the end of the performance the defendant ran quickly down the stairs, turning out, as he went, the gas lights on the middle and lower landing and closing with a bar the doors of exit, as a consequence of which

there was a jam on the staircase in which several persons were injured. These facts and the language of the indictment which is quoted render the exposition of the legal rules entirely applicable to the question before us.

Other cases illustrative of the same rules are *People* vs. *Morehouse,* 53 Hun. 638, 6 N. Y. Supp. 763; *Smith* vs. *Commonwealth,* 100 Pa. 324; *People* vs. *Raher,* 92 Mich. 165, 52 N. W. 625, 31 Am. St. Rep. 575; *State* vs. *Myers,* 19 Iowa, 517; *Commonwealth* vs. *Hawkins,* 157 Mass. 551, 32 N. E. 862, in which a large number of cases are cited.

The industry of counsel has not furnished, nor have I been able to find a decided case in which the assault was committed with an automobile, a comparatively modern appliance, but the principles involved are as old as the criminal law itself. Indeed, counsel for the plaintiff-in-error does not seriously controvert these principles, but, on the contrary, bases his argument, as I understand it, upon his other contention, viz.: that a mere act of negligence will not sustain a conviction for assault and battery. For this proposition, which needs no external support, he cites as authority the dictum of Mr. Justice Dixon in *State* vs. *Thomas,* 65 N. J. Law, 598, 48 Atl. 1007, who, in commenting upon the case of *State* vs. *O'Brien,* 32 N. J. Law, 169, said:

> "Certainly if death had not ensued from his negligence, but only personal injury, a charge of assault and battery could not have been sustained."

The case of *State* vs. *O'Brien* was a conviction of manslaughter under an indictment that charged that offense based upon the negligence of the defendant in the tending of a railroad switch, and *State* vs. *Thomas* was a review of a conviction for assault and battery under an indictment for man-

slaughter which, it was held as a matter of pleading, did not distinctly set forth the offense of which the defendant was convicted.

The dictum quoted went, therefore, far beyond the decision in that it dealt hypothically with the substantive criminal law, whereas the decision was rested solely upon the degree of certainty required by the rules of criminal pleading.

The line of reasoning on which this dictum rested was that manslaughter, based upon negligence and excluding malice, had nothing in common with assault and battery, which necessarily includes malice. With the soundness of this reasoning we are not now concerned, since it has no foundation in fact in the case before us in which we are not dealing with an indictment for manslaughter or with an assault and battery that resulted from negligence. On the contrary, we are dealing with a wilful act done under circumstances that rendered likely the infliction of such an injury as that which actually resulted from it. In such a case, to argue from the assumed premise that, if death had occurred, the crime would have been manslaughter is a complete begging of the question. In the very case referred to (i. e., *State* vs. *O'Brien*) Mr. Justice Dalrymple was careful to say:

> "If the defendant's omission of duty was wilful, or, in other words, if his will concurred in his negligence, he was guilty of murder."

The running of a car at a high rate of speed is an act in which the will of the driver concurs, and hence is clearly a wilful act, as distinguished from merely negligent conduct, when considered with respect to the state of mind of the offender, which is what the criminal law considers.

The civil law, on the contrary, disregards this

distinction in awarding compensation in damages, and, as is pointed out in *Evers* vs. *Davis,* 90 Atl. 677, groups together both wilful and negligent acts in its effort to compel tort-feasors to make compensation for injuries without regard to the state of mind with which they were inflicted. The civil action of negligence, therefore, throws no light upon the distinction made by the criminal law between a wilful and a negligent act.

With this misleading test and the fallacious hypothesis of manslaughter out of the way, it requires neither argument nor illustration to show that the excessive rate of speed at which an automobile is driven is a product of the will of its driver, and not the result of his mere inattention or negligence. The two cannot be confused any more than the hurling of a baseball bat into a crowd of spectators could be confused with its accidentally slipping from the hand of the batter. If a blow inflicted in the former manner would constitute an assault, so must a blow inflicted by a wilful act applied to a much more dangerous agency, since it cannot be that what would be a crime if done with a plaything weighing a few ounces ceases to be a crime if committed with an engine weighing thousands of pounds driven by many horsepowers of force. It has often been held that responsibility increases with the likelihood of injury, but never the reverse, that I am aware of.

There is, therefore, no legal reason why the crime of assault and battery may not be committed by driving an automobile on a public highway at a rate of speed that endangers the safety of other persons and actually results in such an injury. This being so, it was not error for the Trial Court to deny the motion to acquit, and the judgment of the Hudson Sessions is affirmed.

Rule for Affirmance of Judgment.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, *Defendant-in-Error,* vs. WALTER SCHUTTE, *Plaintiff-in-Error.*	In Error to Hudson Special Sessions. Rule on Affirmance.

This cause having been duly argued at the June term, A. D. 1914, of this Court by Robert S. Hudspeth, Prosecutor of the Pleas, counsel for the defendant-in-error, and William S. Stuhr, counsel for the plaintiff-in-error, and the Court having considered the same and finding no error in the record and proceedings of the Hudson Quarter Sessions, or in the judgment rendered therein;

It is hereby ORDERED and ADJUDGED that the judgment of the Hudson Quarter Sessions be affirmed with costs, and that the record be remitted to the Hudson Quarter Sessions, there to be proceeded with according to law.

Dated March 10th, 1915.

On motion of

R. S. HUDSPETH,
Prosecutor of the Pleas,
Attorney for the State of New Jersey,
Defendant-in-Error.

Entered March 11th, 1915.

Assignment of Errors.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, *Defendant-in-Error,* vs. WALTER SCHUTTE, *Plaintiff-in-Error.*	In Error. Assignment of Errors.

Afterwards, to wit, on the thirtieth day of March, A. D. nineteen hundred and fifteen, before the Judges of the said Court of Errors and Appeals in the last resort in all causes, at Trenton, comes the said Walter Schutte, by William S. Stuhr, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, because the said Court affirmed the judgment of the Court of Special Sessions in and for the County of Hudson, rendered against the plaintiff-in-error, Walter Schutte, whereas by the law of the land the said Court should have reversed the said judgment of the said Court of Special Sessions of the County of Hudson.

Therefore, the said plaintiff-in-error prays that the judgment aforesaid, by reason of the aforesaid error and all other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said plaintiff-in-error may be restored to all things which he hath lost on occasion of the said judgment, and that the said defendant-in-error, the State of New Jersey, may join to the said errors.

WILLIAM S. STUHR,
Attorney for and of Counsel with Plaintiff-in-Error.

(Common joinder in error.)